

**Weekly notes
of cases
argued and
determined in
the Supreme ...**

Pennsylvania.
Supreme Court,
United States. ...

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WEEKLY NOTES OF CASES^{cf}

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF PENNSYLVANIA, THE COUNTY COURTS OF
PHILADELPHIA, AND THE UNITED STATES DISTRICT
AND CIRCUIT COURTS FOR THE EASTERN
DISTRICT OF PENNSYLVANIA.

BY

MEMBERS OF THE BAR.

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ERRATA.

MANEVAL v. TOWNSHIP OF JACKSON, p. 130, col. ii., end of line 23, insert the word "*borrow*."

LAW'S ESTATE, p. 190, col. i., line 27, **HANNA**, P. J. (and not **PENROSE**, J.), delivered the opinion of the Orphans' Court; p. 191, col. ii., line 20, for "of" read "*in*."

CLASS v. KINGSLEY, p. 321, col. i., line 17 from bottom, strike out "*therefore*;" col. ii., line 27, for "statutory" read "*salutary*."

COMMONWEALTH v. McMANUS, p. 511, col. ii., line 13, for "on" read "*of*;" p. 512, col. i., line 33, for "prevent" read "*pervert*;" p. 514, col. ii., lines 34 and 35 should read: "*Townsend v. State* (2 *Blackf.* 151, but see *Armstrong v. State*, 4 *Blackf.* 247); *Pierson v. State*," etc.

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VOL. XXVIII.] FRIDAY, APR. 24, 1891. [No. 1.

Supreme Court.

July '90, 175.

January 23, 1891.

Meigs v. Bunting.

Bond and mortgage—Satisfaction of either security—How far presumption of payment between the parties and as to third persons—Sheriff's sales—Notice to purchasers at.

A purchaser at sheriff's sale is entitled to rely upon the record evidence of the incumbrances on the property.

A bond and mortgage are distinct and separate securities, though for the same debt; but as against the rights of third parties, payment in fact of either extinguishes the debt, and therefore satisfies the other.

As between the parties satisfaction of one security is presumed to be satisfaction of the other, but this result depends upon the intention of the parties, and the presumption is rebuttable, the burden of proof being upon the creditor.

A third party is not bound to look into the actual facts of payment, or the intention of the parties, further than they have been made accessible to him on the record.

An entry of satisfaction of a mortgage, while a judgment on the bond is left standing on the docket, is notice to those who inspect the record that the judgment is not to be affected, and a purchaser at sheriff's sale finding this state of facts may rely upon the record as conclusive evidence that the judgment is still an existing incumbrance.

The fact that a rule is pending to open the judgment makes no difference, for *non constat* that the judgment will be opened; and even if it were, the rule unacted upon by the Court has no greater force than the affidavit on which it is founded; and the purchaser at sheriff's sale is entitled to rely on the legal effect of the judgment so long as it stands on the record unmodified by any action of the Court.

In an action of *sci. fa. sur mortgage*, executed by B. in favor of M., mortgagee, it appeared that at the time the mortgage was executed, there was in existence a bond and mortgage given by B. to R. upon another property, and judgment had been entered upon this bond. Subsequently the mortgage to R. was marked "satisfied," but the judgment on the bond was kept open and marked to use. Under these circumstances judgment upon bond and warrant of attorney was entered against B. by E., and execution issued against the property bound by the mortgage to M. The property was bought by C., who defended, as terre-tenant, against the *sci. fa.*:

Held, that the state of the record justified the purchaser at sheriff's sale in supposing that the judgment on the bond accompanying R.'s mortgage was still valid, and that the M. mortgage was a junior incumbrance, and therefore discharged by the sheriff's sale.

At the time C. became purchaser at the sheriff's sale a rule was pending to open the R. judgment, and to let the defendant (B.) into a defence:

Held, that this did not affect the rights of C.

Appeal of Samuel C. Bunting, Jr., defendant, with notice to Charles D. Clark, William C. Randall, and James E. Patterson, terre-tenants, from the judgment of the Common Pleas No. 3, of Philadelphia County, in an action of *sci. fa. sur mortgage* brought by Arthur V. Meigs and William M. Meigs, executors of the last will and testament of J. Forsyth Meigs, deceased, against Samuel C. Bunting, Jr., defendant, with notice to terre-tenants as above. The writ issued on April 18, 1889.

The defence was made by Clark as terre-tenant, who filed an affidavit of defence, claiming that the Meigs mortgage had been divested by sheriff's sale to him upon a judgment entered against Bunting, at a time when a judgment in favor of R. W. Ryerss in respect to which the Meigs mortgage was a junior incumbrance appeared by the record unsatisfied against Bunting. The plaintiffs however claimed that this Ryerss judgment had been entered upon a bond secured by mortgage upon premises other than those subject to the Meigs mortgage; and that this mortgage had been marked satisfied of record prior to the sale to Clark, the terre-tenant. They further showed that an affidavit had been filed by Bunting in support of a rule to open said judgment and let him into a defence, which rule was pending at the time of the sheriff's sale to Clark, and claimed that this was notice to Clark. It further appeared that this rule was discharged, but subsequently reinstated and finally withdrawn by agreement on May 16, 1877, within a few weeks after the sale to Clark.

Subsequently a case stated in the nature of a special verdict was agreed upon as follows:—

(1) On August 3, 1873, there was entered of record (as of June Term, 1873, O. D. C., D. S. B., No. 882) a judgment against Samuel C. Bunting, Jr., in favor of Robert W. Ryerss for \$8000, upon a bond and warrant of attorney. The mortgage of Samuel C. Bunting, Jr., to Robert W. Ryerss for \$8000, dated November 4, 1872, and recorded in Mortgage-book J. A. H., No. 291, page 118, etc. (which secured the bond and warrant under which the above judgment of Ryerss v. Bunting was entered) was satisfied of record upon October 31, 1874, by Frederick B. Vogel, by virtue of an assignment from Robert W. Ryerss, dated September 23,

1874, and recorded upon October 29, 1874, in Mortgage-book F. T. W., No. 207, page 165, etc.

(2) On November 26, 1873, Samuel C. Bunting, Jr., executed to J. Forsyth Meigs the mortgage upon which this suit is brought. (This mortgage is for \$9000, and was recorded on November 26, 1873, the day of its date, in Mortgage-book F. T. W., No. 95, page 477, etc.)

(3) On June 11, 1875, there was entered of record as of Common Pleas No. 1, June, 1875, No. 334, a judgment against the said Samuel C. Bunting, Jr., in favor of Ephraim Clark for \$12,000 upon a bond and warrant of attorney. An *alias* writ of *ieri facias* was issued upon this judgment January 26, 1877, and the lot of ground second described in the said mortgage of Bunting to Meigs, dated November 26, 1873, was levied upon, and subsequently (under a writ of *venditioni exponas*, issued February 21, 1877, in the same case) was sold by the sheriff on March 5, 1877, for \$2600, but the terms of sale not having been complied with, under an *alias* writ, the said lot was again sold April 2, 1877, and was bought by Charles D. Clark, the terre-tenant, and one of the defendants in this suit. The sheriff made a deed to said Clark, which was acknowledged May 12, 1877, and duly recorded.

Upon this case stated judgment was entered in the Court below on June 25, 1890, against the terre-tenants for the amount of the mortgage with interest from June 16, 1878, making \$15,628.48. Whereupon the terre-tenants took this appeal, assigning for error this action of the Court.

John G. Johnson, for appellants, cited—

Fleming v. Parry, 24 Pa. 50.
Seiple v. Seiple, 25 WEEKLY NOTES, 488.
Hughes v. Torrance, 17 Id. 214.
West's Appeal, 7 Id. 427.
Reading v. Hopson, 90 Pa. 497.
Harper's Appeal, 4 WEEKLY NOTES, 49.
Coyne v. Souther, 61 Pa. 457.
Magaw v. Garrett, 25 Id. 322.
Goepp v. Gartiser, 35 Id. 133.
Saunders v. Gould, 26 WEEKLY NOTES, 121.

William M. Meigs and John Samuel, for appellees, cited—

Dewitt's Appeal, 76 Pa. 283.
Kirke's Appeal, 87 Id. 242.
Cohen's Appeal, 10 WEEKLY NOTES, 545.
Goepp v. Gartiser, 25 Pa. 130.
Loverin v. Humboldt Co., 17 WEEKLY NOTES, 487.
Waters v. Largy, 5 Rawle, 131.
Mitchell v. Coombs, 11 WEEKLY NOTES, 70.
Wood v. Vanarsdale, 3 Rawle, 401.
Anderson v. Neff, 11 S. & R. 208.
Griffith v. Sears, 17 WEEKLY NOTES, 468.
Biddle v. Tomlinson, 20 Id. 74.
Parke v. Neely, 9 Id. 193.
Miller v. Fluck, 26 Id. 213.
Patterson v. Given, 15 Phila. 347.

April 6, 1891. MITCHELL, J. A bond and mortgage are distinct and separate securities though for the same debt. As against the rights of third

parties, payment in fact of either extinguishes the debt, and therefore satisfies the other. (*Mitchell v. Coombs*, 96 Pa. 430; *Loverin v. Humboldt Co.*, 113 Id. 6.) And even between the parties the two securities are so far parts of the same transaction that the satisfaction of one is presumed to be the payment of the debt, and therefore to include the satisfaction of the other, and the burden of proof is on the creditor to show the contrary. But this result depends on the intention of the parties. The presumption therefore is rebuttable, and satisfaction of one security will not in fact be satisfaction of the other unless the parties so intend, or the debt be actually paid. (*Fleming v. Parry*, 24 Pa. 47; *Seiple v. Seiple*, 133 Id. 470.)

These being the rights and the presumption between the parties, we come now to the question in the present case, what is the presumption as applicable to a third party having an interest in the subject-matter, for instance, as purchaser at a sheriff's sale? Is he bound to look into the actual facts of payment, or the intention of the parties, further than they have been made accessible to him on the record? The clear result of our cases seems to be that he is not. In *Magaw v. Garrett* (25 Pa. 319), there was a judgment of the same date as a mortgage, and the record indicated that it was a subsisting lien at the time of sheriff's sale. It was held that as to the purchaser the mortgage was discharged, though the judgment were in fact paid. "The record, in the absence of notice to the contrary, is for him a safe guide." *Goepp v. Gartiser* (35 Pa. 130), was to the same effect. *Coyne v. Souther* (61 Id. 455) was the converse of the preceding cases. There a judgment prior to the mortgage was marked satisfied on the record, and it was held that the mortgage was not discharged, though the judgment was not in fact paid, and evidence that the mortgagee had been notified, before the sale, of a rule to show cause why the entry of satisfaction on the senior judgment should not be stricken off, was properly excluded, the mortgagee not being bound to pay any attention to such a notice. In *Reading v. Hopson* (90 Pa. 494), there was no lien of record when the mortgage was made and recorded, but a mechanic's claim was subsequently filed which it was offered to be shown related back to the commencement of the building prior to the mortgage. It was held that the offer was properly refused, and the mortgage was not discharged. The date of the commencement of the building did not appear on the face of the lien, and it was held that it could not be proved by parol. *SHARSWOOD, C. J.*, saying that while this might be shown as between the mortgagee and the lien claimant, because the former was bound to take notice of the actual state of things on the ground,

yet as between the mortgagee and the purchaser it was different. "As the bidder at sheriff's sale is not bound to look beyond the record in determining what he shall bid, and it cannot be shown as against him that a prior lien has been paid or is not subsisting, so neither can he take advantage of any fact *dehors* the record to discharge the land from the lien of the mortgage." (Id. 497.) And in the latest review of the subject, it is said by our brother CLARK (Saunders v. Gould, 134 Pa. 445, 460), "A purchaser is not bound to look beyond the record. The payment of a prior lien not satisfied of record will not protect a subsequent mortgage from being discharged by the sale. . . . He had a right . . . to assume that the liens were as they appeared upon the record, and the judgment docket was the criterion."

These cases establish the general rule that a purchaser at sheriff's sale is entitled to rely upon the record evidence of the incumbrances on the property. There is no sufficient reason to make the case of double securities for the same debt, as *e. g.*, a mortgage and a judgment on the accompanying bond, an exception. As already shown, satisfaction of one is only presumptive payment of the debt, from which satisfaction of the other would follow. The parties have an unquestionable right to extinguish one security and keep the other alive. If they put or leave the record in such shape as to indicate that they have exercised that right, why may not the purchaser rely upon it as conclusive evidence as in other cases? If the parties had made a formal entry on the judgment docket that "the mortgage accompanying the bond in this case has been satisfied, but the parties agree that the judgment is not to be affected thereby," there could be no possible question of the validity of the judgment as a subsisting incumbrance. But parties by leaving the judgment on the docket do in effect make such a representation to those who inspect the record. If the bidder goes to the parties for information he may not get a truthful account, and in the present case would almost certainly have got a conflicting one, for it appears that the creditor was trying to collect the judgment by *fi. fa.*, and the debtor was asserting to the Court that it had been paid. But the bidder is not bound to take any such risk. As said by SHARSWOOD, J., in *Coyne v. Souther* (*supra*): "It is very important that bidders at sheriff's sales should feel well assured as to whether they are offering to buy a clear or an incumbered title. . . . In regard to the lien of judgments the judgment docket has been provided, which as to purchasers and subsequent incumbrancers is intended to afford them certain information." (61 Pa. 457.) We are of opinion that cases like the present come within the general rule, and a purchaser finding

the mortgage satisfied, but the judgment still apparently in force, may rely upon the record as conclusive evidence that the parties have exercised their right to maintain the judgment as a subsisting incumbrance, and, therefore, that the sale will discharge the second mortgage.

In the present case the record disclosed an apparent controversy between the plaintiff and defendant in the judgment at the time of the sale. There had been a rule to open the judgment which had been discharged by the Court, and subsequently reinstated by agreement of the parties, and it was still pending at the time of the sale. Even if the whole question were open, it would seem that the most that could be fairly held against the purchaser would be, that having bought with notice of the pendency of the rule, he took the chances of the Court's action upon it, and as the rule was subsequently withdrawn the judgment stood unaffected as if it had never been assailed. But the question is not open. It was held in *Coyne v. Souther* (*supra*) that notice of a rule to strike off satisfaction of a judgment did not change the legal effect of the satisfaction while it stood on the record, and that the purchaser was not bound to pay any attention to such notice. The purchaser here had notice by the record that there was a rule to open the judgment pending, but the rule unacted on by the Court had no greater force than the affidavit of the defendant on which it was founded. It showed no more than a dispute between the parties to which the purchaser was not bound to give any heed. He was entitled to rely on the legal effect of the judgment so long as it stood on the record unmodified by any action of the Court.

Judgment reversed, and judgment on the case stated for the terre-tenant Clark. S. H. T.

July '90, 83.

February 23, 1891.

Warner v. People's Street Railway Co.

Negligence—Contributory negligence—Ordinary care—Street passenger railway and foot passenger using track thereof—Reciprocal rights and duties of.

The rights of a foot passenger walking upon the track of a street passenger railway company upon a public highway are subordinate to the right of way of the company's cars. Both the company and the foot passenger have the right to use the public road, and each is therefore bound to look out for the other.

Plaintiff was walking upon the street passenger railway track of defendant after a heavy snow storm, in order to avoid the snow and slush in the road. At a certain point the company had cleared its track through a drift some two hundred feet long, leaving a passage, just wide enough for the cars, with vertical

walls of snow some two and a half feet in height. The drift was at the top of a rise from which there was an unobstructed view in the direction from which a street car was coming of from a quarter to half a mile. The car came at a moderate speed, with bells that could be heard for forty rods. Plaintiff was overtaken by the car shortly after entering the cut and stepped out of its way on the side. The horses and front part of the car passed her, but she was struck by the hinder part of the car and injured. Plaintiff testified that just before entering the cut she looked for a car but did not see it. The case was left to the jury:

Held, that the Court should have pronounced plaintiff negligent as a matter of law. She had entered a place of manifest danger for a foot passenger and should have used unusual caution and vigilance. The fact that she failed to see the car, which must have been plainly in sight, showed that she did not perform this duty.

Appeal of the People's Street Railway Company of Luzerne County, defendant, from the judgment of the Common Pleas of Lackawanna County, in an action of trespass brought by Abbie Warner, by her next friend George Warner, to recover for injuries received owing to the alleged negligence of defendant.

The plaintiff, a young woman of eighteen years, brought this action to recover for injuries received by a collision with a street car of the defendant while walking upon its track at 2 P. M. on a bright afternoon in March, 1888.

The road of the defendant leads from Scranton to Dunmore, along the public highway. The car track was laid along one side of the travelled way and the carriage track occupied the other. A severe snow storm had occurred previous to March 17, 1888, and a high drift had formed along the street-car track for a distance of a block, or over half a block. This had been shovelled out, leaving a narrow channel just wide enough for the car to pass through and making a bank on each side, with perpendicular walls, two or two and a half feet high. Plaintiff attempted to pass through this narrow cut in front of a car, which, she claimed, she did not see, and was overtaken, when she stepped off the track against the bank. The horses and whippetrees and front end of the car passed her, but before the hind wheels passed her she was hit and thrown down, the hind wheels passing over her ankles. The driver was looking for a broken rail at the switch and did not see her until she was opposite his horses' heads. The plaintiff did not call to the driver to stop or make any motion to him to stop. The horses had bells, upon them which could be heard for forty rods.

Nearly all the witnesses testified that a car could have been seen for from a quarter to half a mile from the entrance to this cut, and a passing switch was at the entrance to the drift.

All defendant's witnesses testified that the

snow on the opposite side of the channel from where plaintiff stepped out was not more than twelve to eighteen inches deep, but the snow was soft and slushy.

It also appeared that plaintiff would have had no difficulty in stepping out on the opposite side of the cut except for the inconvenience of stepping into slushy snow.

Plaintiff testified that when she first saw the car the horses were walking, but when about twelve feet from her they were whipped up to a trot. The grade was a gradually ascending one for a long distance before reaching the switch, and from that point began to descend a little, but was nearly level.

Defendant requested the Court (CONNOLLY, J.) to charge, *inter alia* :—

(2) That under all the evidence the verdict must be for the defendant. *Answer*. As already stated to you, gentlemen of the jury, in our general charge, we leave it as a question of fact to you whether or not there was any negligence on the part of this plaintiff. If you find from the evidence that there was no negligence on her part, then we could not affirm this point. If there was negligence on her part—if you do find there was negligence on her part—then this point we would have to affirm; but as drawn, and under the circumstances, we will have to leave it as a matter of fact to you to find whether or not there was contributory negligence on her part. As the point is drawn we refuse to affirm it. (Second assignment of error.)

Verdict for plaintiff for \$1050 and judgment thereon; whereupon defendant appealed, assigning error, *inter alia*, as above.

William H. Jessup (William H. Jessup, Jr., and Horace E. Hand with him), for appellant.

This, upon the plaintiff's own testimony, was a clear case of contributory negligence.

Buzby v. Phila. Traction Co., 126 Pa. 559.
Ferguson v. Traction Co., 47 Leg. Int. 494.
Pittsburgh Southern Rwy. v. Taylor, 104 Pa. 306.
Patton v. Traction Co., 132 Id. 76.
McKee v. Bidwell, 74 Id. 218.
Goshorn v. Smith, 92 Id. 435.
Baker v. Fehr, 97 Id. 70.
Forker v. Borough of Sandy Lake, 130 Id. 123.
Stiles v. Geesey, 71 Id. 439.
Thomas v. Rwy. Co., 132 Id. 504.
Suydam v. Grand St. etc., R. R., 41 Barb. 375.

Samuel B. Price (J. W. Carpenter with him), for appellee.

It is not contributory negligence on the part of a foot traveller to walk on the carriage-way of a country road, even though a sidewalk be provided.

Shearman & Redfield on Neg., p. 380, § 314.
Coombs v. Purrington, 42 Maine, 332.
Boss v. Litton, 5 Carr. & P. 407.

Where persons are permitted to use a railroad track as a footway, new duties grow out of such

circumstances, and a railroad company when passing such a permissive way is held to a greater degree of care than if no such way existed.

Kay v. Penna. R. R. Co., 65 Pa. 273.

Taylor v. D. & H. Can. Co., 113 Id. 162.

If there is evidence from which negligence may be fairly inferred, it must go to the jury, no matter how strong or persuasive may be the countervailing proof.

Howard Express Co. v. Wile, 64 Pa. 201.

Railway Company v. Foxley, 107 Id. 539.

As to the relative rights of persons and street cars on a highway, see—

Thomas v. Railway Co., 132 Pa. 514.

Jatho v. G. & C. St. Pass. Rwy. Co., 4 Phila. 26.

Patton v. Traction Co., 132 Pa. 76.

Fleckenstein v. Dry Dock Co., 11 N. E. Rep. 951.

Lynam v. Union Rwy. Co., 114 Mass. 83.

April 20, 1891. MITCHELL, J. The place of the accident was in the public road, where both parties had a right to be, and where each, therefore, was bound to be on the lookout for the other. (Schmidt v. McGill, 120 Pa. 405.) But the right of the defendant's cars was superior. They were confined to the track, and on that they had the right of way, to which the use by other parties, on foot or otherwise, was of necessity subordinate. The plaintiff, on the other hand, could use the whole road, and which part of it she took was merely a matter of convenience. That defendant, in clearing its track from snow for the passage of its cars, had made it also more convenient for plaintiff to walk on, could not be turned to its disadvantage or enlarge the plaintiff's rights over that part of the public road. They were still subordinate to defendant's right of way. (Jatho v. Pass. Railway Co., 4 Phila. 24; Thomas v. Pass. Railway Co., 132 Pa. 504; Adolph v. Railroad Co., 76 N. Y. 530.)

These being the respective rights of the parties, the plaintiff came to a point on the road where the defendant's track ran through a snow drift for a distance estimated by plaintiff herself at half a block, where the snow had been removed from the track, leaving a passage just wide enough for the cars, with vertical walls of snow two or two and a half feet in height. It was plainly a place of danger for a foot passenger, in case a car should reach it, and therefore a place for unusual caution and vigilance. But the rest of the road was, as plaintiff testified, ankle deep in snow and slush, and plaintiff took the more dangerous but more comfortable way. She says she looked just before she went into the cut, to see if there was a car behind her, and saw none. But on this, the pivotal point of the case, the uncontradicted evidence is overwhelmingly against her. The drift was at the top of a hill

or rise, from which there was an unobstructed view in the direction from which the car was coming, fixed by plaintiff's own witnesses, at a quarter to half a mile, and up this hill the car came at a moderate speed, with bells that could be heard for forty rods. Yet plaintiff herself says she had got but a little way into the passage before the car came upon her. It is unquestionable that the car must have been plainly in sight at the time she entered this dangerous path, and if she looked at all it must have been a mere heedless glance, which all the evidence shows was not an adequate performance of the duty the situation required. The case belongs clearly to the class of Carroll v. R. R. Co. (12 WEEKLY NOTES, 348), and required the Court to pronounce plaintiff negligent as matter of law. The defendant's second point should have been affirmed.

As this point is conclusive of the case, it is not necessary to discuss the others.

Judgment reversed.

H. C. O. •

Jan. '91, 187.

February 19, 1891.

Christman v. Phila. and Reading R. R. Co.

Negligence—Contributory negligence—Act of April 4, 1868—When a person is not employed about the premises of a railroad company within the meaning of the Act.

A person employed in removing iron which has been unloaded from railroad cars and laid between the two tracks of a private siding belonging to an iron company and on its ground, is not clearly employed "on the premises" of the railroad company within the meaning of the Act of April 4, 1868 (P. L. 58), limiting the liability for injuries in such cases; and in the absence of a specific request for a charge to that effect, it is not error to leave the question to the jury.

Where however the person injured is not employed or engaged in any business connected with the railroad, he does not come within the terms of the Act, and the point is unimportant.

Richter v. R. R. Co. (104 Pa. 511) followed; Cummings v. R. R. Co. (92 Id. 82); R. R. v. Colvin (118 Id. 230) distinguished.

A. an employé of an iron company was engaged in removing iron from a place between two tracks of a private siding of the iron company where it had been deposited by the railroad company the preceding day; in doing so he was obliged to cross one of the sidings and to pass between two empty cars; to give himself more room, he removed the coupling iron and laid it on the bumper of the car; while engaged in his work he saw the shifting engine pass up the main track, and he subsequently replaced the coupling iron so that it should be in place in case it was intended to move the two cars between which he was passing; while so engaged the cars beyond the two in question were backed down without warning and without there being any

one on the rear of the train to give warning, and he was injured:

Held (1) that he was not within the provisions of the Act of April 4, 1868 (P. L. 58).

(2) That the question of how long he might prudently continue at work and what amount of observation he was bound to give to the progress of coupling the cars and the approach to his locality, depended on too many elements to make it the duty of the Court to say that there was any fixed standard of prudent conduct to which he was bound to conform.

Appeal of the Philadelphia and Reading Railroad Company, defendant, from the judgment of the Common Pleas of Lebanon County, in an action of trespass by Wilson Christman, to recover damages for personal injuries.

On the trial, before SIMONTON, P. J., of Dauphin County, it appeared that the plaintiff was an employé of the Lebanon Rolling Mill, whose property was situated along the defendant's railroad in the city of Lebanon. A siding of two nearly parallel tracks had been constructed for the convenience of the rolling mill company from the railroad into the mill company's yard. On the day of the accident, January 15, 1889, the rolling mill company had a pile of bar iron, unloaded from cars the day previously, lying opposite the mill between the two tracks of this siding. The plaintiff was engaged, with a fellow-servant, in carrying the bar iron into the rolling mill, and to do so they had to cross the track or siding immediately adjacent to the mill. The plaintiff and his companion carried the iron until he saw the defendant's shifting engine go up the main track past the rolling mill and towards the point where the siding joined the main track; that was about fifteen minutes before the accident. The shifting engine came in from the west on to the track of siding nearest the mill, and moved the cars on that track for about fifteen minutes before the accident, making shifts or couplings, getting the trains together and the empty cars attached for the purpose of taking out the empty cars—which afterwards were taken out; during this time the plaintiff and his fellow-servant went on carrying the iron into the mill. Immediately before the accident, the plaintiff stopped on the track in the space between the two cars, and between the two rails of the track or siding nearest the mill, and replaced the coupling pin, which he had previously moved so as to give himself more room, in the link or drawhead of the car; he stopped long enough to replace the pin in the drawhead, and immediately thereafter, as he turned to go, the cars were pushed together and he was struck, his arm caught between the bumpers and crushed, and subsequently amputated at the shoulder. The purpose of plaintiff, as he testified, was to replace the pin in the link, and thence to continue across the track for another piece of iron, and his motive

for replacing it was that the pin might be in its proper place if and when the cars were moved out, and because after seeing the shifting engine pass it came into his mind that they might shift. The allegation of the plaintiff was that no warning was given of the approach of the train, and it was uncontradicted that there was no brakeman on the rear, and no one to see the impending danger. Other facts appear in the opinion of the Court.

The defendant requested the Court to charge, *inter alia*, as follows:—

(5) That as the uncontradicted evidence shows that the plaintiff before and at the time of the injury was lawfully employed on and about the siding and premises of the defendant, his right of action and recovery is therefore such only as would exist if he were an employé of defendant, as provided by the Act of Assembly approved April 4, 1868, and therefore he cannot recover. *Refused.*

(6) That as the evidence shows that the plaintiff at the time of the injury was voluntarily engaged on or about a railroad car on siding, and on and about the siding and premises of the defendant, his right of action and recovery is therefore such only as would exist if he were an employé of the defendant, as provided by the Act of Assembly approved April 4, 1868; and as the negligence complained of is the alleged negligence of brakemen and employes in charge of defendant's engine and cars, who occupy the relation of fellow-servants to the plaintiff, therefore he cannot recover. *Refused.*

(7) The statement of the plaintiff that he saw the shifting engine of the defendant pass the rolling mill about fifteen minutes before the accident, in connection with his admission that it came into his mind that the engine might shift, together with his knowledge of the siding and its use, establish his knowledge of the danger at the point where the accident occurred equivalent to notice to him, and taint his subsequent conduct with negligence contributing to the injury, and therefore he cannot recover. *Refused.*

In the general charge the Court said: "That Act of Assembly (April 4, 1868) provides that 'whenever any person shall sustain personal injury'—which this plaintiff here did, and I shall only read the part of the Act which applies—'while lawfully engaged or employed on or about the roads, works, depots, and premises of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employé, the right of action of such person' shall simply be the same as if he were an employé. And the rule of law is that an employé of a company cannot recover for injuries suffered as the result of the negligence of his co-employés; and the defendant here contends that this plaintiff

stands in the same position he would if he had been an employé of the Reading Railroad Company. The negligence complained of and alleged, being negligence of other employes of the railroad company, the defendant contends that this Act of Assembly puts this plaintiff precisely where he would be if he were an employé of the company, and therefore he cannot recover. [And we may say just this to you about that, gentlemen, that if when he was injured, and immediately before he was injured, he was engaged on or about the roads, works, depots, and premises of the railroad company, or in or about any train or car of the railroad company, then he cannot recover. It is not a question of the ownership of the property necessarily. It might be the premises of the railroad company, even if they did not absolutely own it. The question is, Was this the premises of the railroad company, or was it the premises of the Light Rolling Mill? Or it might be both. Two railroad companies might have a right over the track, so that it would be the premises of either in case an accident happened, so far as this Act of Assembly would apply; and you must determine from the evidence in this case as to whether this was the premises of the railroad company. If it was, and if he was employed about the premises of the railroad company, then he cannot recover in this action, because this Act of Assembly stands unrepealed. If it was its premises, he cannot recover, so far as this Act is concerned. If you find that this was the railroad's premises, it is the end of the case."]

Verdict for plaintiff for \$3210. Defendant thereupon appealed, assigning for error, *inter alia*, the answers to the points, and the portion of the charge above inclosed in brackets.

C. H. Killinger (J. W. Killinger with him), for appellant.

Under the facts of this case the defendant was protected by the Act of April 4, 1868.

R. v. Colvin, 118 Pa. 230.

Stone v. R. R., 132 Id. 206.

Richter v. R. R. Co. (104 Pa. 511), is distinguishable, because Richter was hauling ashes, an employment having no connection with the railroad company, while Christman was handling freight that had been unloaded by the company.

To the plaintiff the danger should have been so obvious, from what he thought, that if he exposed himself to it, as he did, without any inquiry, he should not be allowed to ask the appellant to compensate him for injuries, the risk of which he assumed by his voluntary act.

Flower v. Pa. R. R., 66 Pa. 210.

Mulherrin v. R. R., 81 Id. 366.

McDonald v. Rockhill Iron and Coal Co., 135 Id. 1.

A. Frank Seltzer (B. Morris Strouse with him), for appellee.

In order that a railroad company may be protected by the Act of April 4, 1868, it is necessary that the injured person should be employed about the premises of the company; Christman was employed about the iron works.

Richter v. R. R. Co., 104 Pa. 511.

The plaintiff was not guilty of contributory negligence.

R. R. Co. v. Bondron, 92 Pa. 475.

April 20, 1891. MITCHELL, J. The assignments of error raise two questions: first, Was the plaintiff on the footing of an employee of the railroad company under the Act of 1868? That Act includes persons "lawfully engaged or employed on or about the roads, works, depots, and premises of a railroad company, or in or about any train or car therein or thereon." Whether the place of the accident was the premises of the railroad company was left to the jury as a question of fact. The land on which the siding was laid, and the tracks themselves were not the property of the defendant, but of the rolling mill, and were used from time to time as required by the convenience of the mill, by defendants and also by the Cornwall and Lebanon Railroad Company, under conditions which were in evidence by parol. It is not clear that the place was the premises of the railroad company within the meaning of the statute, and certainly in the absence of a specific request to charge to that effect, it was not error to leave the question to the jury. But in either view this point was unimportant, for the plaintiff was not employed or engaged in any business connected with the railroad. There was a pile of iron on the ground of the rolling mill, and plaintiff was engaged in carrying it into the mill. The iron had in fact been unloaded from the cars the day before, but the act of unloading had been fully completed, and had no connection with plaintiff's work. So far as that was concerned, there was no difference whether the unloading was the day before or the year before. So also the fact that when unloaded it had been piled up between the two tracks had nothing to do with the plaintiff's work, except that it involved the incident, immaterial so far as the nature of his work was concerned, that he had to cross one of the tracks in going to and fro between the pile and the mill. If the iron had been piled between the track and the mill, his employment would have been exactly the same, and yet he would not have had anything to do with the track. As said in *Richter v. Pennsylvania Co.* (104 Pa. 511), plaintiff's "business was not with or about the railroad, or its cars, but about the iron works . . . and he became neither an employee nor quasi employee of the defendant simply because he attempted to remove one of its cars from his path." That case in

fact is so closely on all fours with the present that it is unnecessary to do more than refer to it generally for the principles by which this is to be ruled.

The distinctions between this and the other cases cited are obvious. In *Cummings v. R. W. Co.* (92 Pa. 83), the plaintiff was on the car assisting in unloading. In *R. R. Co. v. Colvin* (118 Pa. 230), the plaintiff was hauling freight to the cars, and was in a place which this Court said was "practically a part of the yard." And in *Stone v. Penna. R. R.* (132 Id. 206), plaintiff was separating the train, which was primarily the work of the railroad employees, but which the evidence established was his duty in case the others omitted it. It was railroad business, and while he was engaged at it he was put by the statute in a position of a *quasi* employee.

Secondly, Was the plaintiff so clearly guilty of contributory negligence that the Court was bound to say so as a matter of law? Plaintiff was there in the prosecution of his work. The iron was between the tracks and he necessarily had to cross one of them to get to the mill. The iron bars were from twelve to twenty feet long, and to facilitate his work he widened the passage between the cars by taking out the coupling. While engaged at his work he saw the shifting engine go up on the defendant's road, and after continuing his work for about fifteen minutes, the thought occurring to him that the cars on the siding which he was crossing might be shifted, he replaced the coupling, and as he started across the track for another bar of iron the cars were jammed together, and the injury happened. Much stress was laid by appellant on the fact that plaintiff had been employed on or about the switch for several months, and had knowledge of the danger during the operation of shifting. This fact was sought to be used to show that he was within the Act of 1868, but had no bearing on the nature of his actual employment at the time of the injury. It was, however, relevant as showing knowledge which bore upon the question of negligence. But this knowledge had a double edge. While conveying notice of danger, it also conveyed notice of the time likely to elapse, and the warning customarily given before the danger became imminent. It was in evidence that after the plaintiff saw the engine go up, fifteen or twenty minutes were occupied in coupling the cars to be taken out and getting the train together. It was also in evidence that the two cars between which the injury occurred were not defendant's cars, and were not to be taken out. Under these circumstances it certainly was not plaintiff's duty immediately on seeing the engine go up, to cease work and stand idle for the fifteen or twenty minutes required in the operation of shifting. How long he might

prudently continue at work, and what amount of observation he was bound to give to the progress of coupling the cars and approaching his locality depended on too many elements to enable the Court to say there was any fixed standard of prudent conduct to which he was bound to conform. That under the circumstances in evidence was a question for the jury.

None of the assignments of error can be sustained.

Judgment affirmed.

R. H. N.

Jan. '91, 149.

March 27, 1891.

Flisher v. Allen.

Power of Common Pleas to adopt rules of practice—Rules as to costs.

The power of the Court of Common Pleas to adopt rules of practice is too well settled to be now questioned. The only limitation of the power is that they must not be contrary to law nor unreasonable.

A rule of the Court of Common Pleas requiring that "bills of costs for attendance of witnesses at terms when a cause is continued or tried, must be filed and a copy thereof served on the other party within four days after the continuance or trial," is a rule of practice merely, and was evidently intended to prescribe the mode of ascertaining the amount of the costs due the successful party, and is within the powers of the Court.

Appeal of Isaiah K. Flisher, plaintiff, from the decree of the Common Pleas No. 4 of Philadelphia County, dismissing his appeal from the prothonotary's taxation of costs, and sustaining said taxation, in an action of trespass, wherein George Allen, Junior, was defendant.

The action was begun in March, 1888, for the recovery of damages for injuries to real estate; was put at issue in April, 1888. Witnesses named in plaintiff's bill of costs attended on March 26, 27, 28, and 29, 1889, when the case went over for the term, because it was not reached; they also attended May 6, 8, and 9, 1889, and then the case was continued at the request of the defendant; they further attended upon the trial of the cause October 15, 17, 18, and 19, 1889; a verdict was rendered for the plaintiff upon October 21, 1889.

On October 31, 1889, the plaintiff filed a bill of his costs verified by his affidavit, amounting to \$215.49, covering the fees of witnesses as above set forth. On March 8, 1889, the Court of Common Pleas had made the following rule relative to costs of which rule notice was given by one insertion in the issue of "The Legal Intelligencer" of that date:—

Rule XVI., 44j.—Bills of costs for attendance of witnesses at terms when a cause is continued or tried,

must be filed, and a copy thereof served on the other party within four days after the continuance or trial, and the other party may, within four days after the service of the bill, require the party who files it to tax the same before the prothonotary on forty-eight hours' notice. No bill of costs shall be allowed unless it has been filed and a copy thereof served within the time fixed by this Rule; nor shall any objection to any bill of costs be heard unless the party who filed it shall have been required to tax it under this Rule.

Bills of costs shall contain the names of the witnesses, the dates of their attendance, and the places from which mileage is claimed. They shall be verified by the affidavit of the party filing them that the witnesses were actually present in Court on the days stated, and that, in his opinion, they were material witnesses.

On December 7, 1889, during the pendency of motions made by both parties for a new trial, plaintiff's attorney filed his affidavit setting forth that the above Rule had not been called to his attention until the day the plaintiff's bill of costs had been filed, and moved for leave to file the above bill *nunc pro tunc*. The rule granted upon this motion was afterward discharged by the Court.

The plaintiff's bill of costs was afterward taxed by the prothonotary in accordance with the Rule of Court, and all costs accruing after the passage of said Rule of Court upon March 8, 1889, were disallowed. Upon appeal to the Court, the taxation of costs by the prothonotary was sustained and the appeal dismissed; whereupon plaintiff took this appeal, assigning for error, *inter alia*, the action of the Court in not allowing his bill of costs as filed and in sustaining the taxation thereof by the prothonotary, and in not holding that the foregoing Rule of Court was unreasonable and contrary to law.

B. F. Fisher (*D. H. Stone* with him), for appellant.

A Court ought not to enforce its rules so strictly as to produce injustice.

Sterling v. Ritchey, 17 S. & R. 263.

Magill's Appeal, 59 Pa. 430.

Lance v. Bonnell, 105 Id. 46.

The successful party is entitled to costs, and witness fees are a part of such costs.

Steele v. Lineberger, 72 Pa. 240.

R. R. Co. v. Keiffer, 22 Id. 356.

Statute of Gloucester, 6 Edward I., Cap. I.

Courts have power to establish rules of practice therein, but such rules must not be in contravention of an Act of Assembly.

Act of June 16, 1836, P. D. 279.

Boas v. Nagle, 3 S. & R. 250.

Snyder v. Bauchman, 8 Id. 335.

Reist v. Heilbrenner, 11 Id. 131.

Vanormer v. Ford, 98 Pa. 177.

George Junkin, for appellee.

This Rule of Court is a salutary one, and it is

within the power of the Court to make such a Rule.

Act of March 11, 1836, § 6, P. L. 77.

Act of June 16, 1836, § 21, Id. 792.

Vanatta v. Anderson, 3 Binn. 417.

Barry v. Randolph, Id. 277.

Russell v. Archer, 76 Id. 473.

April 13, 1891. *PER CURIAM*. The eighth assignment of error is aimed at the rule of the Court below adopted March 8, 1889. It alleges that said rule is contrary to law. It may be conceded that if it denies the plaintiff's right to costs, it is not only unreasonable, but unlawful. We fail to see, however, that it denies such right. It is a rule of practice merely, and was evidently intended to prescribe the mode of ascertaining the amount of the costs due the successful party. The power of the Court of Common Pleas to adopt rules of practice is too well settled to be now questioned. The only limitation of the power is that they must not be contrary to law nor unreasonable. The rule in question refers only to the fees of witnesses, and provides that when a cause is continued on trial, the bill of costs for attendance of witnesses must be filed and served upon the opposite party within four days, etc. The obvious purpose of this is to prevent imposition upon the losing party by the filing of large bills of costs for witnesses who may have left the jurisdiction, or be difficult to find. The fact that the rule was adopted by the twelve Judges composing the Courts of Common Pleas of Philadelphia, and has now been in force for two years, with but a single complaint against it, would indicate the necessity for the rule, and that its working has been reasonably satisfactory. It is true a party may lose his costs by a neglect to comply with it. In such case, however, it is his own fault. In like manner a man may lose his right to a trial by jury by not filing an affidavit of defence; a duly qualified elector may lose his right to vote by not making the necessary proof of such right when it is challenged. In these, and many other instances which might be stated, there is no denial of the right, but a regulation of its exercise.

The allegation that the rule is unreasonable because upon a continuance of a cause it compels the parties to disclose the names of their witnesses, possesses little merit. Such disclosure furnishes no indication of the character of their testimony, and we cannot assume that it would lead to their being tampered with. A party who is so void of principle as to engage in such disreputable business is very likely to ascertain the names of the witnesses for the opposite party without the aid of this rule.

Judgment affirmed.

H. S. P. N.

Jan. '91, 49.

February 10, 1891.

Davis v. Carey.*Slander — What words are actionable per se.*

A charge that a person set fire to and burned his own mill to defraud the insurance companies is actionable in itself without proof of special damage.

The English rule that spoken words, which impute that the plaintiff has been guilty of a crime punishable with imprisonment, are actionable *per se*, is qualified in the American cases to the extent that the indictable act, or the punishment which the law assigns to it, must be such as would bring upon the perpetrator social degradation.

Appeal of Thompson Davis, plaintiff, from the judgment of the Common Pleas of Chester County, in an action of slander, against Peter G. Carey.

The facts of the case are fully set out in the opinion of the Supreme Court, *infra*.

The defendant requested the Court to charge the jury as follows:—

(1) If the jury believe that the defendant charged the plaintiff with burning his own mill, their verdict must be for the defendant, because such a charge is not actionable *per se*. *Answer*. That is affirmed. (First assignment of error.)

(2) If the jury believe that the defendant charged the plaintiff with burning his own mill for the purpose of securing payment of the insurance money thereon, such a charge is not actionable *per se*, and their verdict must be for the defendant, because words spoken of a private person to be actionable must contain a plain imputation, not merely of some indictable offence, but the offence must be of an infamous character, or subject to an infamous and disgraceful punishment. *Answer*. That is the question we have just been discussing, and that point is therefore affirmed. (Second assignment of error.)

(3) The allegations made by the plaintiff in this case, if proven, do not *per se* render the defendant subject to an action for slander, and the verdict should be for the defendant. *Answer*. That is affirmed. (Third assignment of error.)

(4) Under all the evidence in this case the verdict should be for the defendant. *Answer*. That point is also affirmed. (Fourth assignment of error.)

The Court, HEMPHILL, J., charged the jury as follows: "This case, as you have already learned from the discussion here, has turned upon a question of law, which is one for the Court. Your labors, therefore, will be very brief, merely to render a verdict in favor of the defendant." (Fifth assignment of error.)

Verdict for defendant and judgment thereon. Plaintiff appealed, and assigned for error as above.

H. H. Gilkynson and William M. Hayes, for appellant.

Words which import a charge of having been guilty of a crime are in themselves actionable.

Starkie on Slander and Libel, *70.

A charge which imputes any crime or misdemeanor for which corporal punishment may be inflicted is actionable *per se*.

Starkie on Slander and Libel, *83.

Ex parte Wilson, 114 U. S. 417.

Mackin v. United States, 117 Id. 348.

To say of a person that he set fire to his own premises, when the same were insured, imputing that he set fire to them for the purpose of defrauding the insurers, is actionable.

Starkie on Slander and Libel, *100.

Sweetapple v. Jesse, 5 B. & A. 31.

Chace v. Sherman, 119 Mass. 387.

In the following cases in Pennsylvania, words imputing a disgraceful crime have been held actionable *per se*:—

Miles v. Oldfield, 4 Yeates, 423.

Phillips v. Heffer, 1 P. & W. 62.

DeFord v. Miller, 3 Id. 103.

Andres v. Koppenhefer, 3 S. & R. 225.

Walton v. Singleton, 7 Id. 449.

Todd v. Rough, 10 Id. 18.

Beck v. Stitzel, 21 Pa. 524.

Lukehart v. Byerly, 53 Id. 420.

Stitzel v. Reynolds, Id. 67 54.

Archibald M. Holding (R. E. Monaghan with him), for appellee.

In order to render the imputation of an offence slanderous *per se*, the offence imputed must be indictable, and must be of an infamous character, or subject to an infamous punishment—the word "infamous" being used in its legal sense.

Dotterer v. Bushey, 16 Pa. 208.

Gosling v. Morgan, 32 Id. 275.

Stitzel v. Reynolds, 67 Id. 57.

Schuylkill Co. v. Copley, 67 Id. 390.

Com'th v. Shaver, 3 W. & S. 342.

Anderson's Law Dictionary, 540.

In the United States cases cited the ordinary meaning of the word "infamous" was applied, and the Massachusetts authorities are governed by statutes, and are of no authority here.

April 6, 1891. CLARK, J. The plaintiff, Thompson Davis, was the owner of a three-story stone merchant grist-mill, situate in Schuylkill Township, Chester County. The mill was insured in the Mutual Fire Insurance Company of Chester County, in the sum of \$2500, and in the Etna Fire Insurance Company, in the sum of \$5000. Whilst thus insured, on the 13th of March, 1889, the mill was destroyed by fire. The defendant, Peter G. Carey, is the agent of the first named company, and is one of the managers and adjusters thereof.

In the plaintiff's statement of claim it is charged, that about the first day of June, 1889, and at various other times, the defendant charged

the plaintiff with setting fire to, and burning the mill, to defraud the insurance companies. If the words uttered were actionable, in themselves, without proof of special damage, the testimony was abundant to send the case to the jury. The charge was that he had burned the mill himself; that he could not have chosen a better day; that it was beyond doubt he had burned the mill; and taking these expressions in the connection in which they were made, they were open to the implication that he had burned the mill to defraud the insurance companies. The Court having given peremptory instructions to find for the defendant, the truth of the testimony adduced by the plaintiff, with all reasonable inferences therefrom, must be assumed. But the learned Judge of the Court below was of opinion they were not actionable, and, upon that ground, gave peremptory instructions to find for the defendant.

Upon the question, what words containing the imputation of a crime are actionable without proof of special damage, the cases of this Court are in some apparent confusion. They are not contradictory; the course of decision is entirely consistent: the confusion arises from what has been said, not what was decided. The cases are in accord, that such words are not actionable unless they import an offence indictable and punishable, either at the common law or by statute (*Harvey v. Boies*, 1 P. & W. 12; *Lukehart v. Byerly* (53 Pa. 418), but this is not the criterion (*Klumph v. Dunn*, 66 Id. 141).

In *Miles v. Oldfield* (4 Yeates, 423), the words were, "You are a vagrant." It was objected, that these words were not actionable, but this Court said: "The Act of February 21, 1767, defines the nature of vagrancy, and authorizes a Justice of the Peace to commit vagrants to the common jail, there to be kept at hard labor for any time not exceeding one month. To charge a person with an offence which subjects him to punishment of this kind, is, in the opinion of the Court, actionable." This case may, however, be distinguished from others in this, that it was not only averred in the declaration, but it was proved, in the nature of a special injury, that in consequence of the words spoken, the plaintiff was apprehended and taken before a Justice of the Peace, as an idle and disorderly person, and thereby suffered damage. In *Shaffer v. Kintzer* (1 Binn. 542), Chief Justice TILGHMAN, says: "With regard to words which will support an action of slander I take the rule to be as laid down by C. J. DE GREY, in the case of *Onslow v. Horne* (3 Wils. 186), in the year 1771, which is an authority in this Court. They must contain an express imputation of 'some crime liable to punishment, some capital offence, or other infamous crime, or misdemeanor.'" But in *Brown v. Lamberton* (2 Binn. 34), the crime charged was

adultery and in *Walton v. Singleton* (7 S. & R. 449), it was fornication merely; no special damage was laid in either case, and it was held that the words were actionable. To the same effect are *Beirer v. Bushfield* (1 Watts, 23); *Vanderlip v. Roe* (23 Pa. 82); *Klumph v. Dunn* (66 Id. 141), and *Rhoads v. Anderson* (13 Atl. Rep. 823). To call a woman a whore or an adulteress, is actionable; the punishment is not infamous, but it is actionable because it is a charge of impurity, depravity, and moral turpitude.

In *Andres v. Koppenhefer* (3 S. & R. 255), the slanderous words spoken, charged the publication of a libel, an indictable offence at the common law, now punishable with fine and imprisonment. Chief Justice TILGHMAN, delivering the opinion of this Court, said: "But supposing the words to imply an indictable offence, it is contended that still they are not actionable, because there is nothing infamous in the crime of libel. It is laid down by some elementary authors that all words are actionable which import an offence for which one is indictable and punishable by fine and imprisonment. I incline to think that this is carrying the matter rather too far. To say that a man has committed an assault and battery, is charging him with an offence punishable by fine and imprisonment, but yet no action of slander has been sustained for such words. It seems that there should be something in the offence of an infamous or disgraceful nature; either a felony or a misdemeanor which affects one's reputation." Mr. Justice GIBSON, in the same case, said: "In England the law is broadly laid down, that words charging an offence that would subject the party to punishment by indictment, are actionable in themselves. In *Brooker v. Coffin* (5 Johns. 188), the rule is restrained to a charge that would, if true, subject the party to an indictment for a crime involving moral turpitude, or that would draw after it an infamous punishment. This distinction appears to me a sound one and to be founded in reason and good sense. There is a variety of misdemeanors, to the commission of which not even the shadow of disgrace is attached by the world, and to be accused of which would not be likely to induce the vexation of a prosecution, if the accused were innocent, and if guilty, he ought not to complain. I think it unreasonable that a charge of having committed a nuisance, assault and battery, and the like should be held actionable." We have quoted extensively from this case of *Andres v. Koppenhefer*, because it seems to be the leading case in Pennsylvania, and contains an exposition of the law which has been followed in the latter cases.

In *Todd v. Rough* (10 S. & R. 18), it was held to be actionable, in a conversation concerning certain boundary trees and allowed land-

marks, to say of the plaintiff that he moved the line and made a new line; for, said this Court, in a conviction of this offence, "not only would the plaintiff be subject to pecuniary loss, but to loss of character. The removal of boundaries has always been held in execration: the curse of God was denounced against it by the Mosaic law; the Romans considered it an infamous offence, and all civilized nations have been of the same opinion. The reason of this general detestation is evident; without certainty of boundary there is no certainty of property in land."

In *Beck v. Stitzel* (21 Pa. 524), the plaintiff was, or had been, one of the administrators of Adam Stitzel, deceased, but had settled his final account some sixteen years before the words complained of were spoken. The defendant charged that the plaintiff, when administrator, "had a room in which were two beds, and both beds were full of leather which he had smuggled away at the time of the appraisement." No special damage was averred in the *narr.*, and none was proved; it was held the words were actionable. In the opinion this Court said: "Where the charge is of an offence, it is usually said that it must involve moral turpitude and danger of punishment; this element of moral turpitude is necessarily adaptive, for it is itself defined by the state of public morals, and thus far fits the action to be at all times accommodated to the common sense of the community. The other element, danger of punishment, is not a necessary one, for it is said in 14 Johns. 233, and repeated here in 5 State Rep. 376, that words are actionable, even though they charge an offence barred by the Statute of Limitations, and it has often been decided that words are actionable though they charge that the punishment has already been inflicted (5 State Rep. 376; 2 Wils. 300; 2 M. & Rob. 119; Cro. Jac. 536.)"

From this reference to a few of the cases, it is clear that when Mr. Justice CHURCH in *Gosling v. Morgan* (32 Pa. 273), said that the undisturbed authority of the leading cases of *Shaffer v. Kintzer* (1 Binn. 537); *McClurg v. Ross* (5 Id. 218), and *Andres v. Koppenhefer* (3 S. & R. 255), establishes the principle that words spoken of a private person are only actionable when they contain a plain imputation not merely of some indictable offence, but one of an infamous character, or subject to an infamous and disgraceful punishment, the word "infamous" could not have been used in its technical, but rather in its popular sense. The only crimes which work infamy and consequent incompetency as a witness, are treason, felony, and every species of the *crimen falsi*, such as forgery, perjury, subornation of perjury, attain of false verdict, and other offences of like description, which involve the charge of falsehood, and affect the public administration of justice. (*Commonwealth v.*

Shaver, 3 W. & S. 342; *Schuylkill Co. v. Coppley*, 67 Pa. 390.) The profession would certainly be greatly surprised to learn that slanderous words are, in Pennsylvania, actionable only when they impute a crime of this class. Our books are full of cases to the contrary.

In *Klumph v. Dunn* (66 Pa. 146), it was held that words imputing the commission of the crime of adultery in another State, are actionable here. "By the law of Pennsylvania," says Mr. Justice SHARSWOOD, "from 1705 to the present time, adultery has always been an indictable offence, and of its moral turpitude there can be no question. The plaintiff was a married man; the defendant knew him to be so, and meant to charge him with this offence, and in language which was designed to convey his own sense of its detestable character, especially, no doubt, in view of the race and color of the party, who was alleged to have been a partaker in the crime. We are of opinion that the words were actionable *per se*, whether they were limited to the State of Georgia, or were general. . . . What then is the criterion? Mr. Starkie, after an elaborate review of the cases, comes to the conclusion, that as it is necessary to have some clear and certain rule, by which the line of demarcation between actionable and non-actionable words can be drawn, none could be adopted more convenient than that which refers the question to the criminal law, and confines the action to imputations of moral turpitude, punishable in the temporal Courts. (1 Starkie on Slander, 27.)"

The English rule is, that spoken words, which impute that the plaintiff has been guilty of a crime punishable with imprisonment, are actionable without proof of special damages. (*Ogden on Lib. and Slan.* 54, and cases there cited.) But in the American cases importance is attached to the inherent nature of the indictable act, and also to the punishment which the law assigns to it, upon the principle that social degradation may result from either. *Brooker v. Coffin* (5 Johns. 190) is the leading case in this country; the rule there laid down is known as the American rule, and is as follows: In case the charge, if true, will subject the party charged to an indictment for a crime, involving moral turpitude, or subject him to an infamous punishment, then the words will be in themselves actionable. "This test," says Mr. Newell in his very recent treatise on Defamation, Libel, and Slander, page 97, "has been accepted and applied so often, and so generally, that it may now be accepted as settled law." It was referred to in *Andres v. Koppenhefer*, with approval, and is spoken of as founded in reason and good sense. The cases in Pennsylvania are in accord with it, and we regard it as stating the true rule.

The plaintiff in this case was charged with

burning his own mill to defraud the insurance companies. The offence involves moral turpitude; it is of a base, and, in a popular sense, infamous character. It is punishable by separate and solitary confinement, at labor, in the penitentiary, for a period not exceeding seven years, which is a disgraceful punishment, inflicted on infamous offences. The words alleged to have been spoken were therefore, without doubt, actionable *per se*, and upon this ground

The judgment is reversed, and a venire facias de novo awarded. W. M. S., Jr.

Jan. '87, 405.

March 24, 1891.

Sansenbacher v. Schickendantz.

Practice—Costs on exceptions to special return of sheriff are chargeable upon the fund when there is probable cause for parties objecting to the return.

Where the sheriff, in pursuance of the Act of April 20, 1846, makes a special return in favor of the lien of a purchaser, and exceptions are taken by a creditor and the same are referred to an Auditor, the party so excepting, although unsuccessful, will not be obliged to pay the costs if he can satisfy the Court that there were special circumstances to create probable cause to object to the claim of his adversary.

The provisions of the Act of April 10, 1848 (Sheriff's Interpleader Act), providing that the costs shall be in the discretion of the Court, have no application to other cases of feigned issues.

Appeal by Ida Schickendantz, from the decree of the Common Pleas No. 4, of Philadelphia County, dismissing her exceptions to the report of the Auditor appointed to make distribution of the proceeds of a sheriff's sale, in an action of assumpsit by Jacob Sansenbacher against Henry Schickendantz.

The facts of the case are substantially as follows: On September 3, 1883, Jacob Sansenbacher obtained a judgment against Henry Schickendantz for \$626.83, under which he levied upon and sold the real estate of defendant. The premises were bought in for \$1105 by Ida Schickendantz, the wife of defendant, who had a judgment against her husband for \$3332, entered August 16, 1883. On December 15, 1883, the sheriff made a special return under the Act of April 20, 1846 (P. L. 411), permitting the purchaser to receipt upon her judgment. Jacob Sansenbacher filed exceptions to this return, alleging the wife's judgment to be fraudulent and collusive. The Court appointed, on motion of Jacob Sansenbacher, an Auditor to make distribution.

The Auditor, Henry Galbraith Ward, Esq., after reviewing the evidence, concluded as follows:—

"The question before the Auditor is the disposition of the fund produced by the sheriff's sale. It is true that no fund is actually in Court, but the proceedings are to be exactly as if there were; and the costs of the distribution should be paid out of the fund unless the exceptions were taken without probable cause, and for that reason the costs should be charged upon the party excepting. (Larimer's Appeal, 10 Harris, 41.)

"Now, having reference to the judgment confessed by Mr. Schickendantz to Henry for \$1700; the large amount of the judgment confessed to his wife; the very moderate circumstances of the family; the circumstances connected with tearing up the judgment note that had been brought by Mr. Reed; the fact that the judgment was confessed to Mrs. Schickendantz shortly after his own suit was instituted, Mr. Sansenbacher cannot be said to have acted without probable cause.

"The Auditor finds the following conclusions of law:—

"(1) That Mrs. Schickendantz has sustained the validity of her judgment, which is not affected by the lapse of time, as the defendant does not set up the statute, and the exceptions to the return should be dismissed.

"(2) That the costs of this proceeding should be paid out of the fund and the balance awarded to Ida Schickendantz on account of her judgment, which is to be reduced to \$1800."

The following exceptions were filed by Ida Schickendantz to this report:—

(1) The Auditor erred in awarding that the costs of the audit should be paid out of the fund, there being no fund in Court.

(2) The Auditor erred in not awarding and directing that the costs of said audit should be paid by the said Jacob Sansenbacher, at whose instance the proceedings before the Auditor were had.

The Court dismissed the exceptions and confirmed the report; whereupon this appeal was taken, assigning for error this action of the Court.

John Sparhawk, Jr., for appellant.

The costs should be paid by the losing party, at whose instance the Auditor was appointed.

No oral or printed argument for appellee.

April 6, 1891. CLARK, J. The judgment of Ida Schickendantz against her husband Henry Schickendantz was entered August 16, 1883, for \$3332. Jacob Sansenbacher's judgment for \$626.83, upon which the defendant's real estate was sold, was entered September 3, 1883. The

property was purchased by Ida Schickendantz for \$1105, which was insufficient to pay her own judgment. She receipted the sheriff for the amount of the bid, less the legal costs of sale, and the sheriff made a special return, under the first and second sections of the Act of April 20, 1846 (P. L. 411). On the reading of the writ in open Court, Sansenbacher filed exceptions, disputing the right of the purchaser to apply the bid to her judgment, and an Auditor was thereupon appointed to distribute the proceeds of the sale, as directed by the above-recited Act.

The Auditor sustained the validity of Mrs. Schickendantz's judgment and dismissed the exceptions, but he found that circumstances attending the various transactions were such that Sansenbacher had probable cause to object to the return, and upon that ground allowed the costs of the audit to be paid out of the fund. The Common Pleas confirmed the report of the Auditor, and the error assigned is the allowance of the costs out of the fund.

In Larimer's Appeal (22 Pa. 41) it was held that when a sheriff makes a special return in favor of the lien of a purchaser at his sale, in pursuance of the Act of April 20, 1846, and exceptions are taken to it by a creditor, which, on reference to an Auditor, are ascertained to be unfounded, the party excepting ought to pay the costs of the audit, unless he satisfies the Court that he had probable cause to object to the return. "We put the decision," says this Court in the case cited, "upon the general rule that in such a contest the losing party ought to pay the costs, unless he can show clearly that there were special circumstances to create probable cause for disputing his adversary's claim."

That such circumstances existed in this case is clear. The Auditor relates them fully in his report, and it is not necessary that we should discuss them at length here. Sansenbacher was a judgment creditor and was interested in the distribution of the money. He had a right, in good faith and for a proper purpose, to ask for the appointment of an Auditor. The first lien creditor was the defendant's wife; her judgment was entered only a few days before the sale; it was entered by confession upon a judgment note of very recent date, and although the parties were in very moderate circumstances, the judgment was for a very large amount—an amount much exceeding the value of the property. The loan from Sansenbacher was made with the knowledge if not at the request of Mrs. Schickendantz, and there was no intimation given of, nor had Sansenbacher any reason to suspect, the existence of this large debt. When Sansenbacher left his claim with Mr. Reed for collection, and Mr. Reed notified Schickendantz of the fact, the latter promptly confessed a judgment to his son Henry for \$1700, which

judgment was satisfied when that of the mother was entered.

Under these circumstances, certainly Sansenbacher had a right to be present at the audit, to exhibit his claim, and to ascertain if he could in a legal manner, the merits of Mrs. Schickendantz's claim, to inquire whether it was a judgment confessed in good faith, and what payments if any had been made; and he might if he chose call witnesses to that end. This was the purpose of the audit, all judgment or lien creditors were invited to attend and present their claims, and acting in good faith and upon probable cause they had a right to be heard at the expense of the fund.

But if Sansenbacher by affidavit setting forth specifically material facts in dispute as provided by the Act of 1846, had put himself formally upon the record as a responsible party to a feigned issue to determine those facts, the costs, under the ruling in Black's Appeal (106 Pa. 344) would of course follow the verdict. When such an issue of fact is made up, it is like any other issue presented by the pleadings in an action at law, and subject to the same rules of practice as to trial, judgment, and all the incidents thereof.

The provisions of the Act of April 10, 1848 (Pur. Dig. 750) known as the Sheriff's Interpleader Act, providing that the costs of all such proceedings shall be in the discretion of the Court, as remarked by our brother STERRETT, who delivered the opinion in Black's Appeal, have no application whatever to other feigned issues directed by the Court for the purpose of determining questions of fact according to the course of the common law.

Hamnett & Son's Appeal (72 Pa. 337), was a case which arose in the District Court of Allegheny County upon the distribution of the proceeds of a sheriff's sale of the real estate of John C. Smith and Adaline Smith, his wife, upon a mortgage. The sheriff made a special return; Hamnett & Sons, who were creditors of the husband, filed exceptions, and an Auditor was appointed. At the hearing the exceptants attempted to show that although the written title was in the wife's name, the husband had an equitable interest in the land. The Auditor reported against the exceptants, but upon the ground that they had proceeded upon probable cause, he allowed the costs out of the fund. The exceptants, however, had the report referred back to the Auditor, but they gave no further evidence, and the Auditor thereupon charged them with the costs of the second audit. The District Court, upon due consideration, decreed that Hamnett & Sons, should pay all the costs of the audit; and this Court upon appeal affirmed the decree. Mr. Justice SHARSWOOD in the opinion filed, said: "It may be that the costs of the first audit, if the matter

had rested there, ought not to have been put upon the appellants. But they renewed their claim with full knowledge of the facts upon the second audit, and it was agreed that the testimony taken on the first audit should be received and used on the second. Under these circumstances we think that the order by the Court below, that the appellants should pay the costs of the audit, was right."

This case recognizes the general doctrine set forth in Larimer's Appeal (*supra*), and we think that is the true rule.

The decree of the Common Pleas is affirmed, and the appeal dismissed at the cost of the appellant.

W. M. S., Jr.

Oct. '90, 193.

November 8, 1890.

Felty v. Calhoon.

Deeds—Construction of—Uncertainty of description—When remediable—Specific performance.

Uncertainty of description, as to the land intended to be conveyed in articles of agreement, will not prevent a bill for specific performance if the contract contains the means by which the land can be identified.

F. and C. entered into articles of agreement for the sale of land. The land to be conveyed was described as follows: "Having a front of four hundred feet on West Run Township Road, starting at the corner of land now belonging to F. D., thence running along said Township Road towards the P. V. & C. Railroad, said distance of four hundred feet and extending back along line of said D. and another line to be fixed sufficient, with said frontage, to make two acres of land." C. subsequently refused to execute a deed, and F. filed a bill in equity for specific performance. Upon demurrer the Court dismissed the bill:

Held, that the articles of agreement contained everything necessary to determine the unfixed line; and that the Court erred in dismissing the bill.

Appeal of Levi E. Felty, plaintiff, from the decree of the Common Pleas No. 1, of Allegheny County, dismissing a bill in equity filed by him against D. K. Calhoon, to compel specific performance of a written agreement for sale of land.

The bill averred the following facts: On July 19, 1889, Calhoon agreed in writing to convey to Felty two acres of ground in Midlin Township, Allegheny County. The articles of agreement were as follows:—

Homestead, Pa., July 19, 1889, Received of Levi E. Felty, the sum of ten (\$10) dollars, hand money on purchase of a piece of ground situate in Midlin Township, county of Allegheny, and State of Pennsylvania, having a front of four hundred (400) feet on West Run Township Road, starting at the corner of land now belonging to Frederick Drews, thence running along said township road towards the Pitts-

burgh, Virginia, and Charleston Railroad, said distance of four hundred (400) feet, and extending back along line of said Drews and another line to be fixed sufficient, with said frontage, to make two (2) acres of land. Being a part of a larger tract of land now belonging to D. K. Calhoon, Esq. The price of said described land is two hundred and twenty-five (\$225) per acre, cash on tender of good and valid general warranty deed, within thirty (30) days from date hereof, clear of all incumbrances.

I accept the above,

D. K. CALHOON,

LEVI E. FELTY.

Witness to both: D. R. JONES.

Before the time for making the deed had expired Calhoon told Felty that he would make no deed for the land, that his wife would not join him in it. Felty then offered to take a deed for the land without release of dower and to pay the full amount of the purchase-money. This offer defendant refused. The bill prayed a decree for specific performance.

To the bill defendant demurred for the following reasons:—

(1) That the bill does not set out any property to be conveyed, or any tender of the purchase-money therefor, with sufficient certainty and definiteness to base a decree thereon.

(2) The bill, as a whole, discloses no facts for which an action at law would not lie and give an adequate remedy.

(3) The bill does not set out such a state of facts as would entitle the plaintiff to the equitable relief prayed for.

The Court sustained the demurrer, filing the following opinion:—

"I do not see how I can avoid sustaining the demurrer filed to plaintiff's bill. The agreement fails to set out anything by which the piece of land can be identified. Indeed its very terms show that it was not defined even in the minds of the contracting parties.

"There is only one line given with certainty, viz., 400 feet along West Run Township Road towards the P. V. & C. R. R., starting at corner of land of Frederick Drews. The other description 'extending back along line of said Drews and the line to be fixed sufficient with said frontage to make two acres,' is so vague as to amount to nothing. Drews' line can be located, but another line 'to be fixed' with said frontage to make two acres, shows that the line was not then determined upon, and the agreement gives no means of determining where it shall start or how long it shall be, so as to include the two acres. There is nothing upon which we can base the maxim *certum est quod certum reddi potest*. Demurrer sustained."

The Court subsequently dismissed the bill at the costs of the plaintiff; whereupon the plaintiff took this appeal, assigning for error this action of the Court.

D. R. Jones, for appellant.

It is not necessary that the description of the subject-matter should be so full as to be fully known from a mere reading of the language. If the agreement is certain to a common intent more will not be required.

Pomeroy on Contracts, § 152.
Waterman on Specific Performance, § 144.
2 Leading Cases in Equity, Pt. 1, 1030.
Herdic's Appeal, 58 Pa. 211.
Bispham's Equity, § 377.
Fry on Specific Performances, § 207.
White v. Hermann, 51 Ill. 243.

No counsel appeared *contra*.

January 5, 1891. PAXSON, C. J. The learned Judge below declined to decree specific performance, for the reason that the description contained in the contract was too vague to identify the lot of ground in question. If he is right as to his facts, his conclusion is accurate. The description is as follows: "A piece of ground situate in Mifflin Township, county of Allegheny, and State of Pennsylvania, having a front of four hundred feet on West Run Township Road, starting at the corner of land now belonging to Frederick Drews, thence running along said Township Road towards the Pittsburgh, Virginia, and Charleston Railroad, said distance of four hundred feet, and extending back along line of said Drews and another line to be fixed sufficient, with said frontage, to make two acres of land, being part of a larger tract of land now belonging to D. K. Calhoun, Esq."

The object of the description is to identify the land with certainty. The learned Judge was of opinion that because one line remained to be fixed, it was impossible to identify it. If, however, the contract contains the means by which the lines can be run and marked out, the difficulty disappears. *Certum est quod certum reddi potest*. The plain meaning of the contract is this: The lot is to have a front of four hundred feet on West Run Township Road. It is then to run back, of that width, along Frederick Drews's land to a depth sufficient to make two acres. How far it must go to make two acres can be ascertained with mathematical precision. A competent surveyor could run the lines and locate the unfixed line in an hour. It is evident that when the parties drew the agreement they did not know how deep the lot must be to give the two acres; that was left to be fixed by a survey. The case is too plain to require elaboration.

The decree sustaining the demurrer is reversed at the costs of the appellee; the bill is reinstated, and it is now ordered that a decree be entered for the plaintiff upon the demurrer.

S. H. T.

Common Pleas.

C. P. No. 4.

April 11, 1891.

Kramer v. Crump.

Mechanic's lien—Acts of August 1, 1868, and May 18, 1887.

A mechanic's lien for alterations and additions, which does not aver that notice of the intention to file a lien was given to the owner at the time of furnishing the materials or doing the work, is fatally defective. The Act of May 18, 1887 (P. L. 118), repeals by implication the Act of August 1, 1868.

Morrison v. Henderson, 22 WEEKLY NOTES, 8, followed.

Rule to strike off mechanic's lien.

The plaintiff filed a lien for alterations and additions, under the Act of August 1, 1868. The lien did not contain an averment of notice to the owner, at the time the work was done and materials furnished, that a lien would be filed therefore.

Ormond Rambo, for the rule.

The Act of May 18, 1887 (P. L. 118), extends the Act of 1861 to all the counties of the State, and provides that notice of intention to file a lien must be given by any one desiring to take the benefit of the provisions of the Act. It, by implication, repeals the Act of August 1, 1868, which is confined to Philadelphia. As no notice is alleged, the lien is defective.

Morrison v. Henderson, 22 WEEKLY NOTES, 8

(C. P. No. 1); affirmed, 24 Id. 38; 126 Pa. 216.

Groeinger v. Ostheim, 135 Pa. 604.

Best v. Baumgardner, 122 Id. 17.

John H. Sloan, contra.

The Act of 1868 does not require notice to be given. In Morrison v. Henderson in the Supreme Court, as appears from the report, the Court did not rest its decision upon the ground that the Act of 1868 was repealed. It is a fair assumption that it did not regard it as repealed. See also—

Thomas v. Hinkle, 126 Pa. 478.

The Act of 1887 does not expressly repeal the Act of 1868, and the two Acts are not inconsistent.

ARNOLD, J. The right to file liens exists by statute only, and the statute may fix the terms, on which the right depends, which terms must be strictly followed. As Common Pleas No. 1 has passed upon the question we will follow its ruling.

Rule absolute.

H. B.

[The notice must be given before the work is done. See *Strawick v. Munhall*, 27 WEEKLY NOTES, 195.]

WEEKLY NOTES OF CASES.

VOL. XXVIII.] FRIDAY, MAY 1, 1891. [No. 2.

Supreme Court.

Jan. '91, 146.

February 4, 1891.

Sutherland v. Ross.

Evidence—Competency of witnesses—Act of May 23, 1887—Husband and wife.

Where the thing or action before the Court is the right or title to premises under a deed alleged to be a forgery, and where one of the parties, whose right by his own act has passed to a third party, is dead, it follows from the express provision of the Act of May 23, 1887, that the surviving or remaining party to the deed is not competent to testify to any matter occurring before the death of the deceased party. Even though the deceased party were not present at the time the alleged facts occurred, but was represented by an agent who is living, yet he was a party to the deed, and therefore the other party is excluded from testifying after his death.

As the surviving party was incompetent, his wife was also incompetent for the same purpose. The identity of interest between husband and wife is such that where one of them is incompetent to testify as a witness, the other is incompetent also.

Appeal of James Sutherland, plaintiff, from the judgment of the Common Pleas of Montgomery County, in an action of ejectment against William Ross.

On the trial, before SWARTZ, P. J., title to the lot in dispute was admitted to be in Nicholas F. Dager, on March 11, 1874.

Plaintiff offered in evidence deed dated March 11, 1874, from Dager *et ux.* to James Sutherland, conveying the lot in dispute and one other lot, in consideration of \$1350, and rested.

Defendant thereupon offered in evidence deed dated February 14, 1877, from Sutherland *et ux.* to Dager, reconveying the lot described in the writ, the consideration being \$1000; also deed dated April 3, 1877, from Dager *et ux.* to William Ross, the defendant.

Plaintiff, in rebuttal, offered to prove by Sutherland, who purports to be the grantor in the deed dated February 14, 1877, from Sutherland *et ux.* to Dager, that the signature to that deed is a forgery. Having been sworn on his *voir dire*, it appeared that Dager, the grantee in the deed was dead, and the defendant then objected to the offer.

Plaintiff's counsel offered to prove by this witness, not a forgery committed by Dager, but to prove that Dager employed William Haywood,

Justice of the Peace, as his agent, on February 14, 1877, to prepare and obtain from Sutherland and his wife a conveyance, in consideration of the payment of \$1000, of the premises in controversy; and while in that employment the agent, Haywood, prepared or had prepared a deed dated February 14, purporting to be signed by James Sutherland and his wife, and witnessed by Mary Nugent and William Haywood, and purporting to be acknowledged by William Haywood, Justice of the Peace; and that no such deed was signed by the witness or his wife, or by Mary Nugent, as witness, or acknowledged by Mr. Haywood, Justice of the Peace.

Objected to by defendant. Objection sustained. Exception. (First assignment of error.)

Plaintiff then called Mary Powell, one of the subscribing witnesses to the deed, who testified that Dager was not present at the execution and acknowledgment of the writing; that Haywood, the other subscribing witness and Justice of the Peace before whom the deed purports to have been acknowledged, was present.

Plaintiff then called Mrs. Sutherland and offered to prove by her that the certificate of February 15, 1877, of Justice of the Peace Haywood, attached to said alleged deed of February 14, 1877, from Sutherland to Dager, that he had examined her separate and apart from her husband, and that she knew the contents of the said deed and had attached her signature thereto, was false.

Objected to by defendant. Objection sustained. Exception. (Second assignment of error.)

Plaintiff offered to prove further by Mrs. Sutherland, that she was present during the whole time on February 15, 1877, when Justice Haywood, Mary Nugent and her husband were together at Sutherland's residence, and that neither \$1000, nor any other sum of money was paid by Haywood or anybody else on behalf of Dager to her husband as a consideration for said alleged deed from her husband and herself to Dager.

Objection by defendant. Objection sustained. Exception. (Third assignment of error.)

Verdict for defendant and judgment thereon. Plaintiff appealed, and specified for error the rulings on the offers of evidence, as above set forth.

John M. Arundel, for appellant.

Neither the Act of April 15, 1869, nor that of May 23, 1887, contemplates the exclusion of a party from testifying to a contract made between the agent of a deceased party and himself, when the contract was not made in the presence of the deceased party.

VanHorne v. Clark, 126 Pa. 411.

Karns v. Tanner, 66 Id. 297.

McClelland's Exr. v. West's Admr., 70 Id. 183.

The decisions are numerous and uniform, that the statutes should be liberally construed as enabling rather than disabling acts, and always in favor of competency unless expressly excluded by the language or spirit of the Act.

Hess v. Gourley, 89 Pa. 195.

Hostetter v. Schalk, 85 Id. 220.

Gamble v. Hepburn, 90 Id. 439.

This very point has been expressly decided in many of the other States having similar statutes to our own.

Brown v. Brightman, 93 Mass. 226.

Hildebrand v. Crawford, 65 N. Y. 107.

Wheeler v. Arnold, 30 Mich. 307.

Ward v. Ward, 37 Id. 253.

The acknowledgment of a deed is a judicial act, and the certificate of it, in the absence of fraud, is conclusive of the facts therein stated.

Heeter v. Glasgow, 79 Pa. 83.

Cover v. Manaway, 115 Id. 338.

In this case the offer was to show fraud of the grossest kind, not mere duress or coercion which might save the certificate as against an innocent purchaser; but certifying to a forgery, which made the deed itself a nullity.

In a question of fraud of this character, great latitude is always allowed; and if there is any evidence offered to support it, it should be submitted to the jury.

Jamison v. Jamison, 3 Wharton, 457.

Hall v. Patterson, 51 Pa. 289.

McCandless v. Engle, Id. 309.

Williams v. Baker, 71 Id. 476.

Heeter v. Glasgow, *supra*.

Cover v. Manaway, *supra*.

Louis M. Childs (Montgomery Evans and George N. Corson with him), for appellee.

Sutherland was an incompetent witness under Section 5 (e) of the Act of May 23, 1887 (P. L. 158).

The Act provides, "Nor where any party to a thing or contract in action is dead, . . . and his right thereto or therein has passed, either by his own act or by the act of the law, to a party on the record who represents his interest in the subject in controversy, shall any surviving or remaining party to such thing or contract, or any other person whose interest shall be adverse to the said right of such deceased or lunatic party, be a competent witness to any matter occurring before the death of said party."

The subject in controversy here was the deed from Sutherland to Dager. Dager was deceased, and his right therein or thereto had passed by his own act to Ross, who was a party on the record, and who represented Dager's interest, and Sutherland was called to prove matters occurring before the death of Dager.

The case is then within the express words of the exception. The rule applies in cases of ejectment, where the validity of the deed under which one of the parties claims is in question.

Parry v. Parry, 130 Pa. 94.

The rule applies where the question is one of forgery of an instrument.

Foster v. Collner, 107 Pa. 305.

It also excludes the testimony of existing facts, which necessarily relate to or tend to establish facts which occurred or existed in decedent's lifetime.

Foster v. Collner, 107 Pa. 305.

Adams v. Edwards, 115 Id. 211.

Hostetter v. Schalk, 85 Id. 220.

Mrs. Sutherland, being the wife of the plaintiff, and he being disqualified as a witness, she was likewise disqualified, and the second offer was properly rejected.

Bitner v. Boone, 128 Pa. 567.

Ross, being a *bona fide* purchaser for value without notice, and the certificate of acknowledgment being correct, is not affected by any fraud in its procurement, however gross.

Heeter v. Glasgow, 79 Pa. 79.

Miller v. Wentworth, 82 Id. 280.

Cressona Saving Fund v. Sowers, 134 Id. 354.

March 2, 1891. CLARK, J. The lot of ground in dispute is situated in West Conshohocken, in the county of Montgomery. It is one of two lots, Nos. 121 and 122, in a plot of lots laid out by one William Davis, Sr., conveyed by William Davis, Sr., to Nicholas F. Dager, by his deed dated April 6, 1871, and this is admitted to be the common source of title.

The plaintiff gave in evidence a deed from Nicholas F. Dager and Elizabeth his wife, dated March 11, 1874, describing and conveying both of said lots to James Sutherland; consideration, \$1350.

The defendant thereupon gave in evidence the record of a deed dated February 14, 1877, from James Sutherland and Agnes his wife, reconveying the particular lot and premises in dispute to Nicholas F. Dager; consideration, \$1000; and also a deed dated April 3, 1877, from Nicholas F. Dager and wife to William Ross; consideration, \$1400.

The plaintiff, James Sutherland, then took the witness stand, and it was proposed to prove by him that the deed from Sutherland and wife to Dager, dated February 14, 1877, was a forgery. Having been sworn on his *voir dire*, it appeared that Nicholas F. Dager, the grantee in the deed, was dead, and objection was made to the competency of Sutherland to testify to any matter occurring before the death of Dager. The objection was sustained, and the witness held to be incompetent.

The plaintiff thereupon called Mrs. Mary Powell, one of the subscribing witnesses to the deed, who testified that Nicholas F. Dager was not present at the execution and acknowledgment of the instrument of writing which she witnessed; that William Haywood, the other subscribing

witness, and the Justice of the Peace before whom the deed purports to have been acknowledged, was present, but that the entire transaction occurred in the absence of Dager, the grantee therein. The offer was then renewed, with some modification. The plaintiff's counsel offered to prove by Sutherland, the plaintiff, not that a forgery was committed by Dager, but that Dager employed William Haywood, the Justice of the Peace, as his agent, on February 14, 1877, to prepare and obtain from James Sutherland and his wife a conveyance of the premises in dispute, in consideration of the payment of \$1000; and whilst in that employment, the agent, Haywood, prepared or had prepared the deed dated February 14, 1877, purporting to be signed by James Sutherland and his wife, and witnessed by Mary Nugent and William Haywood, and purporting to be acknowledged before William Haywood, as a Justice of the Peace, and that no such deed was signed by the witness or his wife, or by Mary Nugent as witness, or acknowledged before William Haywood, as a Justice of the Peace. Objection was also made to this offer, to the same effect as before, which objection was sustained, and this is the first assignment of error.

The contention of the appellant is, that as Dager, the grantee in the deed, was not present at the alleged execution of the deed, but was represented by an agent, who is alive and competent to testify as to the whole transaction, Sutherland, the surviving party, may testify, although Dager is dead. In clause (c) of the 5th section of the Act of May 23, 1887, it is provided in the plainest manner that where any party to a thing or contract in action is dead, and his right thereto or therein has passed, either by his own act or by the act of the law, to a party on the record, who represents his interest in the subject in controversy, neither the surviving or remaining party to such thing or contract, nor any other person whose interest shall be adverse to the said right of the deceased party, except in certain specified cases, shall be a competent witness to any matter occurring before his death.

The thing or contract in action here is the right or title to the premises in dispute under the deed of February 14, 1877, which is alleged to be a forgery, and the record of which was in evidence. Nicholas F. Dager was a party to that deed, and his right under it has by his own act passed to William Ross, a party on the record, who represents his interest in the subject in controversy, and it follows from the express words of the statute that James Sutherland, who is the surviving or remaining party to the deed, is not in this case competent to testify to any matter occurring before the death of Dager, who is deceased.

It is true that at the time of the execution of the deed, or at the time of its alleged execution, Dager was not present; this is conceded: but he was a party to the deed, and in privity of estate with the plaintiff; and although the transaction may have been conducted by Haywood in his absence, in his interest, *that*, according to the terms of the statute, would not render Sutherland competent as a witness to testify on that subject after Dager's death. Such was the construction finally put upon similar language in the Act of 1869. After the passage of that Act, the question arose whether the exclusion of parties to the action was only as to transactions with the decedent, and for a time, it must be conceded, the course of the decisions upon that point was somewhat unsteady; but it was the manifest purpose of the statute to close the mouth of him who is adversary to the deceased assignor. In *Karns v. Tanner* (66 Pa. 297), the broad and general doctrine was thus stated by Mr. Justice AGNEW: "The true spirit of the proviso then seems to be, that when a party to a thing or contract in action is dead, and his rights have passed, either by his own act or by that of the law, to another who represents his interest in the subject of controversy, the surviving party to that subject shall not testify to matters occurring in the lifetime of the adverse party, whose lips are now closed." This statement of the law was followed in *Watts v. Leidig* (29 Leg. Int. 293); *Brady v. Reed* (87 Pa. 111); *Hess v. Gourley* (89 Id. 195); *Ewing v. Ewing* (96 Id. 381); *Foster v. Collner* (107 Id. 305); *Adams v. Edwards* (115 Id. 211).

We think this was the settled construction at the time of the passage of the Act of May 23, 1887, which has also been similarly construed in *Duffield v. Hue* (129 Pa. 94), and in *Parry v. Parry* (130 Id. 94).

As Sutherland was himself incompetent, not only under the words and settled policy of the statute, but as a person "whose interest is adverse to the said right of the deceased," his wife was also incompetent for the same purpose. The identity of interest between husband and wife is such, that where one of them is incompetent to testify as a witness, the other is incompetent also. (*Bitner v. Boone*, 128 Pa. 567.)

Judgment is affirmed.

[See *Yost v. Mensch*, 27 WEEKLY NOTES, 562.]

W. M. S., JR.

Jan. '91, 251.

February 26, 1891.

Doud v. Citizens' Ins. Co.***Policy of fire insurance—Construction of—Cessation of occupancy during change of tenants.***

An absence from a building for a temporary and unavoidable purpose, is not such an abandonment of occupancy as will prevent the owner of the same from recovering on a policy of fire insurance which provides as follows: "This policy will not cover unoccupied buildings [unless insured as such], and if the premises insured shall be vacated without the consent of the company indorsed hereon . . . the policy shall cease and determine."

Under the above provision a reasonable time must be allowed to effect a change of tenants, without imposing upon the insured the penalty of an intended or permitted vacation of the premises.

Appeal of Sarah Doud, plaintiff, from the judgment of the Common Pleas of Lackawanna County, in an action of assumpsit on a fire insurance policy, issued by the Citizens' Insurance Company, defendant.

The facts, as they appeared at the trial, before ARCHBALD, P. J., and the rulings upon which the assignments of error were based, are fully set out in the opinion of the Supreme Court, *infra*.

The Court directed a verdict for defendant, which was accordingly rendered, and judgment was subsequently entered thereon. Plaintiff appealed, and specified for error this ruling, as well as the rulings on the offers of evidence, as set out in the opinion of the Supreme Court.

P. P. Smith (Connolly Davis with him), for appellant.

A. J. Colborn, Jr. (Samuel B. Price with him), for appellee.

March 23, 1891. GREEN, J. On the trial of this case the plaintiff testified that she went to the house in question on Wednesday, the day before the fire; that she had received no notice from her tenant, Mrs. Berheight, that she intended to leave the house, and that she, the plaintiff, had no knowledge until that day that the tenant had left. She was corroborated in this statement as to her going to the house on that Wednesday by the witness, Mrs. Brown, and there was no testimony in the case contradicting either the plaintiff or Mrs. Brown on this subject. Both of these witnesses also testified that there were several articles of furniture belonging to the plaintiff in the house at that time, and that the plaintiff was engaged, and remained in the house all day until 6 o'clock in the evening. Although Mrs. Berheight at first said that it was about a week after she moved before Mrs. Doud came over to the house, she was un-

able to fix the time definitely either when she finished moving, or on what day it was she saw Mrs. Doud at the house. She said she would not be precise as to a day or two, she was sure she moved early in the week, and thought it was Friday when Mrs. Doud came over, but she was clearly wrong in this as the fire occurred during the night of Thursday. She said it was either Monday or Tuesday that she moved, and that it took her one or two days to finish moving. But Mrs. Brown testified that Mrs. Berheight moved the last of her things out two days before the fire, and that Mrs. Doud came to the house on the day before the fire, so that if her testimony was correct, Mrs. Doud came to the house the next day after Mrs. Berheight left and remained all day. This being the state of the admitted testimony, Mrs. Doud offered to prove that she went to the village where the house was, desiring to get possession of part of the building for herself and an invalid son, that upon learning that Mrs. Berheight was moving out, she went to her home in Dunmore, and immediately packed such household and personal articles as she needed, with the intention of moving into the house on Friday morning, and that she had her things packed on Thursday ready to move on Friday, but was prevented from doing so by the fire. This offer of proof was rejected. Another offer was then made covering substantially the same facts, and also that she had been advised by her physician to take her invalid son to the village of Drinker where the house was; and further, that she had placed a man in charge of the house on Wednesday to remain until Friday. This offer also was rejected. She also made a similar offer of proof by her daughter that she was engaged all day Thursday in picking up and packing household articles preparatory to the moving on Friday. This offer also was rejected.

The question that arises is whether, under all the facts proven and offered to be proved, there was such a vacation of the premises as avoided the policy under the sixth clause thereof. The language of the clause is as follows:—

VI. This policy will not cover unoccupied buildings [unless insured as such], and if the premises insured shall be vacated without the consent of the company indorsed hereon . . . the policy shall cease and determine.

It is argued for the appellee that the case of McClure v. Watertown Fire Insurance Co. of New York (90 Pa. 277), decides the question adversely to the appellant. Upon examining that case however it will be found that there is a marked difference in its facts from those of the present case. There an absolute vacation of the premises had taken place in the very manner prohibited by the contract, by the "removal of the occupant," and there was no substitution of

another occupant, either as tenant or owner, actually proceeding when the fire occurred. The very contingency, which in express terms avoided the policy, had occurred. The vacation of the premises was complete, and had been for several days; the owner did not occupy or propose or intend to occupy the house himself, and no new tenant had been obtained or was even being negotiated with. There was nothing but an intention and an effort of the owner to engage a new tenant. Nothing had been accomplished however in that direction when the fire took place. We held that it was the duty of the insured in those circumstances to obtain the consent of the company to the vacancy, and as no effort of that kind was made, the literal terms of the policy prevailed and it was avoided.

But in the present case the facts were entirely different. The owner had several articles of furniture in the building, and a few of those of the departed tenant had not yet been removed. The owner immediately took possession of the house on the day before the fire, remaining until evening, having first sent for and obtained the key from the departing tenant. She also immediately announced her purpose of occupying the house as soon as she could get her household goods removed, and at once commenced and continued through the whole of Thursday the preparation of her goods for removal on the next day, Friday. Moreover, she offered to prove, but was not permitted to do so, that she placed a man in charge of the house on Wednesday to remain until Friday. In such circumstances as these we do not consider that there was any vacation of the premises or any more of a cessation of occupancy than would necessarily arise upon a change of tenants. A reasonable time must necessarily be allowed to carry out such a change without imposing upon the insured the penalty of either an intended or a permitted vacation of the premises. There was no intended vacation here in any view of the facts, and there was no real cessation of occupancy. The occupancy of the owner on Wednesday was part of a continuing occupancy to be proceeded with on Friday, and only delayed by the absolute necessity of obtaining and removing the owner's goods from her home, seven miles distant. Her absence from the building was only for a temporary purpose, which was unavoidable, but which was in no sense an abandonment of occupancy. In this respect the case is entirely analogous with the case of *Franklin Fire Ins. Co. v. Kepler* (95 Pa. 492), where we held that the absence of the insured from his dwelling, from Wednesday until Monday to attend a funeral, was not a breach of the condition of his policy, almost identical with that of the present policy. The same principle was enforced in *Lebanon Mut. Ins. Co. v.*

Leathers (20 WEEKLY NOTES, 107, not reported), where there was a cessation of the operations of a tannery for three months, and a condition of avoidance if the property should cease to be operated as a tannery. We held that "a mere temporary suspension of the business of the establishment for the purpose of making repairs, or from want of a supply of materials, is clearly not ceasing to operate the establishment within the meaning of the policy."

In the case of *Ins. Co. v. Hannum* (reported in 1 Monaghan Rep. 369, but not reported elsewhere), with the same condition as to vacancy as in this case, the tenant moved out on April 1, at the expiration of his term, and the premises were rented to another tenant for a term commencing at that date, but the new tenant did not move in at once, but made his arrangements to move in on April 5. The house was burnt on April 3. The Court below ruled that "the period of time during which the house was not occupied or rather the condition in which it was during those two days, was not such a cessation of the occupancy contemplated by the policy, for such a length of time as would vitiate the policy." This Court affirmed the judgment for the plaintiff without hearing the defendant in error.

We are clearly of opinion that there was no breach of the condition of this policy prohibiting the vacation of the premises. We sustain the first, second, fifth, and sixth assignments of error.

As we hold that there was no breach of condition arising upon the facts of the case, it is not necessary to consider the question whether there was a waiver of the condition in question. The rejected offers of testimony should all have been received, except the one covered by the fourth assignment, which was a mere general offer without any specific facts stated.

Judgment reversed, and venire de novo awarded.

W. M. S., JR.

Jan. '90, 146.

March 24, 1891.

Phillips v. Library Company.

Practice—Service of process upon officers of foreign corporations—Jurisdiction—Act of March 21, 1849.

Plaintiff had the sheriff of Philadelphia County serve process upon the president of a New Jersey corporation while temporarily within this State, in a cause of action against the company arising in the State of New Jersey. The defendant pleaded in abatement to the jurisdiction of the Court, on the ground that defendant was a foreign corporation and did not do business in Pennsylvania. Plaintiff demurred to this plea:

Held, (1) that judgment was properly entered for defendant upon the demurrer.

(2) That the Act of March 21, 1849, directing the method of service of process upon officers and agents of foreign corporations, contemplates a foreign corporation doing business in this Commonwealth.

Appeal of James Phillips and Emily his wife, in right of said Emily, plaintiffs, from the judgment of the Common Pleas No. 3, of Philadelphia County, entered for defendant on plaintiff's demurrer to defendant's plea in abatement, in an action of trespass against the Library Company of Burlington, New Jersey, for personal injuries alleged to have been sustained by said Emily Phillips through the negligence of defendant in failing to keep covered a pit upon its grounds in Burlington.

It appeared that service of process in this case was made upon the president of defendant company while he was temporarily in Philadelphia.

The defendant filed a plea alleging that the Court ought not to take further cognizance of this action, because it is a foreign corporation chartered by King George II. in the year 1723; that it exists only in the State of New Jersey and has no agent or agency or place of business in the county of Philadelphia or State of Pennsylvania, and does no business in said county or State.

To this plaintiffs demurred, and the Court, after argument, entered judgment for the defendant on the demurrer.

Plaintiffs then appealed, specifying for error this action of the Court.

Sylvester Gavitt, Jr. (*Oliver E. Shannon* with him), for appellants.

Josiah R. Adams and *Samuel B. Huey*, for appellee, were not heard.

April 13, 1891. *PAXSON, C. J.* The question here is one of jurisdiction. The defendant company is a foreign corporation having its existence and place of business only in the State of New Jersey. It does not do business in the State of Pennsylvania nor has it ever done so. The president of said corporation being temporarily within this State for either business or pleasure—it does not matter which—was served with process issued against the company for a cause of action arising in the State of New Jersey. The defendant pleaded in abatement to the jurisdiction of the Court, on the ground that the defendant is a foreign corporation and exists only in the State of New Jersey, etc. To this plea the plaintiffs filed a demurrer, and on argument the Court below gave judgment for the defendant.

The Act of March 21, 1849, provides that in all actions in any Court of record in Pennsylvania against a foreign corporation not holding its charter under the laws of Pennsylvania,

"process may be served upon any officer, agent, or engineer of such corporation, either personally, or by copy, or by leaving a certified copy at the office, depot, or usual place of business of said corporation, and such service shall be good and valid in law to all intents and purposes."

It was contended by the plaintiffs that the service upon the defendant company was good under this Act of Assembly, and *Knicht v. Railroad Company* (108 Pa. 250); *Usher v. Railroad Company* (126 Id. 210), and other cases were cited in support of this proposition.

It may be that if proper service had been made upon the company, the Court would have had jurisdiction under the cases referred to. But the Act of 1849, and the authorities cited, contemplate a foreign corporation doing business within this Commonwealth. It was said by our late brother *TRUNKEY*, in *Knicht v. West Jersey Railroad Company*, *supra*, "The defendant in this case, if not incorporated under the laws of Pennsylvania, is doing business therein, else it could not have been made subject to the jurisdiction of the Court of Common Pleas of Philadelphia." We do not understand that the Act of 1849, or any of the cases cited, countenance the doctrine that if the president of a New Jersey corporation, which transacts no business in this State, crosses the Delaware River to dine with a friend on this side, he thereby carries the corporation with him, and subjects it to the jurisdiction of the Courts of this State as to contracts made or torts committed in New Jersey. Under such circumstances he is not here in his representative capacity. He is not the corporation, nor does he bring it here. If the rule were otherwise, he would carry the corporation with him upon a trip round the world, and subject it to the jurisdiction of every country he might visit. We will not designate such a proposition as absurd, but it certainly has not a shadow of reason to sustain it. The law upon this subject is well stated in *Rolling Mill v. Iron Company* (32 N. J. 15), as follows: "Upon general principles, and in the absence of statutory innovations, it is to be regarded as settled, that if a foreign corporation at the time of the commencement of suit, does not do business, and has not any office or place of business in this State, such corporation, except by its own consent, cannot be brought within the jurisdiction of this or any other Court of this State. Under such circumstances the officers or agents of such foreign corporation, when they come into this jurisdiction, do not bring with them their official character or functions, and are not to be esteemed out of the sovereignty by the laws of which the corporate body exists, the representatives for the purpose of responding to suits at law of such corporate body."

It is needless to multiply authorities upon so plain a question. The alleged injury of which the plaintiffs complain occurred in Burlington, New Jersey, the town in which the defendant company is located. There is no good reason why the Courts of this State should be vexed with such a suit. Yet, the action being transitory, might have been sustained here had the corporation been doing business here, and a proper service made upon it. Under the circumstances the judgment was properly entered for the defendant upon the demurrer.

Judgment affirmed.

W. M. S., Jr.

Jan. '91, 194.

March 3, 1891.

Riegelman v. Focht.

*Verbal promise to pay the debt of another—
Statute of Frauds.*

Where a plaintiff agrees to forbear to evict a tenant and to allow him to live on the premises to the end of the term, upon the promise of the defendant, a third party, to pay the rent, this is not the creation of a new and independent debt of the promisor alone, but a mere promise to pay the debt of the tenant who was to continue to occupy the premises until the end of the term.

In such a case the debt of the tenant remains, there is no extinguishment of it, and no substitution of any other debt in its place; there is nothing but the collateral, verbal promise of the defendant to pay it, and such a promise is within the operation of the Statute of Frauds and Perjuries.

When the object of the promise or agreement is to become guarantor or surety to the promisee for a debt for which another party is and continues to be primarily liable, the agreement, whether made before or after, or at the time, with the promise of the principal, is within the Statute of Frauds, and not binding unless evidenced by writing.

Maule v. Bucknell (50 Pa. 39) and Nugent v. Wolfe (111 Id. 471) followed; Merriman v. McManus (102 Id. 102) distinguished.

Appeal of Daniel Focht, defendant, from the judgment of the Common Pleas of Berks County, in an action of assumpsit brought by Benjamin Riegelman.

The case was begun before a justice of the peace and brought into the Common Pleas by appeal on the part of the defendant.

On the trial, before ERMENROUT, P. J., the following facts appeared: Benjamin Riegelman, the plaintiff, rented on a verbal lease to James Focht, the son of the defendant in this case, a certain hotel property in Lenhartsville for the term of one year from April 1, 1884. The plaintiff testified that the rent was \$200 per year, while James Focht testified that it was \$150. The sum of \$75 was paid on account. The lessee

not having paid any further rent, Riegelman determined to evict him, but having met the father of the lessee, Daniel Focht, the defendant in this case, he decided to allow the son to remain as his tenant. The agreement between the plaintiff and defendant is set forth in the assignments of error, *infra*. The rent not having been paid, the plaintiff then brought this action against Daniel Focht.

At the trial plaintiff testified as follows, under objection on the part of the defendant:—

Q. Will you tell us whether or not you made an agreement at any time with Daniel Focht, the defendant in this case, about the payment of the rent of the hotel?

Mr. Rothermel. This is objected to, unless it be shown that the alleged agreement was put in writing or that the new agreement was made in pursuance of a consideration. The testimony is incompetent and immaterial.

Mr. Marx. The plaintiff proposes to show a new agreement.

Objection overruled. Exception. Evidence admitted, as follows: A. James Focht went on and put the telephone in the house; he did not pay any rent nor did he give bail. Then Dan Focht came there, the old man, and said to me, "Jim is doing a good business," and that I should let him live on the premises, that he, Daniel Focht, would pay the rent either monthly or quarterly, as I desired it. But he did not pay it either monthly or quarterly. That is all I have to say or know. Q. Did you at that time threaten to evict James Focht? A. I said if he did not pay his rent or give bail, I would evict him. Q. What was Daniel Focht's answer at that time? A. Dan Focht said then I should leave him remain, and that he would pay the rent monthly or quarterly, as I desired. Q. What did he do then? A. He remained there until the end of the year. Q. What did you say to Daniel Focht? A. Then I left him live there; upon the old man's promises I left him live there; I cannot answer what answer I gave; it is so long ago, I have forgotten it. Q. Was any one present at the time you made this contract? A. Yes; I took Isaac Becker along as a witness. Q. Was he present at the time you made the agreement? A. Yes; we talked it over, and then I called Isaac Becker and told him we had made such a bargain. Q. Did you tell him what bargain you had made? A. I cannot say what I told him; it is too long. Q. Was Mr. Daniel Focht present when you stated the contract to Becker? A. Yes, sir; I and Focht stood together, and then Becker came there.

By Mr. Schaeffer. Q. What was said at that time? A. I cannot say that; perhaps I told Becker that we made such a contract. Q. Have you any recollection of what you said or anything

at all that you said to Becker? A. Yes; I told Becker to come there, and that we had made such a bargain. Q. Can you recollect what you said to Becker? A. I cannot say that any more; it is so long.

By THE COURT. Q. Did you repeat the bargain to Becker? A. I will not say that I did, but perhaps I did. Q. You cannot recollect any more? A. I may have told the bargain to Becker, but I cannot recollect it any more, and what I do not remember, I will not say; it is so long ago. Q. You called Mr. Becker there to witness the contract between you?

First assignment of error.

Isaac Becker testified as follows: Q. Do you know Benjamin Riegelman, the plaintiff in this case? A. Yes. Q. And do you know the defendant, Daniel Focht? A. Yes. Q. If at any time you were present that Riegelman and Daniel Focht entered into a contract in relation to the payment of rent for the Farmers' and Drovers' Hotel, in Lenhartsville, tell us where it was and when? A. It was in Lenhartsville, in 1884, in the month of August or September; I do not remember any more, it is so long ago. Q. What was the agreement between the parties—what was said and done? A. All I know is this: I was there in the store next to Riegelman's hotel. Then Riegelman and old Mr. Focht were standing at the rail where the horses were tied on in front of the hotel. Then Riegelman said, "Becker, come up here." Then Riegelman said, "We have now a contract that James Focht shall remain living here." Then Riegelman said—I am not positive whether Riegelman said, "Dan Focht stands for the rent" or "Dan Focht will pay the rent." I am not positive sure which of the two he said. Q. Was Daniel Focht present at the time? A. Daniel Focht was standing aside of us.

Cross-examination. Q. Who else was present? A. Nobody. Q. Did not James Focht come there while you were talking? A. That I cannot remember; I do not know whether James Focht came to it, but these two were standing together and called me to it. Q. You did not hear Focht say anything about paying the rent? A. No; only Riegelman. Q. Then they did not say anything about any contract? A. No, sir.

Mr. Rothermel. Defendant renews his objection to this part of the testimony, and moves the Court to strike it out. Motion overruled. Exception. (Second assignment of error.)

The Court charged the jury, *inter alia*, as follows:—

"If the jury, under the evidence, should find that in consideration of a promise made by Riegelman to Focht, that he, Riegelman, would not eject James Focht from the premises if he,

Daniel Focht, would pay the rent—if they would find that to be the state of facts—that, in law, would amount to a contract by and between Daniel Focht and the plaintiff, upon which the defendant, Daniel Focht, would be liable, and there could be a recovery in this case. But before there can be any recovery you must find that there was such a contract." (Third assignment of error.)

Verdict for plaintiff for \$99.65, and judgment thereon. Whereupon defendant took this appeal, assigning error as above.

John H. Rothermel, for appellant.

Forbearance to proceed against the estate or person of a debtor, though a good consideration, is insufficient to avoid the statute.

Maule v. Bucknell, 50 Pa. 53.

Addison on Contracts, § 210.

Brown on the Statute of Frauds, § 212, note.

9 Am. & Eng. Ency. of Law, p. 73.

Ehleman v. Harnish, 76 Pa. 103.

Hearney & Co. v. Dittman, 8 Phila. 307.

Birkmyr v. Darnell, 1 S. L. C. 559.

Allshouse v. Ramsay, 6 Whar. 331.

Watson v. Randall, 20 Wend. 201.

Dexter v. Blanchard, 11 Allen, 365.

Nugent v. Wolfe, 111 Pa. 471.

D. N. Schaeffer (James H. Marx with him), for appellee.

Daniel Focht's agreement was such that he became the principal debtor; the statute therefore does not apply.

Ehleman v. Harnish, 76 Pa. 103.

Maule v. Bucknell, 50 Id. 51.

Merriman v. McManus, 102 Id. 102.

Taylor v. Preston, 79 Id. 436.

Merriman v. Liggett, 1 WEEKLY NOTES, 379.

Lefevre v. Bank, 2 Id. 174.

Weyand v. Crichfield, 3 Grant, 113.

Warnick v. Grosholz, Id. 234.

Watts v. Cummins, 59 Pa. 88.

Reeves v. D. L. & W. R. R., 30 Id. 454.

Kerr v. Sharp, 14 S. & R. 399.

Carothers v. Lessee of Dunning, 3 Id. 373.

April 6, 1891. GREEN, J. In any aspect of the testimony in this case, the promise upon which the suit was brought was a verbal promise to pay the debt of another, and therefore void under the Statute of Frauds. The original letting of the premises in question was admittedly made by the plaintiff to James S. Focht. Daniel Focht, the defendant, was in no sense a party to that contract. The letting was for one year, and under it James S. Focht moved into the house, and continued to live there until the end of the term. He paid part of the rent, \$75, and it is not claimed by the plaintiff, nor is it the fact, that the plaintiff at any time released him from his obligation to pay the remainder of the rent. On the contrary, the plaintiff testified that "Jim," his tenant, still owed him the \$125 balance of the rent at the trial. He was asked: "Q. Then James S. Focht paid you \$75, and still

owes you \$125? A. Yes, sir; Jim, but he did not pay it on the bargain, and he owes me \$125 yet. Q. Jim Focht paid you \$75, and owes you \$125; is that so or not? A. I rented it to him for \$200. Now it is easy to know how it is."

The plaintiff's own testimony as to the defendant's promise was that he asked him, the plaintiff, to let Jim remain on the premises, and that he, the defendant, said he would pay the rent monthly or quarterly, as he desired. "Q. Did you at that time threaten to evict James Focht? A. I said if he did not pay his rent or give bail I would evict him. Q. What was Daniel Focht's answer at that time? A. Dan Focht said then I should leave him remain, and that he would pay the rent monthly or quarterly, as I desired. Q. What did he do then? A. He remained there till the end of the year. Q. What did you say to Daniel Focht? A. Then I left him live there. Upon the old man's promise I left him live there. I cannot answer what answer I gave. It is so long ago I have forgotten it."

Thus it will be seen that the whole of the plaintiff's case, according to his own testimony, was that he would forbear an eviction of the tenant and let him continue to live on the premises to the end of the term, upon the defendant's promise to pay the rent. It is really too plain for argument that this is not the creation of a new and independent debt of the promisor alone, but a mere promise to pay the debt of the tenant, who was to continue to occupy the premises until the end of the term. And this is precisely what he did. No change took place in his relation to the plaintiff as his tenant. He still continued liable for the accruing rent, and the plaintiff so testified. Of course no relation of tenancy between the plaintiff and the defendant ever arose, nor was there the slightest pretence that it did, or that anything was said between them on that subject.

The defendant received no consideration of any kind for his promise except such as would arise from the fact that his son was permitted to remain on the premises. There is no testimony in the case which, in any degree, improves that of the plaintiff himself. The debt of the tenant remained; there was no extinguishment of it, and no substitution of any other debt in its place; there was nothing but the collateral, verbal promise of the defendant to pay it, and under all the authorities such a promise is within the operation of the Statute of Frauds and Perjuries.

Said Mr. Justice STRONG, in *Maule v. Buckness* (50 Pa. 39): "In *Williams's Saunders*, (211 e, note 1) it is said, 'The question whether each particular case comes within the clause of the statute or not, depends not on the consideration for the promise, but on the fact of the origi-

nal party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise.' The doctrine of this note is supported by very many cases, and it is in harmony with the words of the statute."

In *Nugent v. Wolfe* (111 Pa. 471), our brother STERRETT said: "As a general rule, when the leading object of the promise or agreement is to become guarantor or surety to the promisee, for a debt for which a third party is and continues to be primarily liable, the agreement, whether made before or after, or at the time with the promise of the principal, is within the statute, and not binding unless evidenced by writing."

In the note to *Birkmyr v. Darnell* (1 Smith's Leading Cases 559, 8th ed.), it is said, "It is universally conceded that forbearance to proceed against the estate or person of the debtor, though a good consideration, is insufficient to avoid the statute," citing many cases in support of the principle.

The doctrine is well stated in the American and English Encyclopedia of Law (vol. 9, p. 73), as follows. "If the evidence shows that the party who receives and profits by the consideration is liable, and may be sued for the debt in assumpsit, or that credit was given primarily to him in any form, the case will fall within the statute, and no recovery can be had on a collateral promise unless reduced to writing, or based upon a distinct and independent consideration moving to the promissor."

It is unnecessary to multiply authorities upon these familiar principles which are directly applicable to the facts of this case. The case of *Merriman v. McManus* (102 Pa. 102), which is cited by the appellee, is not at all in point as its facts are entirely different. There the work under the original contract had ceased because of the insolvency of the party who was liable originally. But it was essential that the work should proceed, and the parties interested in the completion of the work, made a new and independent agreement with the plaintiff, to go on and finish the work, and they would pay him for it. The work was thereafter done, and of course the defendants were held bound to pay for the work subsequently done under their contract to pay for it.

We are of opinion that the learned Court below was in error in the portion of the charge embraced in the third assignment of error. It was in effect a direction that if the defendant's promise to pay was based upon the plaintiff's agreement not to eject the tenant, the plaintiff might recover. We do not so understand the law. The assignments of error are all sustained.

Judgment reversed.

H. S. P. N.

July '90, 171.

January 23, 1891.

Kelly v. Eby.

Promise to pay a debt for which there is no legal obligation—Moral duty a sufficient consideration—Requirements of such a promise—What insufficient—Charge of Court—Mistake in statement of facts—When ground for reversal.

The rule with reference to promises to remove the bar of the Statute of Limitations, viz., that they must be clear and distinct, and that they are only enforceable according to their terms, applies with equal force and greater reason to promises set up to validate the contracts of infants and married women. In the latter case, an express promise is necessary, and the action must proceed upon it.

In an action to recover money loaned to a married woman, a promise made by the debtor after she became discoverit in the following words: "According as I get the money from my boarders, I will give you so much, until I pay you the money," is vague, indefinite, and qualified, and insufficient to support the action.

In an action by A. against B., a widow, to recover money loaned, the plaintiff testified that she loaned the money to B. during coverture, and on being advised to get some evidence of the loan, received the note of C., the husband of B.; and that C. renewed the notes regularly, and paid the interest till his death. B. testified that the loan was made not to her, but to C., who was then doing a good business, though he subsequently failed and died insolvent. A. was unable to read or write. There was no other testimony on the subject of C.'s financial standing at the time of the loan. The Judge charged "if the defendant asked and received a loan of money, and in fact a note of the husband's, then insolvent, was given to a woman ignorant of its contents, that would not change the character of the loan."

Held, that there was nothing in the testimony justifying this inference, and that the charge was in this respect misleading and prejudicial to the defendant.

Appeal of Sarah E. Eby, defendant, from the judgment of the Common Pleas No. 3, of Philadelphia County, in an action of assumpsit for money loaned, brought by Julia Kelly.

The plaintiff, an illiterate working woman, testified: "I loaned to Mrs. Eby \$350. She asked me to let her have the money to help her out of a difficulty she was in. I was at my brother's house, 1202 Carlton Street. Mrs. Eby came there and asked me for the money. She said, 'Julia, why did you disappoint me, and me in a corner and can't get out of it?' The next day I drew the money out of bank and gave it to her. The money was handed to her in the back room of her house. No one was present when I handed her the money. This was the 30th day of December, 1884. She often promised me to pay it. I saw her several times before Mr. Eby died, and the day before he died she said, 'Julia, Mr. Eby is going to die, and I will pay you out of the 'insurance money,' and about two weeks after

his death I asked her about it, and she said, 'according as I get the money from my boarders I will give you so much till I pay you the money.' She never paid it." She further testified that her brother afterwards advised her to get "something to show for her loan," and that she went accordingly to the defendant's house, and the defendant's husband gave her his note (which however she could not read), and from that time regularly gave her renewals and paid interest. The last renewal was given January 2, 1888. The husband died insolvent in March, 1888.

The defendant testified: "This money was not paid me at all. Julia told me her brother was wanting to get her money, and Mr. Eby said if she had any money he would take it and pay her interest for it. She came in a day or two afterwards and gave the money to Mr. Eby in the sitting room. I thought it was only \$250. I supposed she got the note at the same time. She was very particular to get a note from Mr. Eby. He wrote the note and handed it to her. I had nothing to do with it. She would not loan me any money. I asked her for a little trifling loan a few days before that, and she refused to give it to me." She further testified that he was doing a good business at the date of the loan, but failed about a year before he died. There was no other testimony as to his means.

The defendant requested the Court to charge, *inter alia*, as follows:—

(1) If the jury believe from the evidence that at the time of the alleged loan the defendant, Sarah E. Eby, was a married woman and living with her husband, then the plaintiff is not entitled to recover here, and your verdict should be for the defendant. *Refused.* (Fourth assignment of error.)

(2) If the jury believe from the evidence that when the loan was made the plaintiff received for the said loan the note of E. C. Eby, defendant's husband, which note was afterwards taken up by said E. C. Eby at maturity, then the plaintiff is not entitled to recover here, and your verdict should be for the defendant. *Refused.* (Fifth assignment of error.)

(4) Under the evidence in this cause the verdict should be for the defendant. *Refused.* (Sixth assignment of error.)

In the general charge the Court (GORDON, J.) said:—

"It is undoubtedly the law that a married woman at that time could not make a valid contract such as this, and that if any married woman could induce another to loan her money it never could be recovered against her, unless afterwards the married woman becoming sole by the death of her husband revived and assumed the indebtedness. Now, undoubtedly when, according to the plaintiff's story, this loan was made, there could

be no recovery, and if, then, nothing subsequent happened there could be nothing recovered now. It is alleged by the plaintiff, however, that she went to the defendant at the time of the death of her husband, and defendant then promised to pay.

["For the purpose of this case I instruct you that if you should find that fact is true, that the loan was made to her in the first instance, and that the note was received in ignorance of its contents, from defendant, and after the death of the husband she promised to pay it, that was sufficient obligation upon which she could be now sued for the original indebtedness."] (First assignment of error.)

["There are two defences of law. One is, that the note was taken from the husband. Gentlemen, if the defendant asked and received a loan of money, and, in fact, a note of the husband, then insolvent, was given to a woman ignorant of its contents, that would not change the character of the loan."] (Second assignment of error.)

"The other defence is, that it was a loan for the husband. That it was intended and known to be such, and that is the only defence in this case you can pass upon.

["If you believe plaintiff's story as to how she loaned the money originally, and the subsequent occurrences relating to it, I instruct you under the evidence she is entitled to recover."] Third assignment of error.)

"If, on the other hand, you believe the money was loaned to the husband originally, and intended to be loaned to him, then the verdict should be for defendant."

Verdict and judgment for plaintiff for \$419.85. Defendant thereupon appealed, assigning for error the answers to her points and the portions of the charge included in brackets.

Frederick Gaston (John E. Faunce with him), for appellant.

J. Henry McIntyre, for appellee.

March 30, 1891. *McCOLLUM, J.* The claim of the appellee, briefly stated, is that on the 30th of December, 1884, she loaned three hundred and fifty dollars to the appellant who was then a married woman residing with her husband, and that about two weeks after her husband's death in March, 1888, she referred to the loan and said to the appellee, "According as I get the money from my boarders, I will give you so much till I pay you the money." The appellee testified that she handed the money to the appellant in the back room of the latter's house when they were alone, that a day or two afterwards she called upon the husband of the appellant and obtained from him his note for the money, payable in one year with interest; that at the expiration of the year he

paid her the interest and gave her a new note; that while he lived he annually paid the interest and renewed the note, and that the last note, which was given on the 2d of January, 1888, and payable one year thereafter with interest, she still holds. There is no evidence that anything was said by the parties at the time of the alleged loan, about the payment of interest or the return of the principal, and there is nothing whatever to fix its terms except the subsequent dealings of the appellee with the husband of the appellant respecting it. The only corroboration of the story of the appellee in relation to the loan is found in the testimony of her brother, to the effect that the appellant on the 29th of December, 1884, called on him and inquired for his sister, and said that she wanted to borrow some money. All of this evidence is distinctly and in detail denied by the appellant, who says that the loan was made by her husband at the request of the appellee, and she is strongly corroborated in her statement by the admitted course of dealing between the parties for the next three years. The learned Judge instructed the jury that the appellee was entitled to recover if they believed her story as to the loan and the promise made by the appellant after the death of her husband. It is contended that the portions of the charge embraced in the first and second specifications of error were misleading as to the facts, and injurious to the appellant in that they suggested the perpetration of a fraud on the appellee with reference to the note. It is clear from the evidence produced by her that she exhibited the note to her brother on the day she received it, and that she knew it was the note of the husband for the money she claims she loaned to the wife. There was no offer to prove that the maker of the note was insolvent at the time of the alleged loan, and the uncontradicted evidence is that he was then, and for two years after, doing a good business as a wholesale grocer. It is not pretended that the appellee, at any time, requested the appellant to give her a note or receipt for the money, or that she was induced by any misrepresentation or artifice to accept the note of the husband. The undisputed fact is that she applied to him for a note for the money and that she obtained it. As there was nothing in the testimony to justify the inference that "a note of the husband, then insolvent, was given to a woman ignorant of its contents," the charge was misleading in this respect and prejudicial to the appellant.

The fact that the husband gave his note for the money was corroborative of the claim of the appellant that it was loaned to him, and was for the consideration of the jury; but it was not a sufficient answer to the suit, if the appellant borrowed the money, and after the death of her husband gave to the appellee a distinct and unequivocal promise to pay it.

If the loan was made to the appellant as claimed, she was under no legal obligation to pay it, but the moral duty arising therefrom was a sufficient consideration to support an express promise made after coverture (*Hemphill v. McClimans*, 24 Pa. 367). The promise to be available must be clear and distinct, and it is then enforceable only according to its terms. This is the rule with reference to promises relied on to remove the bar of the Statute of Limitations, and it applies with equal force and greater reason to promises set up to validate the contracts of infants and married women (*Chandler v. Glover's Admr.*, 32 Pa. 509). Acknowledgments alone, if consistent with a promise to pay, may remove the bar of the statute, but they will not validate a promise or contract that is void. An express promise is necessary and the action must proceed upon it. The promise testified to by the appellee was not absolute and unqualified: it was at most a promise to pay from board money when received by the promisor. If it was sufficiently distinct and clear, there could be no recovery upon it without proof that the promisor had received the fund from which she proposed to pay. But was the promise intelligible and such as could be enforced? It was not a promise to apply in payment of the loan all the money she received from her boarders, nor to appropriate a defined portion of it to that purpose. It was vague and indefinite and in our opinion insufficient to support an action. The 1st, 2d, 3d, and 6th specifications of error are sustained, and the 4th and 5th specifications are dismissed.

Judgment reversed, and *venire facias* de novo awarded.

R. H. N.

July '90, 180.

February 24, 1891.

Lowery v. Robinson.

Practice—Evidence—Nonsuit—Statute of Limitations.

The refusal of a lower Court to strike out evidence which has been given without objection and also the refusal to enter a compulsory nonsuit, are matters within the discretion of the lower Court, and are not reviewable in the Supreme Court.

An unexplained delivery of money by one person to another does not create the relation of debtor and creditor between the parties; the presumption in such a case is that the money was received in payment of an antecedent debt.

In order to remove the bar of the Statute of Limitations there must be a distinct and unconditional promise to pay, or an acknowledgment and identification consistent with a promise to pay.

A declaration of an intention to pay is not the equivalent of a promise to pay; it is more in the nature of an expression of desire to pay, and from this there is no implication of a promise.

Appeal of B. S. Robinson, administrator of G. S. Robinson, deceased, defendant, from the judgment of the Common Pleas of Lackawanna County, upon an appeal from the judgment of a justice of the peace, in an action brought by C. S. Lowery, to recover forty dollars which he alleged he had loaned to G. S. Robinson in 1875.

On the trial, before SITTSEB, P. J., of the forty-fourth judicial district, the plaintiff called a witness, William Slocum, who testified *inter alia*, as follows: Q. If you have since had any conversation with Mr. Robinson in regard to these sums of money that were loaned, state when it occurred, and what it was? A. Well, I was there once in the house, sitting there, got talking about Mr. Lowery; I says to him, "By-the-way, Charlie wanted me to collect that little bill you owe him." "Well," he says, "I will pay Charlie when I get ready," he says, "he can wait."

Plaintiff also called one Chamberlain, who testified, *inter alia*, as follows: Q. State what you heard Mr. Robinson say? A. Why, he said that he had borrowed some money of Charlie, he was going to pay it to him, but he said Charlie hadn't used him right; he said, "I am going to pay it to him when I get damn good and ready."

Defendant subsequently moved the court to strike out the above testimony for the reason that neither of the alleged admissions was consistent with a promise to pay, and the latter one was not made to a known agent of plaintiff. The court refused the motions. (First and second assignments of error.)

Alfred Townsend, another of plaintiff's witnesses, testified, *inter alia*, as follows: Q. What took place between you and Mr. Robinson? A. Mr. Lowery gave me a bill to go down to Mr. Robinson's for to collect some money. Q. Did you see Mr. Robinson? A. I did, sir. Q. What conversation did you have with him about it? A. I gave Mr. Robinson the bill, and he looked it over, and he said—there was a bar bill on it, and he said that the money—that he didn't have just at present, but he intended to pay it when he had it; that he didn't have it at that time. Q. The borrowed money he intended to pay, but he didn't have it at that time? A. Yes, sir. Q. Say anything about anything else? A. He said the other bill—why, he thought he had paid enough of that kind. Q. What did you mean by the other bill? A. The bar bill. Q. He said about the bar bill that he thought he had paid enough of bar bills? A. Yes, sir.

At the conclusion of plaintiff's case defendant moved for a compulsory nonsuit for the following reasons: (1) That the original indebtedness has not been sufficiently established by the testimony. (2) That the acknowledgments proved by the witnesses have not been shown to relate to the same indebtedness. (3) That most of the ac-

knowledgements have not been consistent with a promise to pay, and that none of the witnesses have sufficiently identified the indebtedness. (4) That the promises, except in a single instance, were not made to the known agent of the plaintiff. The court refused the motion. Exception. (Fifth assignment of error.)

The court charged the jury as follows: The parties in interest, of course, are incompetent to testify as to transactions occurring in the lifetime of G. S. Robinson, who is now dead, and the plaintiff has attempted, by the testimony of various witnesses, to establish the fact that sometime G. S. Robinson borrowed some money of the plaintiff. The first witness called upon that subject was William Slocum, and you heard his testimony. He testifies he saw the plaintiff and G. S. Robinson together; that he saw Mr. Lowery hand some money to Mr. Robinson. His testimony in chief would seem to indicate that the money was then borrowed by Robinson of Lowery. On cross-examination you recollect what he said of the conversation between the parties; he did not hear it, but heard Lowery say it was borrowed money. The other witnesses were called: Cyrus Barrowcliff, George Stansbury, and Whitney Chamberlain, not in the view of proving previous indebtedness, but as I understand, a promise to pay an indebtedness, or an acknowledgment of it. There is nothing in the testimony of these witnesses that would go to show an unequivocal acknowledgment of the debt, or a promise to pay it that would take it out of the statute of limitations. The last witness, however, called by the plaintiff, by the name of Townsend, testified as to a conversation that occurred between him and G. S. Robinson sometime in May or June, 1884. You will recollect what his testimony was on the subject. As I remember it he stated substantially, in May or June, 1884, he had a bill given to him by Mr. Lowery against G. S. Robinson, that he was then in the employ of Mr. Lowery, who sent him to collect that bill; that he presented it to Mr. Robinson. Mr. Robinson looked at it and stated that the bar bill contained upon it he would not pay, but the borrowed money he would, and that the bill contained an item of \$40. If C. S. Lowery, through his agent, presented a charge of \$40 for borrowed money, and the defendant on looking at that item admitted that the \$40 was borrowed money, that is evidence of that fact for you, if you believe the witness. If he said to this witness that he would pay it, it was an express, unequivocal promise, such a promise as would take it out of the statute of limitations, even if the indebtedness was over six years when this suit was brought. You heard the testimony of this witness. You are the judges of his credibility, and if the testimony satisfies

you that it was at this time, an admission that he owed the plaintiff \$40 of borrowed money, and that he promised to pay it, your verdict should be for the plaintiff. If not, then your verdict should be for the defendant.

Verdict for plaintiff for \$52.80, and judgment thereon.

Defendant then appealed, and assigned as error (1 and 2) the refusal to strike out the testimony of Slocum and Chamberlain; (3) the submission of the case to the jury on the testimony of Townsend as the admission of indebtedness, testified to by him, related only to one item of the account, was uncertain as to its subject matter, and was conditional; (4) the submission of the case to the jury without proof of original indebtedness; (5) the refusal of compulsory nonsuit; and (6) in charging that under the evidence the plaintiff might recover.

H. M. Hannah, for appellant.

Henry A. Knapp, for appellee.

March 30, 1891. **MCCOLLUM, J.** The refusal of the trial court to strike out evidence received without objection, or to enter a compulsory nonsuit, is not reviewable here, and upon this ground the first, second, and fifth specifications of error are dismissed (*Montgomery v. Cunningham*, 104 Pa. 349; *Schubkagel v. Dierstein*, 131 Id. 46). The third, fourth, and sixth specifications may be considered together as they raise substantially the same question.

In 1887 Lowery brought this action against Robinson's administrator to recover forty dollars which he alleges he loaned to Robinson in 1875. Slocum testified on the trial that sometime in the year 1875, he saw Lowery hand twenty dollars to Robinson, but that he did not hear any conversation between them respecting it. An unexplained delivery of money or a check by one person to another does not create the relation of debtor and creditor between the parties; the presumption in such case is that the money or check was received in payment of an antecedent debt, and not as a loan. There is no evidence in this case of anything said or done by the parties within the next seven years, explanatory of this transaction, or which would render Robinson liable to an action for the money so delivered to him. It is claimed however that in 1883 or 1884 Robinson made some declarations to the effect that he had previously borrowed money of Lowery which he intended to pay when he got ready or was able. But none of these declarations referred in terms to the alleged loan in 1875, to the time when any loan was made, or to the amount thereof. They were offered and received for the purpose of establishing an acknowledgment of or a promise to pay a pre-existing debt and of removing the statu-

tory bar to its collection. They were not intended to, and cannot create an obligation, nor convert that which was a payment or gift into a loan.

The sole reliance of the appellee is the declaration testified to by Alfred Townsend, and on that the Court below permitted a recovery. Is it sufficient to remove the bar of the statute in a case where the existence of the debt is satisfactorily shown? On this point Townsend testified as follows: "Mr. Lowery gave me a bill to go down to Mr. Robinson's for to collect some money. Q. Did you see Mr. Robinson? A. I did, sir. Q. What conversation did you have with him about it? A. I gave Mr. Robinson the bill and he looked it over, and he said, there was a bar bill on it, and he said that the money that he didn't have just at present, but he intended to pay it when he had it; that he didn't have it at that time. Q. The borrowed money he intended to pay, but he didn't have it at that time? A. Yes, sir. Q. Say anything about anything else? A. He said the other bill, why, he thought he had paid enough of that kind. Q. What did you mean by the other bill? A. The bar bill. Q. He said about the bar bill that he thought he had paid enough of bar bills? A. Yes, sir. Q. Do you remember how much the borrowed money was? A. The bill said forty dollars. Q. When did that conversation occur? A. It was either sometime in May or June in 1884." It is noticeable that there is not in the conversation detailed by Townsend any admission by Robinson that he was indebted to Lowery for borrowed money in any sum whatever, nor any promise to pay him any sum at any time. The bill which was presented to Robinson was not exhibited on the trial, and no attempt was made to account for its non-production. The items of it showing dates and amounts were not given. The inferences of counsel, though assented to by the witness, are not a satisfactory substitute for the declarations of the party whose estate it is sought to charge, nor is the statement of the witness that "the bill said forty dollars," a sufficient identification of the alleged loan. A claim twice barred by the statute of limitations, should have a better foundation, as respects its origin and the subsequent acknowledgment of its validity, than is disclosed by the evidence in this case. A declaration of an intention to pay is not the equivalent of a promise to pay; it is more in the nature of the expression of a desire to pay, and from this there is no implication of a promise. In this case there is no distinct and unconditional promise to pay, nor clear and unequivocal acknowledgment and identification of a debt, and the proofs of an original indebtedness are wholly inadequate.

Judgment reversed, and venire facias de novo awarded.

W. M. S., Jr.

Jan. '91, 58.

February 10, 1891.

Whitaker v. Borough of Phoenixville.

Land taken for streets—Damages—Time of assessment.

Where a person at the time of opening a street owns only the land taken for the street, he is entitled to the full value of the land taken, and there is no question of advantages and disadvantages.

No damages are sustained until a street is opened, and the right of action to have damages assessed to the owner does not commence until the opening of the street or the doing of some unequivocal act by the municipality which indicates that the possession of the owner is about to be disturbed.

If, at the time a street is opened, an owner still continues to own adjoining land he, of course, must submit to the application of the doctrine that his damages for the part taken must be estimated with reference to the effect of the opening of the street, upon the value of his entire holding. But if he has, in perfect good faith, years before the opening, sold off all of his land except that which is taken for the street, he is entitled to the value of the land taken as the measure of his damages.

If the plaintiff has sold off the adjoining land to another as a corner lot adjoining the new street, and has given the right of frontage on the new street to his grantee and deprived himself of all right to interfere in any manner with the frontage line of the lot sold, he can recover only the value of the land covered by the street as affected by the conveyance of the adjoining ground.

Appeal of Joseph C. Whitaker, plaintiff, from the judgment of the Common Pleas of Chester County, in an issue framed between him and the Borough of Phoenixville, to determine the damages suffered by him by reason of the opening of Fourth Avenue in said borough.

On the trial, before WADDELL, P. J., the following facts appeared: Joseph C. Whitaker was the owner of a lot of land having a front of 200 feet on Main Street in the borough of Phoenixville. By ordinance of June 7, 1887, the borough authorities ordained Fourth Avenue, running east and west, almost at right angles with Main Street, and taking the southernmost 60 feet of the ground owned by Whitaker, "to begin in a line with the west side of Starr Street, the centre line of which shall be 360 feet south of the centre line of Third Avenue, thence to and parallel with said Third Avenue south 82° west to Nutts Avenue, said Fourth Avenue to be sixty (60) feet wide."

In July, 1888, Whitaker sold ninety-three feet four inches of his land immediately adjoining the strip of ground upon which Fourth Avenue had been laid out by the above ordinance of 1887. On August 12, 1889, the borough presented its petition to the Quarter Sessions of Chester County, under the Act of April 22, 1856, for a

jury to assess the damages for opening of the street. The jury was duly appointed and filed its report on October 28, 1889, and on November 25, 1889, the plaintiff, Whitaker, being dissatisfied with the finding of the jury, appealed to the Common Pleas.

Plaintiff presented, *inter alia*, the following points:—

(1) In assessing the damages, the jury can only have regard to the advantages and disadvantages caused to the several properties along the line of and adjoining Fourth Avenue. The advantages accruing to the lot owned by the plaintiff, situated on Main Street and separated from said Fourth Avenue by ninety-three feet, cannot be taken into consideration; regard is only to be had to the tract of land through which Fourth Avenue runs, and not to the person of the owner. *Answer.* This would be true and correct if, in the estimation of the Court, it was applicable to this case; that is, you could only take into consideration and assess the damages for properties abutting on Fourth Avenue. But, as you see, in the estimation of the Court, we regard Mr. Whitaker's property as all abutting on Fourth Avenue, the one hundred and forty feet, and not exclusive of the balance. I think it is some forty-seven feet that is left. I would affirm the point on general principles, but I do not think it is applicable to this case. (First assignment of error.)

(3) As therefore the plaintiff owns no property along the line of or adjoining Fourth Avenue, except the property absolutely and wholly taken by the opening of said Fourth Avenue, there were no advantages to be considered by the jury and the verdict must be for the plaintiff for the value of the land so wholly taken. *Answer.* You will see from what I have already said, that I cannot affirm that point, and must, therefore, disaffirm it. I have endeavored to explain to you what, in the opinion of the Court, are the principles applicable to it. I have said to you, in our estimation, you are to consider Mr. Whitaker as owning the one hundred and forty feet which he owned at the time this street was dedicated to the borough. (Second assignment of error.)

The Court charged the jury, *inter alia*, as follows: "At the time this street was thus ordained and dedicated by the borough to public use, Mr. Whitaker was the owner of two hundred feet of ground fronting on Main Street. Fourth Avenue intersects Main Street and, as I understand it, passes along the southern line of these two hundred feet. The one hundred and forty feet left after this street had been dedicated, which street was sixty feet wide, belonging to the Whitaker estate, all lay south of this avenue. This was the condition of things when the

borough dedicated this street to the use of the public, and in the opinion of the Court, you will consider the condition, or you will consider Mr. Whitaker's rights as of that time. It is estimated here that he is entitled to be paid for the ground occupied by this street, inasmuch as he owns no other ground appurtenant to the street. It is undoubtedly a principle of law, that where a gentleman is the owner of a lot of ground in a town like Phoenixville, say sixty feet in width, facing on a principal street, and by reason of the opening of a cross street, the borough thinks it its duty to the public to take that whole lot thus belonging to the gentleman, as you will see, his lot is blotted out; there are no advantages to be computed; he has nothing left; they have dedicated to the public all the ground he owned, and he is entitled to be paid for that ground just what it is worth. You will see there cannot be any advantages estimated in such a case. But in the opinion of the Court, that is not the principle applicable to this case. At the time this street was dedicated to the public, Mr. Whitaker was the owner of two hundred feet of land adjoining and appurtenant to the street thus laid out by the borough, and you are to take into consideration whether or not this street thus dedicated to the public, has been any advantage to him so far as the two hundred feet are concerned, or in other words, as far as the remaining one hundred and forty feet may be concerned. In the opinion of the Court that is the principle applicable to this case and you will apply the evidence which has been furnished you to that principle."

Verdict for plaintiff \$350; whereupon plaintiff took this appeal, assigning for error the answers to the points, as above, and the portions of the charge quoted.

William R. Murphy, for appellant.

The jury must take into consideration only the advantages and disadvantages to properties along the line of and adjoining the street. The advantages to be considered are only such as are special and actual to the property itself, and not to the person of the owner.

Sohnylkill Navigation Co. v. Thoburn, 7 S. & R. 411.

Long v. Harrisburg R. R. Co., 126 Pa. 146.

Railroad Co. v. Moore, 4 WEEKLY NOTES, 532.

Act of February 19, 1849, 2 *Purd. Dig.* 1424.

Act of April 22, 1856, P. L. 525.

Damages are to be assessed at the time of the opening of the street.

In re Keller St., 25 WEEKLY NOTES, 524.

Dillon on Munic. Corp., p. 572, § 473.

In re Canal St., 11 *Wend.* 154.

In re Anthony St., 20 *Id.* 618.

Graff v. Mayor of Baltimore, 10 *Md.* 544.

Wagoner v. Dismant, 2 *Chest. Co. Rep.* 371.

In re Volkmar St., 124 Pa. 327.

Borough of Easton v. Walters, 18 WEEKLY NOTES, 117.

City of Pittsburgh Case, 2 W. & S. 320.

Easton Borough v. Rinek, 116 Pa. 7.

North Chester Borough v. Eckfeldt, 1 Monaghan, 732.

H. H. Gilkyson, for appellee.

The right to damages accrues as soon as the ordinance establishes the street.

Dillon on Munic. Corp., § 614.

Shaw v. Charlestown, 3 Allen, 538.

Philadelphia v. Dickson, 38 Pa. 247.

In re Fifth and Sixth Streets, 4 WEEKLY NOTES, 443.

April 6, 1891. *GREEN, J.* The ordinance ordaining Fourth Avenue was passed in June, 1887. The petition of the borough to have damages assessed for opening Fourth Avenue was presented in August, 1889. In the meantime in July, 1888, Mr. Whitaker, the plaintiff, sold to Miss Caswell two lots measuring together on Main Street ninety-three feet, and extending along Fourth Avenue the whole depth of the lot. At the time, therefore, the proceedings to open were commenced, the plaintiff owned only the ground which was actually covered by the street along the line of the street. He had no land left which abutted on the street. There is no doubt that when a person owns all the ground which the street takes, he is entitled to the full value of the land taken, and there is no question of advantages and disadvantages to be considered. The only question that is raised on the present record is at what time is the assessment to be made. If at the time of the ordaining of the street, the case was properly tried in the Court below, and the judgment should be affirmed, but if at the time of the opening, or of the commencement of the proceedings to open, the case was wrongly tried and the judgment should be reversed.

We did decide, in *Philadelphia v. Dickson* (38 Pa. 247), that the owner had a right to have his damages assessed as soon as the street was established, whether it was opened or not, but that was because the Act of 1855 expressly gave that right to the owner. The Act of 1856, under which the present proceedings are instituted, contains no such provision, and hence that case is no authority for this. But in *Volkmar Street* (124 Pa. 320) we decided that the right of action to have damages assessed to the owner did not commence until the opening of the street or the doing of some unequivocal act of the city, which indicated that the possession of the owner was about to be disturbed. And in *Easton Borough v. Rinek* (116 Pa. 7), we held that no damages were sustained until the street was opened. It was thought by the Court below that the plaintiff by his sale to Miss Caswell had already reaped the advantages of the ordaining and practically of the opening of the street, and

testimony was certainly given tending to prove that fact. But does that circumstance change the rule of law as to the time at which the damages are ascertained? We think not. The rule remains the same, and if the owner has obtained an advantage by the delay of the borough in opening the street, we see no reason why he should be deprived of the benefit of the rule on that account. It is simply an advantage which he has acquired by force of the circumstances. At the time of the proceedings to open he did, in fact, only own the land taken for the street, and that land was not a part of any other and larger tract owned by him. It is difficult to understand upon what principle we can go back to an anterior time when he held other land in connection with this, in order to deprive him of the value of the land now taken. If we can go back one year for that purpose, there is no reason why we cannot do so for five, ten, or twenty years. Yet to do this would seem strangely unreasonable, when we consider all the changes of title and improvements which may have taken place on the intervening land in the meantime. It is a very common occurrence in the boroughs, and smaller towns of the interior of the State, that streets are plotted upon duly authorized maps and formally adopted by the authorities upon adjacent farm lands lying within the municipal limits, many years before they are opened. The damages for opening these streets cannot be assessed until the land covered by the streets is actually taken. If an owner still continues to own adjoining land, he, of course, must submit to the application of the doctrine that his damages for the part taken must be estimated with reference to the effect of the opening of the street upon the value of his entire holding. But if he has, in perfect good faith, years before the opening, sold off all of his land except that which is taken for the street, why shall he not have the value of the land taken as the measure of his damage? We see no reason why. The time of the opening is the legal time for assessing the damage to the owner. At that time he has no land but the land taken, and he is entitled to its value. Rules of law do not shift and vary according to changing circumstances.

When an owner, who has no land but that which is taken, invokes the law as it is, with reference to all other citizens, he cannot be told that at some more or less remote time he owned other contiguous land, and therefore he cannot have the protection of the law as other citizens can. There cannot be two different and conflicting rules applicable to the same state of facts. We are of opinion that the allowance for advantages on the ground that the land taken is part of a larger tract belonging to a common owner of the whole cannot be made against the

plaintiff, because he is not such an owner at the time his land is taken. It is possible, however, that the value of the land taken by the street may be affected to some extent by the fact that the plaintiff had sold off the adjoining land to another as a corner lot adjoining Fourth Avenue, and thereby gave the right of frontage on the avenue to his grantee, and deprived himself of all right to interfere in any manner with the frontage line of the lot sold. If this difference in the character of his ownership after the conveyance of the lot affected the value of the remaining ground covered by the street, the plaintiff could only recover the value of that land as affected by the conveyance of the adjoining ground.

The question whether the value of the ground was thus affected, and to what extent, should be left to the jury, with instructions that it is only the value of the land, subject to the right of the grantee of the adjoining lot to have a clear front on the avenue, that should be allowed as damages. The assignments of error are all sustained.

Judgment reversed, and new venire awarded.

H. S. P. N.

Jan. '91, 13.

March 2, 1891.

Shalters v. Ladd.

Descent and purchase—Wills—Construction of
—"Issue"—Estates tail—Legal and equitable
interests will not coalesce—Separate use.

While a testator, having given a fee simple, cannot denude it of its incidents and properties, he may restrain the generality of a devise by subsequent expressions and convert that which would otherwise have been a fee simple into an inferior estate.

The word "issue" in a will *prima facie* means heirs of the body, and is to be construed as a word of limitation and not of purchase, unless there be something on the face of the will to show it was intended to have a less extended meaning and to be applied to children only or to a particular class or at a particular time.

A testator, by a will dated in 1849, devised certain real estate to "my daughter H., intermarried with F., and to her heirs and assigns, forever . . . the said real estate to be enjoyed by [her] during her natural life, to her sole and separate use, to the exclusion of her husband; she shall not be at liberty to sell or incur the same, . . . and immediately after her death the said real estate shall vest in and be enjoyed by the lawful issue of my said daughter H., excepting that if my son-in-law, F., shall survive his wife, he shall during his lifetime enjoy the rents, issues and profits of one-third of the said real estate:

Held, that H. took an estate for life, equitable during the lifetime of her husband and legal thereafter, and that her children took as purchasers in fee.

By a later clause in his will testator provided: "I declare it to be my will, that if any or all of my said daughters shall request my executors . . . to invest [her] share in said residue of my real, personal,

and mixed estate, in real estate, it shall be the duty of my said executors so to invest it for the sole and separate use of my said daughters, respectively, during their lives, and after their deaths to go in fee simple to their children, or lawful issue, the same as I devised to them the other real estate in former part of my will."

Held, that this reference to the previous devise being in the language of the testator himself, is explanatory of his intention that the issue of his daughter were to take by purchase and by way of remainder in fee.

Appeal of Amanda S. Ladd, trustee for Francis B. Shalters *et al.*, from an order of the Common Pleas of Berks County discharging a rule to show cause why she should not be admitted as a party to the record in an action of partition, wherein the said Francis B. Shalters was demandant and the said Amanda S. Ladd (in her own right), Lucy J. Livingood, and Emma S. Kuendig were defendants, and from a judgment *quod partitio fiat* therein.

A summons in partition for certain real estate in Reading having issued, the said Amanda S. Ladd presented a petition setting forth that she was trustee for the said Francis B. Shalters, his wife, and children, under the will of Hannah R. Shalters, deceased; that the said real estate was late of the estate of Nicholas Seidel, deceased, who died seised thereof, having by his will dated October 1, 1849, devised the same as follows:—

Also, I give and devise to my daughter Hannah, intermarried with Francis B. Shalters, and to her heirs and assigns, forever, the three-storied brick tavern and the ground and stable thereto belonging, as it is now possessed and occupied by George Kalbach, situate on the north side of Penn Street, in the city of Reading, and county of Berks, and adjoining the house and premises which I myself occupy, the said real estate to be enjoyed by my said daughter Hannah, during her natural life, to her sole and separate use, to the exclusion of her husband; she shall not be at liberty to sell or incur the same, and her receipts, from time to time, shall be a sufficient discharge for the rents thereof; and immediately after her death the said real estate shall vest in and be enjoyed by the lawful issue of my said daughter Hannah, excepting that if my said son-in-law, Francis B. Shalters, shall survive his wife, he shall during his lifetime enjoy the rents, issues and profits of one-third of the said real estate.

That the said Francis B. Shalters, the elder (father of the present demandant), died July 5, 1873, and that thereafter his widow duly executed a deed for barring entails, and subsequently died, leaving to survive her four children, the parties to this cause, viz., Francis B. Shalters (the younger), Amanda S. Ladd, Lucy J. Livingood, and Emma S. Kuendig, having, however, first made her last will, whereby she devised one-fourth of the said estate to each of her said daughters and the remaining one-fourth to the petitioner and another (which other has since been discharged), in trust, upon an active trust for the said Francis, his wife, and children.

The petitioner therefore prayed a rule on the parties to show cause why she, in her capacity as such trustee, should not be added to the record as one of the defendants.

By a subsequent clause of his will, the said Nicholas Seidel provided :—

And further, I do hereby order and direct, and I declare it to be my will, that if any or all of my said daughters shall request my said executors, or the survivors, or survivor of them, to invest their shares or any one of their shares in said residue of my real, personal, and mixed estate, in real estate, it shall be the duty of my said executors so to invest it for the sole and separate use of my said daughters, respectively, during their lives, and after their deaths to go in fee simple to their children, or lawful issue, the same as I devised to them the other real estate in former part of my will.

A rule to show cause having been granted was, after argument, discharged by the Court, in an opinion by ENDLICH, J., holding that under the will of Nicholas Seidel, the said Hannah R. Shalters took but a life estate, and that the parties to this suit took the remainder as purchasers, and that there was no estate in the said Hannah on which either her deed to bar entails or her will could operate.

Judgment *quod partitio fiat* having been subsequently entered, the petitioner took this appeal, assigning for error the discharge of her rule and the entry of said judgment.

Jacob S. Livingood, for appellant.

A devise for life, followed by a devise to the issue of the life-tenant, gives an estate tail, even though it defeats a manifest intention that the first taker should have but an estate for life.

Guthrie's Appeal, 37 Pa. 13.

Ogden's Appeal, 70 Id. 509.

The estate in fee simple given in the former part of the devise is reduced to an estate tail by the provisions in the latter part.

Sheetz's Appeal, 82 Pa. 217.

Haldeman v. Haldeman, 40 Id. 34.

Frank S. Livingood (A. B. Wanner & Son with him), for appellee.

The word issue is *prima facie* a word of limitation, but explanatory words may show that it was used in a restricted sense, and where so used, it is a word of purchase.

Yarnall's Appeal, 70 Pa. 335.

Carroll v. Burns, 108 Id. 386.

Reinoehl v. Shirk, 119 Id. 108.

The final clause of the will shows clearly that the testator's intention was to give a life estate with remainder in fee.

Moser v. Dunkle, 1 Woodw. 392.

April 6, 1891. CLARK, J. The single question for the determination of this Court is what estate did Hannah R. Shalters take under the will of Nicholas Seidel, deceased, dated October 1, 1849, and proven June 4, 1850. The clause of

the will which gives rise to the controversy is as follows, viz :—

"Also, I give and devise to my daughter Hannah, intermarried with Francis B. Shalters, and to her heirs and assigns forever, the three-story brick tavern, and the ground and stable thereto belonging, as it is now possessed and occupied by George Kalbach, situate on the north side of Penn Street," etc., "the said real estate to be enjoyed by my said daughter, Hannah, during her natural life, to her sole and separate use, to the exclusion of her husband; she shall not be at liberty to sell or incur the same, and her receipts from time to time shall be a sufficient discharge for the rents thereof, and immediately after her death the said real estate shall vest in and be enjoyed by the lawful issue of my said daughter, Hannah, excepting that if my said son-in-law, Francis B. Shalters, shall survive his wife, he shall, during his lifetime, enjoy the rents, issues, and profits of one-third of the said real estate."

It is plain that the devise to his daughter Hannah, her heirs and assigns forever, standing alone, would be a fee-simple; but whilst a testator, having given a fee-simple, cannot denude it of incidents and properties, he may, nevertheless, afterwards devise a less estate. As this Court said in *Haldeman v. Haldeman* (40 Pa. 34), "he may restrain the generality of a devise by subsequent expressions, and convert that which otherwise would have been a fee-simple into an inferior interest; and more frequently in this mode than in any other is a particular estate given. A reduction of the *quantum* of the gift is allowable, while all attempted alterations of its qualities may prove inoperative."

After making this devise in words which of themselves would without doubt create a fee-simple, the testator further provides :—

"The said real estate shall be enjoyed by my said daughter, Hannah, during her natural life, to her sole and separate use, to the exclusion of her husband; she shall not be at liberty to sell or incur the same, and her receipts from time to time shall be a sufficient discharge for the rents thereof."

As Hannah R. Shalters was at the time a married woman, the effect of this was to create an equitable estate for her separate use during coverture. The instrument clearly speaks the testator's intention to bar the husband's marital rights. It is a matter of no consequence that a trustee was not appointed, for equity will supply a trustee, who, under the terms of this will, would be the mere depository of the title. (*Wright v. Brown*, 44 Pa. 224; *MacConnell v. Lindsay*, 131 Id. 476.) The creation and existence of a separate use is sufficient to support the trust during coverture, against the effect of

the Statute of Uses. (Bacon's Appeal, 57 Pa. 504; Rife v. Geyer, 59 Id. 393; Dodson v. Ball, 60 Id. 492; Little v. Wilcox, 119 Id. 439; MacConnell v. Lindsay, *supra*.) The trust for coverture is not inconsistent with her ownership of the fee. The provision last quoted, therefore, would not necessarily have any effect to reduce or lessen the estate previously given. If the will stopped here, Hannah R. Shalters would have had an equitable separate estate during coverture, and when the purposes of the trust were satisfied, she would be vested in possession, as she was previously vested in the title of the absolute fee.

But the testator further provides: "And immediately after her death, the said real estate shall vest in, and be enjoyed by, the lawful issue of my said daughter, Hannah, excepting that if my said son-in-law, Francis B. Shalters, shall survive his wife, he shall during his lifetime enjoy the rents, issues, and profits of one-third of said real estate." The appellant's contention is that the effect of this clause is to create an estate in tail; that the "heirs" entitled at the death of the first taker are not her heirs generally, as might appear from the words originally employed, but the heirs of her body—her "lawful issue." That although, by the second clause quoted, the testator restrained the devise to a life estate only, yet his intention is manifested that her lawful issue shall take as the heirs of her body, which they could not do without a previous estate of inheritance in her, and that thereby she must be held to take an estate in tail, under the Rule in Shelley's Case. For, granting the testator's intention that his daughter should have a life estate only, that particular intent would be sacrificed, under the rule, to the ascertained general purpose of the testator that her lawful issue should take as the heirs of her body.

Upon this theory of the case, it was suggested at the argument, that as her estate was equitable and the estate of those entitled at her decease was legal, the estate for life and in remainder would not coalesce so as to create an estate in fee or in tail. It is well settled that the interest limited to the ancestor and to the heirs, must be of the same quality, that is to say, both must be legal or both equitable. (Little v. Wilcox, 119 Pa. 440; Bacon's Appeal, *supra*; Fearne on Rem., 52-6.) But Francis B. Shalters, the husband, died on the 5th of July, 1873, in the lifetime of his wife, and at the instant of discovery, the equitable estate of the wife was executed, and therefore her estate was legal, not equitable. When the purpose of the special trust for the use of the testator's daughter had been satisfied by the death of her husband, it stood then for the sole benefit of a single woman, and was at once executed under the Statute of

Uses. (Stacey v. Rice, 27 Pa. 75; McKee v. McKinley, 33 Id. 92; Freyvogle v. Hughes, 56 Id. 228; Megargee v. Naglee, 64 Id. 216; Williams's Appeals, 83 Id. 377; Little v. Wilcox, *supra*.)

The whole question turns then upon the effect of that clause of the will last quoted. Whilst this clause would certainly indicate that the word "heirs," as originally employed, was not intended to signify heirs generally so as to create a fee simple, it is by no means clear that the "lawful issue" was intended to take as the heirs of the body of the first taker. "The word 'issue' in a will is to be construed either as a word of limitation or of purchase as will best effectuate the intention of the testator gathered from the entire instrument. *Prima facie*, however, the word means 'heirs of the body,' and is to be construed as a word of limitation and not of purchase, unless there be something on the face of the will to show it was intended to have a less extended meaning, and to be applied to children only, or to a particular class, or at a particular time." (Reinoehl v. Shirk, 119 Pa. 113.) It is plain that the will is most unskillfully drawn; the testator or his scrivener would seem to have had some knowledge of technical terms and phrases, but knew little as to their proper meaning and effect. From the indiscriminate use of terms of technical import, the testator's intention is left in the greatest possible obscurity.

The real estate of a married woman whether held under the statute or in trust for the separate use of herself and her heirs, descends at her death according to the intestate laws, and this saves to the husband his right as tenant by the curtesy. (Dubs v. Dubs, 31 Pa. 149; Van Rensselaer v. Dunkin, 24 Id. 252; Ege v. Medlar, 82 Id. 86; Rank v. Rank, 120 Id. 191.) Unless in case of a separate use by the terms of the will or settlement, the marital rights in this respect are expressly excluded. (Cochran v. O'Hern, 4 W. & S. 95; Stokes v. McKibbin, 13 Pa. 267; Rigler v. Cloud, 14 Id. 361; Yarnall's Appeal, 70 Id. 336.)

By the will of Nicholas Seidel, deceased, the real estate in question was to be enjoyed by his daughter, Hannah, "during her natural life to her sole and separate use, to the exclusion of her husband," and "immediately after her death" the same was to "vest in and be enjoyed by the 'lawful issue' of the said Hannah, excepting that in case he should survive his wife, her husband was to have during his life, one-third of the rents, issues, and profits." The husband's curtesy could not have been excluded from the grant in more apt words. This feature of the testator's will affords strong proof, that the provision for the issue of his daughter was merely a *designatio*

WEEKLY NOTES OF CASES.

VOL. XXVIII.] FRIDAY, MAY 8, 1891. [No. 3.

Supreme Court.

Jan. '91, 228.

April 9, 1891.

Stevens v. Philadelphia Ball Club, Limited.

Promissory note—Negotiability of—Seal—Limited partnership—When sealed note of a corporation negotiable.

A limited partnership under the Act of June 2, 1874, although a quasi corporation, is not authorized or required to use a common seal.

The negotiability of instruments under seal issued by a corporation, depends to a large extent upon the purpose for which they were issued.

A limited partnership under the Act of June 2, 1874, directed "the chairman and treasurer to execute the proper promissory notes for the instalments borrowed, and secure the same with a judgment note for the whole amount, \$25,000." A note was signed by the treasurer, drawn to his own order, and indorsed by him. On the left hand side of the note, over the body of the writing, was a stamped device, in which were embossed the words "Seal of the P. Club, Limited." It did not appear that the association had ever adopted a seal:

Held, that the note was negotiable.

Appeal of the Philadelphia Ball Club, Limited, defendant, from the judgment of the Common Pleas No. 4, of Philadelphia County, dismissing exceptions to the report of a referee under the Act of May 14, 1874, in an action of assumpsit brought by John S. Stevens, to recover the sum of \$5000 upon a note given by defendant.

The facts found by the referee (J. Levering Jones, Esq.), were as follows:—

"This was an action in assumpsit, in which the plaintiff claimed to recover from the defendant, the sum of five thousand dollars, with interest from September 17, 1887, being the amount of a promissory note given by the defendant through John I. Rogers, its treasurer, to the order of himself, and by him indorsed in blank to the Columbian Bank, and by the Columbian Bank negotiated and delivered to John S. Stevens, in consideration of \$5000 paid therefor.

"The defendant filed an affidavit of defence in which it was alleged that the note was given under seal, and not negotiable; that the note was held by the Columbian Bank without any right to negotiate the same; that it had been hypothecated without knowledge of the officers of the

Philadelphia Ball Club, Limited; that it was given as security (collateral), for an antecedent debt, and that there was and is deposited in the Columbian Bank, to the credit of the defendant, specially appropriated to the payment of the note in question, a sum in excess of the indebtedness secured thereby. The pleas filed are non-assumpsit, payment, and set off with leave. I find the facts and the law as follows:—

"The Philadelphia Ball Club, Limited, became a depositor in the Columbian Bank about 1883. Early in 1886 they began the erection of a large pavilion of brick and iron, near Broad and Huntingdon streets, Philadelphia. At this time they had about \$30,000 on deposit in the bank. It was foreseen by the managers of the club that this sum would be insufficient for their purposes, and application was made to the board of directors of the bank for such a loan as might be needed in addition to the deposits already in bank, to construct the building mentioned. The subject was finally considered by the board at its last meeting in November, 1886. At that meeting the plaintiff, John S. Stevens, a director of the bank, was present, also John I. Rogers, treasurer of the Philadelphia Ball Club, Limited, also a director of the bank. Mr. Rogers explained to the directors the resources of the club, and asked the board to authorize the president to make the necessary loans without his applying to the board every time it became necessary to have a note discounted. The president while satisfied with the security, objected to the obligations of a corporation, because their notes being under seal were objectionable to the banks which did not like to take them. To this Mr. Rogers replied that the ball club did not want the banks to take its obligations, but that they proposed to pledge their deposits for the payment of their notes. No further conversation was had on the subject. The entire subject was referred to the president with power to act.

"On November 3, 1886, the ball club passed a resolution, 'That the board of managers be authorized and directed to borrow in one or several amounts sufficient money not exceeding in the aggregate \$25,000, at lawful rates of interest . . . and to secure payment of the same by note, judgment note, bond, or otherwise.'

"On January 5, 1887, the ball club passed a resolution 'That the chairman and treasurer be directed to execute the proper promissory notes for the instalments borrowed, and secure the same with a judgment note for the whole amount, \$25,000.'

"On January 5, 1887, a judgment note for \$25,000 was given by the Philadelphia Club to the Columbian Bank for the purpose of securing such loans as might be made to them by the bank.

"In January they borrowed \$5000, in Febru-

ary \$10,000, in March \$5000. Each of these sums was on a four months' note. As the notes became due each was paid in whole or in part, or a renewal note given. One of these notes was for \$5000, and given by the ball club to the Columbian Bank, March 12, 1887. It was signed by the president and treasurer, and the seal of the corporation was impressed upon it. It matured July 12-15, 1887.

"On June 15, 1887, the bank gave John S. Stevens the note of the ball club last above referred to, receiving a loan of \$5000 from him.

"On the 15th of July, 1887, the deposit of the ball club was insufficient to meet their maturing obligation, and they, upon the request of the bank, gave a renewal note at two months, in place of the last mentioned note, which had been transferred to John S. Stevens. The old note was surrendered by Stevens, and delivered to the Philadelphia Ball Club, the renewal note handed to Stevens with other collateral, together with a demand note of the Columbian Bank. The renewal note was signed only by the treasurer, the president being absent. The corporate seal was impressed upon the face of the note. The note in form was as follows:—

\$5000. Philadelphia, July 15, 1887.

Two months after date we promise to pay to the order of John I. Rogers, Treasurer, five thousand dollars at Columbian Bank without defalcation, value received. (Signed) Philadelphia Ball Club, L't'd.
No. Due. JOHN I. ROGERS, Treas.

[SEAL OF PHILADELPHIA BALL CLUB, L't'd.]

Indorsed, JOHN I. ROGERS, Treas.

"The absence of the signature of the president is not to be considered. That informality, it is agreed, shall not affect in any way the legality of that instrument, the treasurer having been authorized to sign it.

"On July 29, 1887, the Columbian Bank failed; at that time the club had to its credit \$6061.44. This balance was subsequently reduced to \$3500, the present apparent balance to the credit of the ball club. When the note fell due the ball club tendered a check on the assignees of the Columbian Bank in payment of the note held by Stevens. This was declined and suit brought.

"The principal questions for determination in this cause may be stated as follows: Is the promissory note of a corporation with the unattested impression of the corporate seal on it, with all the characteristics of negotiability embraced in it, a negotiable instrument? Were there any circumstances connected with the making of the note, which is the basis of this controversy, rendering it non-negotiable?

"John S. Stevens, the plaintiff, became the holder of the note in question, for a valuable consideration, without notice of any equity or understanding between the maker or payee that might

abridge his rights. It was not taken as collateral security for an antecedent debt. There was a direct loan on the original note. The renewal note was a mere substitute to protect the same debt; when it was given the original note was surrendered. The two notes were, therefore, connected with and relate to the original transaction, which was a direct loan upon the security of the first note. The note was given by the base ball club to the Columbian Bank for money advanced by them. It was given to secure money to be used for the general purposes of the corporation. A corporation has implied power to borrow money to carry on any of the objects for which it is created, and has incidental powers to give security therefor. (*Orr v. Insurance Co.*, 114 Pa. 387.)

"The making of a negotiable promissory note by the base ball club was, therefore, fully within the scope of its powers.

"In this country there can be no substantial doubt that the general principle prevails, that a note of this character is a negotiable note.

"The case of *Bank v. Railroad Co.* (5 South Carolina, 157), was one in which the suit was brought upon a note substantially the same as in this case. It was there held that a note of a corporation signed by its treasurer may be negotiable, although the corporate seal is attached. The Court said: 'The only feature of this note that is referred to as importing an intent to create an obligation under seal, is the impression of the seal of the corporation on its face. The note would be perfect without this impression, being signed by the proper officer of the corporation. It is in the ordinary form of a negotiable promissory note, with nothing beyond the mere presence of the seal itself to indicate an intention to give it any other character. The seal of the corporation is not in itself conclusive of an intent to make a specialty. It is quite appropriate as a means of evidencing the assent of the corporation to be bound by a simple contract as by a specialty.'

"In *Jones on Railway Securities*, section 311, the law is stated as follows: 'Ordinary promissory notes and other instruments made without sealing, when issued by corporations, are not infrequently issued under the corporate seal. The seal in such case is practically without effect. It does not affect the negotiability or the validity of the instrument.' (*Connecticut Mutual Life Ins. Co. v. R. R. Co.*, 41 Barbour, 9; *Halford v. Railroad*, 15 Q. B. 442; *Aggs v. Nicholson*, 1 H. & N. 165; *Goodwin v. Roberts*, L. R. 10 Ex. 337; *In re General Estates Co.*, L. R. 3 Ch. 758.)

"In *Waterman on Corporations*, 319 (1888), it is laid down: 'If a promissory note made by a corporation be attested by its officers with the

corporate seal, which is not usual, the negotiable character of the note is not thereby destroyed.' (Bank v. Railroad Co., 5 Rich. 156.)

"In *Morawetz on Private Corporations*, sec. 341, it is further said: 'It is still the custom to affix the corporate seal to many classes of contracts which were formerly required to be under seal, but which to-day may be executed without the seal. It seems that a contract having the corporate seal affixed must always be declared upon, at common law, as a bond or contract under seal. But it is well settled that promissory notes issued by corporations do not lose their qualities as negotiable instruments merely because they were sealed with the corporate seal.'

"One of the latest definitions of the law compactly stated may be found in *Tiedeman on Commercial Paper*, sec. 117 (1889): 'The general rule of the law of commercial paper is that it must not be sealed in order to be negotiable; but according to the early common law rule, a corporation could not make a lawful, binding contract except under its corporate seal. Following the general rule that the seal destroyed the negotiability of the instrument, it was formerly held that any contract under the corporate seal must at common law be declared upon as a bond or contract under seal. But it is now generally held, first, that a corporation may make any contract or execute any legal instrument without using its corporate seal in all cases in which this may be done by an individual, and secondly, that if a seal is used by a corporation in the execution of what would otherwise be a negotiable instrument, the use of the seal will not destroy the negotiable character of the paper.'

"The foregoing quotations have been made without direct citations from the various cases bearing upon the point. They sufficiently show a gradual change in the principles of the law, and in expression crystallize the transition which has taken place.

"It was urged by the defendants that the law of Pennsylvania, as regards the effect of a seal upon a promissory note issued by a corporation, is different from the law above stated; but such a distinction is not now admitted by Courts of other States in considering the question, however the question may have been formerly regarded on account of the discussion in *Diamond v. Lawrence Co.* (1 Wright, 353).

"The opinion in *Hopkins v. Railroad Co.* (3 W. & S. 410), that the note of a company, though in its form strictly negotiable, yet if it be attested by the seal of the corporation it is a specialty, and in an action upon it by the holder it is subject to the defence of a want of consideration; and the decision of Chief Justice GIBSON in *Frevall v. Fitch* (5 Wharton, 330), that a note

bearing the corporate seal of a bank on its face, though framed in other respects as a promissory note, is a specialty, were only expressive of the law as it was understood at that time, and it was undoubtedly upon the expression in these two decisions, and in recognition of the law as it was then understood, that Judge SHARSWOOD, in his *Lectures on Commercial Law* reiterated the same general rule in 1856.

All the later authorities in Pennsylvania display a marked tendency to modify, or absolutely abrogate the old rule, and treat *corporate instruments* that would otherwise be negotiable if not under seal, as negotiable, although that incidental feature may be attached to them.

"In *Mason v. Frick* (105 Pa. 162), it was held that coupon bonds payable to the bearer, lawfully issued and sold by a corporation (private) possessed incidents of negotiable paper. It is therein said: 'The negotiability of the bond is to be decided by an inspection of its form and the well-known purposes for which it was issued. . . . It is true that the bond is under seal, and the payment thereof secured by a first lien mortgage on the works of the company. As, however, it is payable to the bearer, the manifest intention was to make it transferable by delivery. Presumptively the bonds were issued to raise money to construct the works of the company. It was a private corporation, and it put these bonds in the market for sale. The clear intent of the maker was that they should pass as negotiable paper. With the language of negotiability on its face, did the seal impressed thereon destroy the negotiability of the bond? We are not dealing with the case of an obligation under seal between individuals; nor with the case of an isolated bond of a corporation executed to secure the performance of a contract to do one specific act; but with the case of a corporation which issued 250 of like bonds to borrow money, and put them on the market for sale.

"It is held by the Supreme Court of the United States, and by the Courts of our sister States, that the bond of a corporation of this form and character is negotiable, and that the mere addition of the seal of the corporation which issued it, does not destroy its negotiability. So, where the name of the payee is left blank the holder may fill in his own name, and bring suit on the instrument. (*Chapin v. Vermont & Mass. R. R. Co.*, 8 Gray, 575; *White v. Same*, 21 Howard, 575.) The bond of a railroad company to secure the payment of money, although under seal, when made payable to bearer or to order, is regarded as invested with all the attributes of negotiable paper. (*Zabriskie v. Cleveland C. & C. R. R. Co.*, 23 How. 381; *Win-*

field v. Hudson, 28 N. J. L., 255; Murray v. Lardner, 2 Wall. 120; Morris Canal Co. v. Lewis, 12 N. J. Eq. 323.) . . .

"The early decisions of our own State do not recognize this rule to its full extent. The later cases, however, have been gradually approaching a conclusion in harmony with the decisions elsewhere."

"A review follows from the various cases from *Frevall v. Fitch* (5 Wharton, 325), until the present time, showing that the earlier cases had been substantially modified or overruled, and in speaking further upon the case before them language is employed which clearly indicates the intention to make the law of Pennsylvania harmonize with that of other States in reference to negotiable instruments of corporations incidentally issued under seal. It is said (page 169): 'We adopt the conclusion that a bond of the form of the one now in question, must now be held in Pennsylvania, as elsewhere, to possess the incidents of negotiable paper. The defendant having taken this bond in good faith, and having paid a valuable consideration therefor, acquired a good title. (*Phelan v. Moss*, 17 P. F. Smith, 59; *McSparran v. Neeley*, 10 Norris, 17.)'

"We need not enter into the consideration of any refined or artificial distinction as between the negotiability of a bond under seal, issued for the purpose of borrowing money thereon, and the negotiability of an ordinary promissory note under seal, issued for the same object, the language of both importing negotiability. The expressions of our Courts now indicate a substantial uniformity with the Courts of all the other States, and there has been an evident aim to make them agree. The custom of merchants and the undoubted law has been accurately defined by the text-books. The absence of an individual case in Pennsylvania may well be ascribed to the general recognition of the principle enunciated, that a promissory note issued by a corporation under seal, in form negotiable, is not open to any defence to the maker in the hands of an innocent holder for value."

"It cannot be doubted that it was the intention of the Ball Club to issue an ordinary promissory note, and that this meant a negotiable instrument. This is evident from the language of the resolution passed by the Ball Club on January 5, 1887, that 'The chairman and treasurer be directed to execute the proper promissory notes for the instalments borrowed, and secure the same with a judgment note for the whole amount, \$25,000.'"

"It was urged on behalf of the defendants that a remark of John I. Rogers to the President of the Columbian Bank at the time negotiations for a loan were being carried on in November, 1886, indicated an intention to give

a non-negotiable instrument. We cannot attach such a meaning to the remark in view of the language of the resolution passed by the Ball Club, and before quoted. In any event, if this note is negotiable, the defendant is estopped from interposing as a defence to recovery upon it, a mere conversation which took place between the representative of the defendant, the Ball Club, and the payee, the Columbian Bank; a conversation which resulted in no distinct agreement, and was substantially no more than an incidental observation in the negotiations for the arrangement of the loan."

"The question of a special assignment of the deposits made by the Philadelphia Ball Club, Limited, in the Columbian Bank, as security for the notes given for it, need not be considered in this connection. If the rule of law that has been laid down is sound, such a fact could not affect the rights of plaintiff herein."

"We find nothing in the evidence relieving the defendants from liability. To hold the note non-negotiable would, we think, be inequitable, and a step backward in the progressive movement of commercial and of corporation law."

"I, therefore, find this case in favor of the plaintiff and against the defendant, in the sum of \$5814.50, being the sum of \$5000, with interest thereon from September 18, 1887, and costs of protest; and direct judgment to be entered for this sum in due course after the filing of this report."

Exceptions filed to this report were dismissed by the Court, which filed no opinion, and judgment was entered for plaintiff; whereupon defendant appealed, assigning for error the dismissal of the exceptions.

George Tucker Bispham and John I. Rogers, for appellant.

Mason v. Frick (105 Pa. 162) merely decides that corporation coupon bonds, payable to bearer and thrown upon the market for sale, were negotiable to this extent, that their title would pass to a *bona fide* holder for value, even though he bought them from a thief.

Even if the meaning of that case has been correctly interpreted by the referee as to the negotiability of corporate obligations being unaffected by the addition of a corporate seal, it cannot be contended that a similar rule should apply to sealed obligations of individuals, acting severally or jointly, as in partnerships, or to unincorporated companies like the appellant.

Maloney v. Bruce, 94 Pa. 252.

Coal Co. v. Rogers, 108 Id. 150.

Elliot v. Himrod, Id. 580.

Tide Water Co. v. Kitchenman, Id. 630.

Hill v. Stetler, 127 Id. 161.

We contend that while the ordinary form and phraseology of a promissory note presumes negotiability, yet when a seal is affixed the presumption of negotiability raised by such form and

phraseology is rebutted, and it must then be affirmatively shown that despite the seal the intention of the parties was to make the note negotiable. This plaintiff failed to show.

Crouch v. Credit Foncier, L. R. 8 Q. B. 374.

Matthew v. Bank, 14 Am. Law Reg. (N. S.) 162, note.

Lewis on Stocks and Bonds, 64-83.

Jones on Corporate Bonds, § 155.

John G. Johnson (Frank P. Prichard with him), for appellee.

Limited partnership associations are *quasi* corporations.

Oak Ridge Co. v. Rogers, 108 Pa. 147.

Hill v. Stetler, 127 Id. 145.

The common law doctrine that a corporation could not execute a negotiable instrument, because it could only sign with its corporate seal, which made the instrument a specialty, was the law of this State down to a very recent time.

Hopkins v. R. R. Co., 3 W. & S. 410.

Frevall v. Fitch, 5 Wh. 330.

But this law has been changed by the common usage of the commercial world, which has been recognized and followed by the Courts. See—

White v. Vermont, etc., R. R. Co., 21 How. 575, 577.

Mercer v. Hackett, 1 Wall. 83, 95.

Brainerd v. N. Y., etc., R. R. Co., 25 N. Y. 496, 500.

Kerr v. Corry, 105 Pa. 282 (overruling *Diamond v. Lawrence Co.*, 37 Id. 353).

Mason v. Frick, 105 Id. 162.

Bauk v. R. R. Co., 5 S. Car. 156.

Jackson v. Myers, 43 Md. 452.

Muth v. Doefield, Id. 466.

In England, the law has taken the same course as in this country.

Goodwin v. Roberts, L. R. 10 Exch. 337; 1 App. Cas. 176.

In re General Estates Co., L. R. 3 Ch. App. 758.

In re Imperial Land Co., L. R. 11 Eq. 478.

Brice on Ultra Vires (2d Eng. ed.), 303 (2d Am. ed. 256).

Morawetz on Private Corporations, § 341.

Jones on Railway Securities, § 311.

Tiedeman on Commercial Paper, § 117.

4 *Lawson on Rights, Remedies, and Practice*, § 1456.

April 27, 1891. *PER CURIAM*. The learned referee, and the Court below, held that the note in question was negotiable. That it was so in form is not disputed. It was signed by the treasurer, and his authority to do so was expressly found by the referee. It was urged, however, that the fact that the "seal of the Philadelphia Ball Club, Limited," was attached, destroyed its negotiability. The association was organized under the Act of 1874, providing for the creation of limited partnerships. Such associations were referred to in *Oak Ridge Company v. Rogers* (108 Pa. 147), as *quasi* corporations. They are certainly artificial bodies, not natural persons. Whatever may be the character of

such associations, there is nothing in the Act of 1874, which requires or authorizes them to use a common seal, as in the case of a corporation, nor is there anything to show that it had ever adopted a seal. The resolution authorizing the issue of the note in suit is as follows: "The chairman and treasurer be directed to execute the proper promissory notes for the instalments borrowed, and secure the same with a judgment note for the whole amount, \$25,000." Here was authority to issue proper promissory notes, which means in the usual form of such instruments. There is not a word about a seal, and the seal appended was evidently not that of the officer who signed the paper, nor was it placed opposite his name. It was on the left hand side of the note over the body of the writing, and was a stamped device. As the association had no common seal, so far as the case shows, and as there was no instruction or authority to affix it, we must regard it as surplusage, and not as interfering with the clear intention to make the instrument negotiable.

We need not discuss the question of the effect of a seal upon instruments issued by a corporation further than to say that in such cases the question of their negotiability depends to a large extent upon the purpose for which they were issued. As was said in *Mason v. Frick* (105 Pa. 162), in regard to coupon bonds: "Presumptively the bonds were issued to raise money to construct the works of the company. It was a private corporation, and it put these bonds in the market for sale. The clear intent of the maker was that they should pass as negotiable paper."

In the case in hand we think the intent equally clear that the note was intended by the maker to be negotiable. Even if we treat the device referred to as a seal, it does not show a contrary intent, nor destroy the negotiability of the note.

Judgment affirmed.

H. C. O.

Jan. '91, 147.

April 6, 1891.

Cullen's Estate.

Decedent's estate—Collateral inheritance tax—Lien of—Act of May 6, 1887, § 20.

The proviso to § 20 of the Act of May 6, 1887 (P. L. 79), viz., "that all collateral inheritance taxes shall be sued for within five years after they are due and legally demandable, otherwise they shall be presumed to have been paid, and cease to be a lien as against any purchasers of real estate," was intended to quiet the title of purchasers of real estate, and notwithstanding the expiration of the five years, the personal liability to pay the tax continues, and the lien itself is discharged only where the land has been sold.

Appeal of the Guarantee Trust and Safe Deposit Company, administrator *cum testamento*

annexo of the estate of Peter Cullen, deceased, from the decree of the Orphans' Court of Philadelphia County, dismissing exceptions to the appraisement by the State appraiser of the collateral inheritance tax claimed to be due by said estate to the Commonwealth.

The facts were as follows: Peter Cullen died September 5th, 1881. A contest arose over his will. On October 22, 1881, letters of administration *pendente lite* were granted to the appellant, and continued in force until July 3, 1889, when, the contest over the will having been compromised, letters of administration *cum testamento annexo* were granted to the appellant.

On July 15, 1889, the register of wills of Philadelphia County caused an appraisement of the estate of the decedent to be made for collateral inheritance tax, and from this appraisement the appellant filed, *inter alia*, the following exception:—

The State appraiser erred in assessing a tax against the said estate, no suit having been brought by the Commonwealth of Pennsylvania within five years from September 5, 1881, for the amount of the said tax, as required by the Act of Assembly in that case made and provided, to wit, section 20 of the Act of May 6, 1887, whereby the said estate is relieved from present liability for said tax.

This exception was dismissed by the Orphans' Court, in an opinion by ASHMAN, J. (Cullen's Estate, 26 WEEKLY NOTES, 216), whereupon the administrator took this appeal, assigning for error the dismissal of the above exception.

Furman Sheppard (John Sparhawk, Jr., Albert S. L. Shields, John H. Campbell, and Thomas R. Elcock with him), for appellant.

Tax laws are construed most strongly against the government and most favorably to the tax-payer.

Dwarris on Statutes, 742, 749.

Gurr v. Scudde, 11 Exch. 190.

Doe v. Smith, 8 Bing. 177.

United States v. Wigglesworth, 2 Story, 369.

Barnes v. Doe, 4 Ind. 132.

Del Busto's Estate, 23 WEEKLY NOTES, 111.

In this case the tax had not even been demanded within six years of the date of decedent's death, as in—

Cram's Estate, 25 WEEKLY NOTES, 250.

The Act of May 6, 1887, distinguishes between the lien of the tax and the tax itself. The word "lien" occurs only in sections 3 and 20 of the Act. Section 3 of the Act refers only to remainders over after a life estate or after a term of years, and the lien which is created expressly is applicable to these estates, and these estates only. Section 3 is to be restrained to the subject of the enacting clauses.

The provisions of section 7 of the Act are confined to the payment of a legacy charged upon or payable out of the real estate. It is not appli-

cable to a case of intestacy, nor where there is no real estate.

A proviso is generally intended to restrain and restrict the enacting clause, or in some measure to limit its operation. It is to be so construed, and its effect is to be restricted to that.

Sedgwick, Stat. Const., 2d ed. 49.

The 20th section says, "the lien of the collateral inheritance tax shall continue." What lien? It must be presupposed, something known or something antecedently mentioned. That section does not create a lien. It refers to such lien as antecedently mentioned. You cannot give any broader construction to the word "lien" that extends it beyond the "lien" mentioned in section 3, and the "charge" mentioned in section 7. No lien other than those two is created by the Act. This is corroborated by the first proviso that the lien shall be limited to the property chargeable therewith, which would be unnecessary if the whole estate—real, personal, and mixed—was chargeable with the tax.

There are two alternative and two distinct results to follow from the non-bringing of suit: the first, that all taxes shall be presumed to be paid, and that presumption is conclusive; and the second, that the lien shall cease and determine as against any purchaser of real estate; a separate and distinct clause that must be interpreted with reference to the opening words of section 20, and that it refers to the lien spoken of there—that a purchaser during the five years is discharged, and that that applies to the case only where the tax is expressly made a charge upon the land.

The last part of the section, which is new, shows that the section was intended to bar the collection of all taxes if suit was not brought within five years. The Commonwealth did not sue within five years. What is the legal result? Nothing, according to the view of the appellee. Why, then, require suit to be brought within five years if the failure to sue will not change the *status*? Then the command to sue may be disregarded where there are no such purchasers and the tax be collected after any period of time, and you have a perpetual and everlasting claim.

The legislative history of section 20 shows the Legislature intended the Commonwealth should be barred.

Edward P. Allinson and William U. Hensel, attorney-general (*Boies Penrose, S. Davis Page, and William S. Kirkpatrick*, ex-attorney-general, with them), for appellee.

The Commonwealth is never barred by a Statute of Limitations unless such an intent be manifested by explicit terms or at least by necessary and irresistible implication.

Bagley v. Wallace, 16 S. & R. 245.

Comm. v. Baldwin, 1 Watts, 54.

McKeehan v. Comm., 3 Pa. 151.
Comm. v. Hutchinson, 10 Id. 466.
Comm. v. Johnson, 6 Id. 138.

The purpose of the Act of 1887 is to enforce an efficient collection of the tax.

After making express provisions as to the unlimited liability for the tax, not only in section 1, as to estates in general, but even by explicit reiteration concerning life-interests, reversionary interests, legacies paid out of real estate, and other particular cases mentioned therein, the Act provides, in section 20, for a certain exception. Yet even here the first two lines of the section, in order to place the question beyond doubt, declare that "the lien of the collateral inheritance tax shall continue until the said tax is settled and satisfied." Then come the provisos: "Provided that the said lien shall be limited to the property chargeable therewith; and provided further, that all collateral inheritance taxes shall be sued for within five years after they are due and legally demandable, otherwise they shall be presumed to have been paid and cease to be a lien as against any purchasers of real estate." In short, the lien is very properly, and in harmony with kindred legislation, limited in two ways: (1) To the property chargeable; and (2) to five years as against purchasers.

But all the other sections of the Act, the first two lines of section 20, and the very carefully worded provisos of section 20, show clearly that the liability for the tax, as regards the parties owing the same, is not discharged except by payment.

There was no limitation of liability for collateral inheritance tax until the Act of May 4, 1855 (P. L. 425), section 3 of which provided that "all collateral inheritance taxes not sued for within twenty years after they accrued shall be presumed to have been paid and cease to be a lien as against any purchasers of real estate." This provision is similar to the twentieth section of the Act of May 6, 1887, and has been construed only to limit the liability as against *bona fide* purchasers in—

Mellon's Appeal, 114 Pa. 564.

April 27, 1891. PAXSON, C. J. We are of opinion that the Orphans' Court took the proper view of the twentieth section of the Act of May 6, 1887, relating to the collateral inheritance tax. The opinion of the learned Judge below is so clear and satisfactory that we are spared a discussion of the case, and we affirm the decree for the reasons given by him.

Decree affirmed, and the appeal dismissed at the costs of the appellant.

Jan. '91, 276 & 310.

April 8, 1891.

City of Philadelphia v. Heister. Same v. Baker.

Taxes—Lien of taxes—Duration of lien—Acts of February 3, 1824; April 16, 1845; March 11, 1846; April 21, 1858—Repeal of statute—What is irreconcilable repugnancy—Meaning of words "bringing suit."

In the city of Philadelphia, where a claim is filed for delinquent taxes a writ of scire facias thereon must issue within five years from the first day of January in the year succeeding that in which the taxes became due, or the lien will be lost.

Under the terms of the Acts of April 16, 1845 (P. L. 489), and March 11, 1846 (P. L. 114), providing for the preservation of the lien of taxes by filing a claim and the collection of the same by writ of scire facias, the issuing of the said scire facias is "bringing suit."

The Acts of April 16, 1845, and March 11, 1846, are not repealed by the Act of April 21, 1858 (P. L. 385).

Appeals of the City of Philadelphia, plaintiff, from the judgment of the Common Pleas No. 1, of Philadelphia County, in an action of scire facias sur tax claim, wherein Isaac Heister was defendant, and from an order of the said Court striking off a judgment and quashing a writ of scire facias sur tax claim, wherein "Mrs." Baker was defendant. The cases were argued together in the Supreme Court.

In the former case a claim for the taxes of the years 1877 and 1878 against Isaac Heister, owner, and a lot of ground on the north side of Master Street, above Eighth Street, was filed on October 21, 1880. On August 14, 1885, a writ of scire facias was issued, to which an affidavit of defence and pleas were filed. The case was not put on trial until May 13, 1890, when a verdict was rendered for the plaintiff, subject to a point of law reserved, viz., "whether the taxes for the years 1877 and 1878 ceased to be a lien after the expiration of five years from the first days of January 1878 and 1879, respectively."

Judgment was subsequently, on December 24, 1890, entered for defendant upon the reserved points, in an opinion by BIDDLE, J. (27 WEEKLY NOTES, 213). Thereupon the plaintiff took this appeal, assigning for error this action of the Court.

In the case second above-named, a claim for the taxes of 1872, 1873, and 1874 was filed against "Mrs." Baker, and a lot at the southeast corner of Clearfield and Janney streets, on December 26, 1877; on November 22, 1882, a scire facias issued, which was served by posting; on October 17, 1887, judgment was entered for want of an affidavit of defence.

Subsequently a rule was entered to strike off the judgment and quash the writ of scire facias,

which was made absolute by the Court. Whereupon the plaintiff appealed, assigning for error this action of the Court.

Abraham M. Beidler, assistant city solicitor (*Isaac H. Shields*, assistant city solicitor, and *Charles F. Warwick*, city solicitor with him), for appellant.

Under the Act of February 3, 1824 (P. L. 18), taxes were made a lien by virtue of their assessment, and continued a lien until paid.

Wallace's Estate, 59 Pa. 401.

Though the Act of April 16, 1840 (P. L. 410) provided for the filing of a claim in the prothonotary's office, and the Acts of April 16, 1845 (P. L. 489), and March 11, 1846 (P. L. 114), provided limitations thereto, yet these Acts, so far as they limit the lien, have been repealed by the Act of April 21, 1858 (P. L. 385), which provides:—

"That in the month of January, annually, the said receiver shall, in books to be called 'The Register of Unpaid Taxes on Real Estate,' register all unpaid taxes (except occupation taxes) of the preceding year, and the said taxes are hereby declared to be a lien on all real estate in accordance with the provisions of the Act of 3d February, 1824, entitled 'An Act relating to taxes on certain real estate in the city and county of Philadelphia.'"

But even if this position be incorrect, the Court below erred in entering judgment for the defendant, because, inasmuch as the claim was filed within the prescribed period, "suit was brought" within the meaning of the Act.

Grape St., 103 Pa. 121.

Foster v. Fowler, 60 Id. 30.

Knabb's App., 10 Id. 192.

Weston v. Charleston, 2 Peters, 449.

Robert H. Neilson, for appellee *Baker (James Rich Grier*, for appellee *Heister*, with him).

There is no repeal of the Acts of 1845 and 1846 by the Act of 1858, because there is no irreconcilable repugnancy.

Barber's Case, 86 Pa. 392.

Seifried v. Com., 101 Id. 202.

Regina v. St. Edmunds, 2 Q. B. 84.

Potter's Dwaris Stat., 154, n. 4.

The purpose of the Act of 1858 was to make "all taxes except occupation taxes" liens on real estate; and the reference to the Act of 1824 was with this end in view only. The preamble to the Act (P. L. 1858, 385) shows this.

The meaning of the words "bringing suit" must be sought in their history. In ancient times the plaintiff was required to establish the truth of his declaration in the first instance and before it was called into question upon the pleading, by the simultaneous production of his *secta*, that is, a number of persons prepared to confirm his allegations.

Stephen's Pleading, *429.

Producit sectam was proffering to the Court the testimony of the witnesses or followers.

Gilbert's C. P. 48.

3 Bl. Com. *295.

The practice arose from the provision in section 38 of *Magna Charta*, which provided that "no bailiff should put any one to his law . . . without the oaths of trustworthy men summoned for that purpose." Hence it follows that whatever period in modern legal proceedings corresponds to the period when the *testi fideles* were required to be summoned, is the period when "suit is brought."

The distinction between the *claim*, as a means of detention of the property from purchasers or incumbrancers, and *suit* for the recovery of the debt, is preserved throughout the Acts relating to this subject, *e. g.*:—

1843, April 19, § 1 (P. L. 342).

1844, February 17, § 3 (P. L. 486).

1845, April 16, § 4 (P. L. 489).

1846, March 11, § 2 (P. L. 114).

1849, January 23, § 3 (P. L. 686).

1851, April 14, § 8 (P. L. 591).

1859, April 12, § 1 (P. L. 543).

1861, April 9, § 5 (P. L. 269).

1866, March 23, §§ 1 and 2 (P. L. 303).

1874, May 23, §§ 36 and 37 (P. L. 250).

And in the Acts in question, the former, viz: 1845, provided that the lien could be continued for five years by filing a claim, while the latter, viz: 1846, repeals this provision in terms, and provides that the lien should cease "unless suit be brought to recover the same."

CITY v. HEISTER.

April 27, 1891. *PER CURIAM*. This judgment is affirmed upon the opinion of the learned Judge of the Court below.

CITY v. BAKER.

April 27, 1891. *PER CURIAM*. All of the questions presented by this record are ruled by the *City v. Heister*, just decided.

Judgment affirmed.

R. H. N.

Jan. '91, 47.

January 29, 1891.

Harris v. Schuylkill River East Side R. R. Co.

Railroad company—Eminent domain—Right of way—Damages—Elements proper to be considered in estimation of—Values—Test of—Expert testimony—How may be tested—Evidence.

The true test of damages for the taking of land for railroad purposes, is the difference between the value

of the entire lot as it was just before the taking, and the value of what is left after the taking.

In estimating the value of a lot before the taking, its possible and probable uses are important elements, and may be shown by the opinions of experts.

The value at the time of taking is the value as it was, not as it might have been with improvements, though the availability for these is an element in its value as it is, and the value of the remainder of the lot after the taking, is its value as it then is, not as it is when improved.

Details of improvements, the cost thereof, probable rents afterwards, etc., are not admissible as independent facts for the jury; but upon the examination of an expert witness, whether such details have been taken into consideration by him in forming his judgment, is a legitimate subject of cross-examination.

Values of a lot, before and after the taking, are the general market values of the particular lot, considering such advantages or disadvantages as are special and peculiar to it, without reference to the general rise or fall common to it with other property in the neighborhood consequent upon the coming of the railroad.

A railroad company took land for the purposes of building its road across a lot fronting on a river. It appeared that good engineering then required that a bulkhead should be built below low-water mark. The company having no right to build outside of its right of way, nor to do this without the consent of the lot owner, agreed that if the latter would make application to the port wardens for permission to build the bulkhead, the company would construct it "without cost or expense to you (the owner), either for labor or material."

Held, that any benefit or advantage resulting to the lot owner from the building of the bulkhead as above, should be disregarded by the jury in the estimation of the damages.

Under the above circumstances, questions asked of witnesses for the railroad upon cross-examination, to direct their attention to the effect of the construction of the railroad, including the necessary bulkhead within the right of way, were excluded upon the ground that they assumed a condition of circumstances, which never in fact existed:

Held, to be error.

The presence of a sewer which discharged upon the lot at the time of the entry of the railroad, even though the sewer was there without right, was a fact affecting the condition and value of the lot, and evidence relative thereto was properly admitted.

The record of an action of ejectment by the lot owner against the city, offered for the purpose of establishing a trespass on the part of the city (the maintenance of said sewer) which it was bound to discontinue, was admissible in evidence on the question whether the sewer was removed by the city.

Appeal of Amanda G. Harris, plaintiff, from the judgment of the Common Pleas No. 2, of Philadelphia County, in an issue framed upon an appeal from the award of viewers appointed to assess damages for entry upon and occupation of land formerly of Henry G. Harris, in which issue the Schuylkill River East Side Railroad Company was defendant.

The facts were these: Robert E. Pattison, trustee, on May 27, 1880, conveyed the land in question to Walter Boswell, who in the same year addressed a petition to the councils of Philadelphia, stating that a sewer, known as the Federal Street sewer, had been diverted at its mouth, so that it flowed on his land, preventing the improvement of the land, and asking that the sewer be extended in its proper course to the Schuylkill River. Walter Boswell and wife, on March 15, 1881, conveyed the lot to Henry G. Harris. On April 2, 1881, in response to the petition of Boswell and efforts of H. G. Harris, the councils passed an ordinance for the extension of the sewer on the line of Ellsworth Street, providing that the land owner would dedicate one-half the land required for the extension of the street. On October 22, 1881, such a deed was tendered at the office of the chief engineer and surveyor, and by him accepted on behalf of the city, and the owner prepared his plans for building his wharf. Each year thereafter the survey department included in their estimates to councils an appropriation for the extension of the sewer. Councils however did not make the appropriation in 1882, 1883 or 1884. Thereupon, in June Term, 1885, an action of ejectment was brought by Henry G. Harris against the city of Philadelphia, upon which judgment in ejectment was subsequently recovered; Amanda G. Harris, the appellant here, having also been joined as plaintiff. On October 10, 1885, Henry G. Harris conveyed the lot to Amanda G. Harris, the appellant. On November 2, 1885, the defendant gave a bond to secure the damages of the owner for its entry on the land, and the same was directly afterwards accepted, and the railroad entered upon the land for the construction of its road.

The railroad company having surveyed part of its line beyond low-water mark in the river Schuylkill, was encroaching upon the waters of the port of Philadelphia, and as to such portion of its road was obliged to conform to the port regulations and the directions of the port wardens. The laws of the port prohibited any material being thrown into the stream or any structure being built therein. But upon application of the land owner, accompanied by a plan and description of a substantial bulkheaded pier, if the proposed structure were approved by the board of port wardens, a license could be obtained for its construction at or within the port wardens' line, this line being the limit to which piers could be extended. The ownership of a pier creating obligations as to its condition, repairs upon it, and the protection of the stream, licenses for piers are strictly limited to the owners of the land on which the piers are built. The defendant company proposed in writing that if Mr.

Harris would apply for and obtain for it a license to build a bulkhead, the company would construct such a bulkhead on the port wardens' line without cost or expense to him. To this proposition he acceded in writing upon condition that any supposed benefit to him should not be offset to his claim for damages by reason of land taken, and that the company should keep the bulkhead in repair, unless he could utilize the space between the track and the bulkhead. Plaintiff claimed that this counter proposition was accepted, defendant denied it. Defendant thereafter took the application, secured the license, built its track, and subsequently constructed the bulkhead outside of it.

The company in constructing its track built a bridge in the middle of Ellsworth Street, as projected by the ordinance of 1881, leaving there a water-way through which the flow from the sewer might find its way. The construction of the road-bed occupied considerable time, and afterward sinking of crib-work, and backing it up with earth entirely occupied the plaintiff's land until about March 1, 1887. About March, 1887, the city of Philadelphia, in pursuance of its ordinance of 1881, extended its sewer on Ellsworth Street to the line of defendant's track, connecting with the east end of the railroad bridge. The land-owner immediately after the construction by the city of its sewer extension, filled up the course of the old water-flow, filled in east and west of the company's track to level of the track, and completed the same about July 1, 1887, when, for the first time, the property could be used as a wharf. From 1881 to March, 1887, the lot was in use, either by the city or the railroad company, and the owner obliged to let it lie unimproved. About July 1, 1887, the owner had completed the work necessary to put the property to use as a wharf, and immediately rented it, subject to and excepting the right-of-way taken by the railroad, at first for \$500, and afterwards for \$600 per year.

The viewers awarded the sum of \$3250, as damages; whereupon both parties appealed.

On the trial, before PENNYPACKER, J., the plaintiff produced as experts on the value of property witnesses who testified as to the value of the land before the taking, treating it as a lot 113 feet in front on the river, capable of being used as a wharf by the construction of a pier or bulkhead, and also as to its value after the taking, estimating the damages at from \$6000 to \$7000.

Defendant's witnesses testified that until the construction of the road, the land upon which it was built was a swamp, entirely covered by water at high tide, but uncovered at low tide, leaving it a mud flat, the rise and fall of the tide being seven feet. The sewer that was upon the property emptied its contents upon it at low water,

and into the river at high water, which came up to, and covered the mouth of the sewer. Good engineering required that a strong bulkhead should be built, which was done at defendant's expense, as was also most of the filling in, and the extending of the main sewer from the east side of the right-of-way to the bulkhead.

All of the witnesses called by the defendant compared the condition of the lot before the railroad was constructed, and with a sewer emptying over it into the river, with the wharf as completed afterwards; and that the railroad improved the value of the land, some of the witnesses saying that railroads improve the value of any property they were built upon by giving increased facilities, others saying that the filling in and bulkheading, that is, the improvements put on the lot, made it more valuable after, than before the road crossed it.

Plaintiff offered to prove the exact cost of the bulkheading. Objected to. Objection sustained. Exception. (First assignment of error.)

Plaintiff asked one of defendant's witnesses on cross-examination "assuming that immediately before the railroad came there, the property had been bulkheaded and made available for wharf purposes, what would it have been worth." Objected to. Objection sustained. Exception. (Second assignment of error.)

Plaintiff also asked on cross-examination: "Do you know the rental value of this property immediately after the construction and completion of the railroad?" and "What was its rental value at that time?" Objected to. Objection overruled. Exception. (Fourth assignment of error.)

Also on cross-examination, "Do you know the cost of bulkheading the front of that property?" Objected to. Objection sustained. Exception. (Fifth assignment of error.)

Also on cross-examination of another witness, plaintiff asked the following questions, all of which were objected to, as assuming a condition of affairs which did not exist, and excluded: "Direct your attention to the consideration of it in the event of that bulkhead having been constructed on the west right-of-way line, and the railroad built entirely upon it within the right-of-way line, leaving the property west of the west right-of-way line and the property east of the east right-of-way line in its natural condition. What then could have been the effect of the railroad upon it? Would it have been to appreciate or depreciate its value?" "Direct your mind to the consideration of this property immediately after it had been taken for the purposes of constructing a railroad, assuming that a railroad was to be constructed upon it within the right-of-way lines, leaving the ground on either side of the right-of-way lines in its natural

condition, what would have been the effect of the railroad upon this property then?

"The bond in this case was delivered on the second of November, 1885, and that was prior to any construction of any kind being placed upon this property. Bearing these facts in mind, state what was the value of this property on November 2, 1885, as affected by the proposed construction of a railroad upon it within the right-of-way lines, as shown upon the map." (Sixth and seventh assignments of error.)

Also on cross-examination: Q. "How does the building of that railroad within the right-of-way lines put those two strips in the market, I refer to the property east and west of the right-of-way lines?" Objected to. Objection sustained. Exception. (Ninth assignment of error.)

"Will you tell me what the value of wharf property is on the Schuylkill, south of Christian Street; I mean built up wharf property, without any railroad upon it, and before the railroad came there?" Objected to. Objection sustained. Exception by plaintiff. "What was the value of wharf property on the river Schuylkill immediately before the coming of the railroad?" *Mr. Vanderslice*. I object to that question unless we can open the gate and go into it fully. Objection sustained. Exception. (Tenth assignment of error.)

Defendant asked one of its witnesses: "Having in your mind any advantage or disadvantage that may have been given to this piece of property by the construction of the railroad, and having in mind that a strip 60 feet wide is occupied for the purposes of a railroad, what in your judgment was the whole property worth immediately after the railroad was constructed?" Objected to. Objection overruled. Exception. (Fourteenth assignment of error.)

Plaintiff offered to prove, in rebuttal the record of the action in ejectment of H. G. Harris to the use of Amanda G. Harris against the city of Philadelphia and the judgment therein obtained by plaintiff for the premises in question, which action determined that no right existed to direct a sewer or water course on plaintiff's land. Objected to. Objection sustained. Exception. (Fifteenth assignment of error.)

Plaintiff requested the Court to charge, *inter alia*:—

(1) In estimating the damages to the landowner caused by the construction of a railroad, the jury must consider the matter just as if they were called on to value the injury at the moment when compensation could first be demanded. As the railroad company gave its bond to secure the payment of damages to the Harris property on November 2, 1885, the rights of the parties in this case must be measured as of that time.

Answer. I decline that point. (Twentieth assignment of error.)

(2) In estimating the damages to the Harris wharf property, the jury should ascertain what the property unaffected by the construction of the railroad was worth at the time the injury was committed, viz., on November 2, 1885, and what it was worth as affected by the injury, immediately after the entry and taking by the railroad company. The difference in value is the true measure of compensation and on that sum interest should be allowed and added from November 2, 1885, to the date of the verdict. *Answer*. I decline that point. If you should find the verdict for the plaintiff, you would be entitled to give as damages what the interest would be from the time of the entry of the railroad—the location of the railroad. (Twenty-first assignment of error.)

(5) That any benefit or advantage resulting to Mrs. Harris, by the subsequent building of the bulkhead by the railroad company at the port warden's line, must be disregarded by the jury in considering the advantages and disadvantages of the construction of the railroad and the taking of part of her land. *Answer*. I decline that point. (Twenty-second assignment of error.)

(6) If the jury find from the evidence that the defendant company constructed the bulkhead on the inner port warden's line, and filled in between its railroad tracks and said port warden's line for the purpose of constructing and securing its line of tracks across this property without the request of the owner, no claim for the cost thereof can be made or set off by the defendant company in this action, and no allowance should be made therefor. *Answer*. I decline that point. (Twenty-third assignment of error.)

(7) There is no evidence that the owner of the property requested the defendant company to fill in between its railroad tracks and the port warden's line, and to erect a bulkhead thereon; the only evidence is a permission by the owner to the company to make such construction at no cost to or liability upon her. *Answer*. As to what the evidence is upon that point and upon every other point is a question of fact for you. (Twenty-fourth assignment of error.)

(9) The defendant's authority extends only to the construction and operation of a railroad between the right-of-way lines. *Answer*. I decline that point. (Twenty-fifth assignment of error.)

(11) The presence of a sewer upon the plaintiff's land, wrongfully and unlawfully constructed or maintained there by the city, cannot be set up by the railroad company to depreciate or lessen the value of her land. Nor can the removal of such sewer from the land by the rail-

road company for the proper construction of its road, or by an arrangement with the city, be claimed by the company as a benefit to the land, and an allowance be made therefor by the jury. *Answer.* I decline that point. (Twenty-sixth assignment of error.)

The Court charged the jury, *inter alia*, as follows:—

“Before leaving that question I may say that the right to recover exists at the time of the location of the road, but that right covers any loss which may result from the subsequent construction and completion of the railroad, the construction being imminent, and that necessarily must follow after the location. You can readily see that the construction of a railroad is a matter involving very considerable work, and oftentimes very considerable time. [It cannot be done instantly, and while the right to sue exists at the time of the location, it includes the subsequent construction.] The measure of damages is the difference between the market value of the whole tract as it was immediately before the location and construction of the road and unaffected by the road, and the market value after the construction and completion as affected by the taking and occupation of the road.

“In administering this rule, you will consider the disadvantages which have followed to the tract because of the construction of the road, which are real and actual disadvantages. In this case I think you will understand what are alleged to have been those disadvantages. In the first place, there is the amount of ground which was taken from the lot, and you will consider the amount of ground as it was left—any disadvantages which may result from its division or from the size of the lots as they were left after the taking. You will also take into consideration those benefits to the tract of ground resulting from the construction of the railroad, which are special and particular to this tract. You will exclude from your consideration any advantages which are general advantages to all of the ground in this locality—any enhancement in price or value which has resulted to the community generally from the construction of the railroad. In considering the value of the lot before the coming of the road, it will be your duty to consider it not solely with reference to the income which existed from it, but with a view to such uses as it might reasonably be put to at the time, it being alleged here that this was a property, though in bad condition at the time, suitable and proper for the construction of a wharf, and it is your duty to consider the lot with reference to the uses to which it could have been reasonably put.

“In administering the rule which I have given to you in this case, considerable difficulty

arises because of the peculiar condition, if I may so term it, of this particular lot, and the serious questions of the case will arise just here. As you have learned, the railroad company, at or about the time of this construction, put up a bulkhead along the port wardens' line, and from that bulkhead extending eastward the ground has been filled in to a considerable depth and to a considerable extent. Much of that work, or most of it, it may be, was done by the railroad company, and some of the filling in was done by Mr. Harris. [If the erection of that bulkhead was a necessary part of the construction of the road, and involved in it, and benefit resulted to the plaintiff here, because of the erection of the bulkhead, then that is a fact which in ascertaining the value of damages you will take into consideration, unless it was provided by the agreement between the parties to the contrary. If the bulkhead was erected by the railroad company, at a different time, either before or afterwards, and it was not necessary, in the sense that good engineering did not require it, to the construction of the railroad, then you will leave it out of consideration.]

“A somewhat similar question arises with reference to the sewer. As you have heard, before the coming of the railroad there was a sewer extending some distance into this lot, about midway I think the witnesses have described it, carrying its filth across the whole ground of the lot into the river. [At the time of the construction of the railroad this sewer was removed. You are to consider this question with reference to the actual condition of things as they existed at the time, and without reference to the rights of outside parties, including the city, which cannot be determined in this case. If that sewer was removed by the railroad as a necessary part of the construction of the road, and its removal resulted in benefit to the plaintiff, then that is a fact, also, which you will consider in reaching your conclusion.] If, on the contrary, the sewer was removed by the city, or what is substantially the same question, if it was removed by the railroad company under contract with the city or as the agent of the city for the purpose, and its removal was only coincident with the construction of the railroad, then you will leave the question of the sewer out of your consideration.

“There is evidence here as to an arrangement or compact or contract made between Henry G. Harris and the railroad company with reference to the bulkhead. As to what were the terms of the contract, you have two letters in evidence before you and the testimony of the witnesses. According to the testimony of Mr. Harris, the contract was as set forth in the second letter, the letter of October 31, 1885, and that letter, as the proposal was made to the company by Mr. Harris,

was, 'that any supposed benefit to me shall not at any time be mentioned or alleged in mitigation of any damages me or my assigns may be entitled to by reason of your taking your right of way over my property,' that with reference to the bulkhead. If that was the agreement, then it provides for the bulkhead in this case, and you will not consider any advantages arising from the bulkhead in mitigation of damages.

"Mr. Ellis, on behalf of the company, testified, however, that that was not the contract as it was made, and that the contract as arranged between them was on the basis of the letter of October 27, 1885, and that that letter was accepted after he had refused it as proposed by Mr. Harris. If that was the contract, then it does not touch the question in any way. I so instruct you.

"I have gone over the questions of law which arise in this case. If, with the instruction I have given you, you should find that there was no diminution in value by the taking of the railroad, your verdict would be for the defendant. If there was such diminution in value, measured as I have explained to you, you will give damages for the plaintiff.

"The experts of the plaintiff, in their testimony, have estimated the diminution in value from \$5000 to \$6000, and I believe one of them estimated it as high as \$7000.

"I shall not attempt to go over the evidence with you. It has been presented to you in detail, and it is for your recollection and your determination, and not for mine.

"[The experts presented on behalf of the defendant have said, on the contrary, that so far from there being a diminution in value, that really the value of this lot has been increased, and they have given you the reasons for it; that it was a water lot, a swamp lot with a sewer on it and filth issuing from it, and that before that time it was not used, and that afterwards it had a rental value which they have fixed from \$600 to \$800. This is the conflicting testimony, and it is entirely and exclusively for your determination.] Wherever, in charging you, I have referred to questions of fact, it has only been with a view of letting the jury have my impression of them; but I want to say to you that they are not for my determination, but entirely for you, both as to your recollection of the testimony and your finding of fact. . . ."

Verdict for plaintiff, \$2500, and judgment accordingly; whereupon plaintiff appealed, assigning error as above, and also the portions of the charge inclosed in brackets.

Francis E. Brewster (M. Hampton Todd with him), for appellant, cited—

Sch. Nav. Co. v. Thoburn, 7 S. & R. 411.
Reese v. Addams, 16 Id. 40.

Irwin v. Trego, 22 Pa. 368.
Miles v. Williamson, 24 Id. 135.
Canal Co. v. Barnes, 31 Id. 193.
Harvey v. R. R. Co., 47 Id. 435.
R. R. Co. v. Braham, 79 Id. 453.
R. R. Co. v. Decker, 82 Id. 124.
R. R. Co. v. Robinson, 95 Id. 426.
Sanderson v. Coal Co., 102 Id. 375.
R. R. Co. v. Patterson, 107 Id. 461.
Ry. Co. v. McCloskey, 110 Id. 442.
Setzler v. R. R. Co., 112 Id. 65.
Ry. Co. v. Vance, 115 Id. 332.
R. R. Co. v. Cleary, 126 Id. 442.
R. R. Co. v. Balthaser, 128 Id. 10.

Thad. L. Vanderslice, for appellee.

April 6, 1891. MITCHELL, J. It has been said too often and too recently to require repetition that the true test of damages for the taking of land for railroad purposes is the difference between the value of the entire lot as it was just before the taking, and the value of what is left after the taking. Both parties to the present controversy admit this rule, but both sought at the trial to present evidence in violation of it. The appellee unfortunately succeeded.

In estimating the value of the lot before the taking, its possible and probable uses are important elements, and may be shown by the opinions of experts. But the details of improvements, the cost, probable rent afterwards, etc., require knowledge of the subject to insure the proper weight to be given, and the inferences to be drawn from them. Hence they are not admissible as independent facts for the jury, and the appellant's offers in that regard, as, *e. g.*, to prove the cost of bulkheading this lot to make a wharf of it, were properly excluded. But such details ought to enter into the view of the expert in forming his judgment, and whether they have done so is a legitimate subject of cross-examination. Again, the value of the lot at the time of the taking is the value as it was, not as it might have been with improvements, though the availability for these is, as already said, an element in its value as it is. And the value of the rest of the lot after the taking is also its value as it then is, not as it is when improved. And both values, before and after the taking, are the general market values of the particular lot, considering such advantages or disadvantages as are special and peculiar to it, without reference to the general rise or fall common to it with other property in the neighborhood consequent upon the coming of the railroad. Without going into the details of the numerous assignments of error on this branch of the case, it is sufficient to say that appellant's questions on cross-examination, as to the basis of the opinions of the appellee's experts, should have been admitted, and also that his objections to the opinions of the same experts upon the value of the property after the

taking, that they were based on the value as an improved wharf lot, and also included elements of the general appreciation of values in the neighborhood, should have been sustained.

The main question, however, is upon the effect, as to damages, of the building of the bulkhead by the railroad company on the port wardens' line. As this was entirely outside of the strip of land taken for the right of way, the company were bound to show some authority for putting it there. Otherwise it was a trespass for which they were not only not entitled to claim that it benefited the property, but were liable in damages. The claim made at the argument that good engineering required the bulkhead to be put where it is, only needs the obvious answer that if so the company should have condemned that part of plaintiff's lot, and paid for it, in the regular way. Their acquisition of the sixty feet wide strip for railroad purposes gave them no right to put retaining walls, or abutments, or bulkhead, upon any other part of plaintiff's lot, and all contention to that effect must be dismissed from the case.

The only authority that defendant did show was the agreement of Harris, as set forth in the letter from Ellis to him, dated October 27, 1885. It is true Harris wrote a letter in answer, in which he made a counter proposition, which he says was accepted, but which Ellis says was refused. For the purposes of this case it is immaterial which is right. The counter proposition stipulated in a certain contingency that the railroad company should keep the bulkhead in repair satisfactory to the port wardens. No question as to which this would be relevant appears in the present case. The rest of Harris's proposition is no more than putting in express terms, *ex majore cautela*, what was already in Ellis's letter. The terms of this were, that in consideration of Harris, as owner, signing the application to the port wardens, through which alone the necessary permission to build the bulkhead on the wardens' line could be had, Ellis agreed that the bulkhead should be built "without cost or expense to you (Harris) either for labor or material." Harris's answer added, that "any supposed benefit to me shall not be alleged in mitigation of any damages . . . by reason of your taking your right of way over my property." It was argued that the expression "cost or expense either for labor or material" meant only that Harris should not be called upon to pay out cash for the work. But this is too narrow a construction. It may be a convenience to be relieved from the necessity of present outlay of money, but what substantial advantage is it if the amount can be immediately afterwards deducted from money which would otherwise come to the owner of the land? If

he has to pay for the bulkhead in either way, it is cost and expense to him which the company indemnified him against. The situation was this: The company had no authority to put the bulkhead outside of its own right of way; good engineering suggested that it should be put on the water line, and this could only be done by the owner's consent; the owner did consent on the agreement that it should be done without cost or expense to him. The substance of the agreement is, that permission was given to build the bulkhead where it would be most useful, but it was to be done without expense, direct or indirect, to the owner of the land. The fair business sense of the word is the legal sense, and to hold that he should pay for it by diminution of the damages for taking his land would be a violation of both. All consideration of the location of the bulkhead at the wardens' line must be omitted in the estimation of the damages. The same reasons require that the questions to the experts to direct their attention to the effect of the construction of the railroad, including the necessary bulkhead, within the right of way, should have been admitted. It is true that the questions assumed a condition of circumstances which never in fact existed, but the agreement under which the location of the bulkhead was changed, requires that the case should be treated as if these circumstances did exist.

The presence of the sewer, even though without right, was a fact affecting the condition and value of the lot at the time of the taking by the railroad, and the evidence relative thereto was properly admitted. Whether the sewer was removed by the railroad company as a necessary incident or result of the construction of the road, or by the city in cessation of its trespass, was also a question of fact for the consideration of the jury, if there was any evidence to show that it was done by the railroad company; but the bill of exceptions as printed does not disclose any such evidence. The record in ejectment against the city was a step in establishing a trespass which it was bound to discontinue, and had some bearing therefore on the question whether the sewer was in fact removed by the city. For that purpose it should have been admitted.

Judgment reversed, and venire de novo awarded.

H. C. O.

Quarter Sessions.

Feb. '90, 3.

April 4, 1891.

Opening of Walnut Street.

A bridge is a great public improvement for which assessment of benefits cannot be made against properties in the immediate vicinity as for opening a street to be used as an approach to the bridge—Benefits cannot be assessed by the foot front rule.

On December 31, 1886, a petition was filed for viewers on the expediency of opening Walnut Street, from Thirty-Second Street eastwardly to the Schuylkill River, and on October 18, 1887, the viewers reported in favor of the opening of the street. Exceptions were filed which were dismissed, and the report confirmed, on February 18, 1888. On April 4, 1888, the same viewers were appointed to assess the damages caused by the opening, and on April 28, on exceptions by the city, the Court set aside the confirmation of the report in favor of the opening, and referred the matter to the same viewers, with directions to proceed according to law, that is to report on the expediency of the opening, and procure releases or assess the damages and benefits, if any, consequent upon the said opening.

Walnut Street west of the river is plotted eighty feet wide, and east of the river sixty feet wide. The grade on the west side was established in 1853 and changed several times afterwards, but kept at about the natural grade of the land until March 18, 1889, when a new grade was established by raising it up above the natural surface, so that the street ran upwards towards the river, instead of downwards. The object of this was to make an approach to the projected bridge across the river Schuylkill at Walnut Street, which was put under contract, and work commenced in the summer of 1887, while the viewers were engaged in their duties. On December 9, 1889, an ordinance of the city was passed, directing that the street be opened in three months, and a bond to secure the damages was filed on March 19, 1890. The powers of the viewers expired by reason of the lapse of three months, without a continuance being granted, and therefore on February 20, 1890, the same viewers were reappointed on a new petition.

They reported that the damages suffered by owners of property through and over which Walnut Street would run, amounted to \$80,200, and they assessed \$60,206.80 of that amount on the owners of 1245 properties in sums of \$3.50 up to \$2530. The property assessed is included

between Sansom Street, which is a half square north of Walnut Street, and Spruce Street, which is two squares south, and Forty-First Street, nine squares west.

Numerous exceptions were filed, alleging that the damages awarded were excessive, and the assessments of benefits contrary to law, because they were not confined to property in the immediate vicinity of the opened street; because they are assessments for supposed benefits arising from the future construction of the Walnut Street Bridge, and the approach to the bridge; and because there is no authority in law to assess benefits caused by change of grade or construction of a bridge.

Joseph De F. Junkin, J. Howard Gendell, Harold Goodwin, and Samuel B. Huey (with whom were numerous others), for the exceptants.

The property owners can have no access to the street which is occupied by the approach to the bridge many feet above.

Borough of Mt. Pleasant v. B. & O. R. R. Co., 27 WEEKLY NOTES, 177.

City of Allegheny v. West. Penn. R. R. Co., Id. 180.

The viewers have assessed for a change of grade, which is contrary to law.

Grade of York Street, 11 Phila. 414.

Grade of Market Street, 42 Leg. Int. 15.

The cost of a great public work, as a bridge, cannot be assessed against adjoining properties.

Hammitt v. Phila., 65 Pa. 146.

Wistar v. Phila., 80 Id. 505.

In re Saw Mill Run Bridge, 85 Id. 163.

In re Twenty-Fifth Street, 20 WEEKLY NOTES, 501.

"Immediate vicinity" under the Act of April 1, 1864, does not mean a mile away, nor can assessments be made by the foot front as was done in this case.

Abraham M. Beitler, assistant city solicitor, contra.

Persons who petition for the opening of a street should be required to pay the damages therefor. This is the law as to grading and paving.

Pepper v. Philadelphia, 114 Pa. 109.

McKnight v. Pittsburgh, 91 Id. 273.

Bidwell v. Pittsburgh, 85 Id. 412.

The law of estoppel applies to them.

Bispham's Equity, § 290.

The Act of April 1, 1864, requires the jury to make inquiry as to the advantages of opening a street. The Act is mandatory and constitutional.

Opening of Moyer Street, 6 Phila. 81.

McMasters v. Comm'rs, 3 Watts, 292.

"Immediate vicinity" cannot be accurately defined.

Extension of Hancock Street, 18 Pa. 26.

Opening of Berks Street, 15 Phila. 383; affirmed by S. C. in 12 WEEKLY NOTES, 10.

The damages must include the land taken and the change of grade.

Pusey v. Allegheny, 98 Pa. 522.

While the jury may not consider the possibility that the city may hereafter open other streets, which will render the land more valuable, they may consider the fact that the property owner may lay out other streets on his own land, thereby increasing his frontage and the value of his property; but this rule has no force here. *Allegheny v. Black*, 99 Pa. 152.

April 18, 1891. THE COURT, by ALLISON, P. J., said that the proceedings to open the street were begun to make it available for the construction of a bridge at Walnut Street, which of itself is not a street on the city plans. The construction of the bridge is a great public improvement, connecting two separate portions of Walnut Street. It is to make this improvement that Walnut Street, from Thirty-second Street east to the Schuylkill River, is to be opened for public use; and not because the improvement of the neighborhood or the convenience of the public by the street, disconnected from the construction of an approach to the proposed bridge, called for or prompted the movement to open this portion of Walnut Street under the pending application. For this purpose benefits could not be assessed.

The assessment of benefits, even if allowable, could only be made against properties in the immediate vicinity, and this has been greatly exceeded in the present proceeding. They have been extended upon several east and west streets, three-fourths of a mile west of Thirty-Second Street, and south to Spruce and north to Sansom Street. The rule of assessment of benefits by the foot front, and not by the value of each separate property, and ascertainment of the amount to which each separate property is benefited, was an erroneous and inequitable basis of assessment for taxation, which could not be sustained.

The exceptions to the awards of damages are dismissed, and the awards confirmed; the exception to the assessment of benefits will be sustained and the assessments set aside; counsel to prepare a proper decree.

The following decree was entered:—

And now, May 4, 1891, the exceptions filed on behalf of the city to the award of damages to the owners of property, taken by the opening of Walnut Street from Thirty-second Street to the river Schuylkill, are set aside and dismissed. Exceptions to the assessment of benefits against properties fronting on the streets mentioned in the report (including all such assessments) are sustained, this portion of the report is set aside, and the remaining portion of it relating to the award of damages is hereby confirmed.

In re Opening of Musgrove Street.

Highways—Road law—Practice—Jury—Province of—Even where a street has already been opened and is in public use, a jury may be appointed to assess damages.

Rule to show cause why a jury should not be appointed.

This was a petition for the appointment of a jury to assess damages for the opening of a street.

The petition set forth that the petitioner, J. E. King, was the owner of land on Musgrove Street, which was laid out on the confirmed plan of the city. That part of it had been dedicated to the city, but not that owned by the petitioner. That in 1886 the commissioner of highways had taken possession of that part of petitioner's land within the lines of the street, and the water department had laid its water-pipes therein. That the public welfare and convenience required that the street be opened, and the petitioner was deprived of the use of his land, and the remainder had depreciated in value from the grading, but he was unable to bring a suit for damages as the street had not been lawfully opened.

The answers of two of the property owners on the street set forth that the street had been on the city plan for over thirty years, and in actual use for many. That the land had been dedicated by all the owners of lots, partly by deed and partly by acquiescence. And further, that the street having been actually laid out and opened, the Court had no jurisdiction to appoint a jury of view to report on the necessity of opening it, and the petitioner was estopped by his acquiescence in the laying out and occupancy of the street.

Benjamin P. Wilson and E. Spencer Miller, assistant city solicitor, for petitioner, cited—
Girard Avenue, 44 Law Journal, 166.

J. Bayard Henry and Frank P. Prichard, for the respondents.

A road jury has two questions to determine: First, where a road shall be located; second, whether the public convenience requires its opening. In this case the road in point of fact was opened, so there was nothing left for the jury to determine. A jury is not appointed to pass upon questions of law. In this case the question is purely one of law, and should be considered by the Court.

In re Milford, 4 Pa. 303.

In re Ridge Avenue, 99 Id 469.

In re Magnolia Avenue, 117 Id. 56.

C. A. V.

BIDDLE and BREGY, JJ. Rule absolute.

W. W. S.

WEEKLY NOTES OF CASES.

VOL. XXVIII.] FRIDAY, MAY 15, 1891. [No. 4.

Supreme Court.

Jan. '90, 119.

March 12, 1890.

March 9, 1891.

Unangst v. Goodyear's India Rubber Glove Mfg. Co.

Sheriff's sale—Interpleader—Fraud—Evidence—Functions of Court and jury—Where there is no evidence of fraud the Court should withdraw the case from the jury.

In a feigned issue upon a sheriff's interpleader to try the validity of a judgment confessed by J. in favor of E., the plaintiff in the feigned issue, G. the defendant in the feigned issue, alleging fraud and collusion between J. and E., called J. as a witness as for cross-examination. J. denied the allegation of fraud, and G. then asked him certain questions as to his declarations about the matter. The Court excluded this evidence, as well as similar testimony of another witness, V.:

Held, that J. was not a party to the issue, and was a competent witness for G., who was therefore not entitled to contradict him or to examine him as upon cross-examination.

Held, also, that the declarations of J. not made in the presence of the plaintiff were not evidence until the allegation of fraud was supported by proof.

Upon these facts the Court instructed the jury to find a verdict for the plaintiff:

Held, not to be error.

Appeal of Goodyear's India Rubber Glove Manufacturing Company, defendant, from the judgment of the Common Pleas of Northampton County, in a feigned issue wherein Eugene P. Unangst was plaintiff, to try the title to certain personal property which had been levied on by the defendant in the issue as the property of J. R. Uberroth.

On the trial, before SCHUYLER, P. J., the following facts appeared: J. R. Uberroth, the defendant in the execution, upon which the interpleader for the feigned issue arose, was engaged in the boot and shoe business in the borough of Bethlehem, on or about April 1, 1888. Within about eight months afterwards he failed, and when his creditors began to push him he confessed a judgment to his brother-in-law, Eugene P. Unangst, the plaintiff in the feigned issue, for \$7000. Execution was issued upon this judgment, and all his stock was sold by the sheriff. The execution creditor Unangst bought most of the goods levied on, and con-

tinued the business under the management of J. R. Uberroth, the only change made in the signs at the place of business being, that the letters "Mgr." were placed over Uberroth's name on the sign in front of the store.

Upon January 28, 1889, the Goodyear's India Rubber Glove Manufacturing Co. obtained judgment against Uberroth for \$826.11. Execution was issued upon this judgment, and the sheriff was directed to levy on the same goods which he had sold to E. P. Unangst, on the former execution. When the levy was made upon these goods which were found in the same place where they had been sold before by the sheriff, and in the possession of Uberroth, they were claimed by Unangst by virtue of the sheriff's sale to him. Whereupon the sheriff petitioned for an interpleader, and this issue was awarded.

The defendant in the issue claimed that the judgment confessed by Uberroth to Unangst had been given to hinder and delay the creditors of Uberroth, and having called him as a witness as upon cross-examination, asked him the following questions: *Q.* Do you know Mr. Van Court? *A.* Yes. *Q.* Was he in your store on November 30th? *A.* I don't know the date; it was before I failed. *Q.* You made a certain statement to him about your financial condition? *A.* I don't know. *Q.* Didn't you say to him that you owed only \$3500, that you owed Mr. Unangst only \$2300, and that you had given no judgment at that time to anybody, and that your stock was worth about \$10,000?

Objected to as incompetent and irrelevant and *res inter alios acta*. Objection sustained. (Second assignment of error.)

The defendant also called a witness, Howard Van Court, and examined him as follows: *Q.* Did you call upon Mr. Uberroth to collect that [claim]? *A.* Yes. *Q.* When did you call? *A.* On the 30th of November, 1888. *Q.* Did you call at his store? *A.* Yes. *Q.* You saw him? *A.* Yes. *Q.* Was Mr. Unangst present? *A.* He was in the back part of the store, engaged with Mr. Leport. *Q.* Did he hear your conversation? *A.* I don't think he did. *Q.* Did Mr. Uberroth then make a statement to you in which he said that he owed only \$3500, and that he owed Mr. Unangst only \$2300, and that he had given no judgment notes to anybody?

Mr. Cope: This question is offered as a declaration of Mr. Uberroth, who is alleged to have been in collusion with the plaintiff for the purpose of defrauding Mr. Uberroth's creditors.

Objected to as incompetent and irrelevant, and *res inter alios acta*. Objection sustained. (Third assignment of error.)

The defendant submitted, *inter alia*, the following point: If the jury believe that the judg-

ment of \$7000 to plaintiff was confessed for more than was due, with the corrupt intention of hindering, delaying, and defrauding the creditors of J. R. Uberroth, the verdict should be for the defendant. *Answer.* Not affirmed. (Fourth assignment of error.)

The plaintiff submitted, *inter alia*, the following point: (3) Under all the evidence submitted in the case the verdict must be for the plaintiff. *Affirmed.* (First assignment of error.)

Verdict for plaintiff and judgment thereon; whereupon defendant took this appeal, assigning for error the rejection of the evidence and the answers to the points, as above.

The case was argued in the Supreme Court, in the absence of McCOLLUM and MITCHELL, JJ., on March 12, 1890, by Robert L. Cope, for appellant, and J. B. Kemerer, for appellee. On March 24, 1890, the judgment was affirmed in a *per curiam* opinion. Subsequently a re-argument was ordered, which was had before a full bench, on March 9, 1891.

Henry C. Cope, for appellant.

Where the facts are not contradicted, if different minds may reasonably draw therefrom different conclusions, the question is for the jury as one of fact and not for the Court as one of law.

Clark v. Douglass, 62 Pa. 408.

Howard Express Co. v. Wile, 64 Id. 201.

Railroad Co. v. Stout, 17 Wallace, 657.

Redfield & Rice Mfg. Co. v. Dysart, 62 Pa. 62.

Graham v. Smith, 25 Id. 323.

Switchell v. McMurtrie, 77 Id. 383.

Madara v. Evernole, 62 Id. 160.

When Uberroth was called as for cross-examination, the Court allowed it and refused to strike out his testimony upon the motion of the plaintiff. It was not fair, therefore, after such cross-examination, to hold the defendants bound by his testimony and not permit them to contradict him. Either all the testimony should have been stricken out or the defendants should have been permitted to contradict the witness.

Starkie on Evidence, 247.

Cowden v. Reynolds, 12 S. & R. 281.

Deakens v. Temple, 41 Pa. 234.

Brinks v. Heite, 84 Id. 246.

Lowe v. Dalrymple, 21 WEEKLY NOTES, 545.

Kichline v. Lobach, 23 Id. 557.

J. B. Kemerer, for appellee.

The burden of proof was upon the defendant to show that the judgment in question was collusive and fraudulent, and unless there was evidence from which the jury could properly find this question for the party on whom the burden of proof rests, the question should be withdrawn from the jury.

Hyatt v. Johnston, 91 Pa. 196.

Howard Express Co. v. Wile, 64 Id. 201.

Raby v. Cell, 85 Id. 80.

Yaple v. Titus, 41 Id. 195.

Meckley's Appeal, 102 Id. 536.

Appeal of Second Nat. Bank, 85 Id. 528.

Sheetz v. Hanbest's Executors, 81 Id. 100.

Bear's Estate, 60 Id. 430.

Morton v. Weaver, 99 Id. 47.

Shoemaker v. Kunkle, 5 Watts, 107.

Haslett v. Ford, 10 Id. 101.

Mead v. Conroe, 18 WEEKLY NOTES, 178.

Uberroth was the defendants' witness, and he had no interest in the question at issue; the defendants could not, therefore, claim that so much of his testimony as told against the plaintiff was true and that which told in his favor was false. They avouched his credibility and are estopped from averring the contrary.

Stockton v. Demuth, 7 Watts, 39.

Sheetz v. Hanbest's Executors, 81 Pa. 100.

Seip v. Storch, 52 Id. 210.

March 23, 1891. PAXSON, C. J. This case was heard at the last term in the Eastern District, and the judgment affirmed. A re-argument was granted, and it was heard again at the present term. We are not convinced that our former judgment was erroneous.

The case below was a feigned issue to try the validity of a judgment confessed by J. R. Uberroth in favor of Eugene P. Unangst, for \$7000. The allegation of the appellant was that the judgment had been given to hinder and delay the creditors of Uberroth. Upon the trial below the defendant called the latter as a witness, as upon cross-examination, and he was asked as to a conversation with a person named Van Court. The Court excluded the evidence, and this forms the subject of the second assignment of error.

The questions were objected to as incompetent, irrelevant, and *res inter alios acta*. We think the objection well taken. Granted, for the sake of the argument, that Uberroth was a knave, and that his purpose was to cheat his creditors, his declarations would not be evidence to defeat the judgment he had given to Unangst, without previous proof that the latter was a party to the fraud. There was no such proof in the case.

Nor was the defendant entitled to examine Uberroth as upon cross-examination. He was not a party to the issue, and was a competent witness. Moreover, he was testifying against his interest in a legal sense.

We do not think the Court erred in excluding the testimony referred to in the third assignment. It rests upon the same principle as the testimony of Uberroth, above referred to. It consisted entirely of his declarations, not made in the presence of the plaintiff. From the bill of exceptions we learn: "This question is offered as a declaration of Mr. Uberroth, who is alleged to have been in collusion with the plaintiff for the purpose of defrauding Mr. Uberroth's creditors." Unfortunately for the offer, it was a

mere allegation, wholly unsupported by proof, that the plaintiff was in collusion with Überroth for the purpose of cheating the creditors of the latter.

The first assignment alleges that the Court erred in affirming the plaintiff's third point. The fourth assignment, that the Court erred in not affirming the defendant's point. The effect of both rulings was the same: to withdraw the case from the jury in favor of the plaintiff.

In this the Court was clearly right. There was not a scintilla of evidence to show any fraud on the part of the plaintiff. The defendant obtained this issue for the purpose of showing that the judgment was fraudulent. The plaintiff has a right to rest upon his judgment until the fraud was shown; a fraud to which he was a party. He did not rest upon it, however. He proceeded to show the consideration. He testified that the whole amount was for borrowed money, or indorsements for which he was liable. The defendant then called Überroth, and he sustained the plaintiff's testimony. This is all the evidence there was of any importance. The defendant's case has failed; there was nothing to impeach the judgment, and the learned Judge could not have done otherwise than give a binding instruction in favor of the plaintiff. The judgment heretofore entered must stand.

Judgment affirmed.

S. H. T.

[See next case.]

Jan. '91, 52.

April 14, 1891.

Tisch v. Utz.

Sheriff's interpleader—Title to property acquired at sheriff's sale—Validity of—Evidence.

In a sheriff's interpleader the sole question before the Court and jury is the validity of the judgment upon which the execution issued. Such a judgment can only be attacked for actual fraud, and where there is no evidence of fraud, the title of the purchaser at sheriff's sale is unassailable.

Transactions occurring prior to the sheriff's sale, even where raising a presumption of constructive fraud, are immaterial and inadmissible in evidence, after the title of the purchaser has been perfected by a judicial sale.

A defendant in a judgment cannot destroy it by his mere declarations. Such declarations are inadmissible for the purpose of showing that the judgment is fraudulent.

Unangst v. Goodyear's India Rubber Co. (preceding case) followed.

At the trial upon a sheriff's interpleader evidence was admitted that the plaintiff in the interpleader prior to his purchase of the property at sheriff's sale

had taken a bill of sale thereof from the defendant in the execution, and the Court in charging the jury commented upon this fact:

Held, to be error, because the evidence was irrelevant.

Appeal of Louis Tisch, executor of the last will and testament of George Schrank, deceased, plaintiff, from the judgment of the Common Pleas of Luzerne County, in a feigned issue upon a sheriff's interpleader, wherein George Schrank was plaintiff, and John Utz, George Brown, and George Shoemaker were defendants, to try the title to certain personal property levied upon by the sheriff as the property of Fritz Raisch in executions issued by the said John Utz, George Brown, and George Shoemaker. Before trial the death of George Schrank, the plaintiff, was suggested, and Louis Tisch, his executor, was substituted as plaintiff.

On the trial, before WOODWARD, J., the following facts appeared: George Schrank held in his lifetime certain judgment notes given him by Fritz Raisch, which he duly entered up prior to August, 1886. On August 20, 1886, John Utz, George Brown, and George Shoemaker, who alleged they were creditors of Raisch, caused attachments to issue, under the provisions of the Act of July 12, 1842, by virtue of which they attached all the personal property of Raisch, consisting of household goods, butchers' implements, horse, wagon, etc. Subsequent to these attachments the plaintiff, George Schrank, caused writs of *fi. fa.* to be issued on the judgments in his favor against Raisch, under which the sheriff levied on all the property of Raisch covered by the attachments, and on November 20, 1886, sold the same to Schrank for the sum of \$835.75. The attaching creditors were present at the sale, and also their attorney, and gave notice to all bidders through the sheriff at the sale that the property purchased would be sold subject to their attachments, which notice the sheriff attached to his writs, the writs being made returnable to the third Monday of November term. And no order being served upon the sheriff by the attaching creditors or their attorney for the payment of proceeds of sale into court to be distributed by an Auditor as the Court should direct, the sheriff, after the return day, applied the proceeds of sale, less sheriff's costs, towards payment of the writs and so returned them, giving the purchaser at the sale possession of the property, who left the defendant, Raisch, in charge of the same to conduct the business for him. Judgments were subsequently obtained by the attaching creditors, who caused executions to issue, and directed the sheriff to levy on the same property he had previously sold to Schrank, whereupon Schrank notified the sheriff that the property levied on by him as the property of

Raisch was his, Schrank's, property. The sheriff then applied to the Court by petition praying for a feigned issue under the Sheriff's Interpleader Act, which was subsequently granted, and an order made, in pursuance of which an issue was framed.

On the trial of the cause the plaintiff's title to the property in question was shown to be by virtue of the sheriff's sale, at which the attaching creditors and their attorney were present.

The defendants claimed, first, that the purchaser at the sheriff's sale purchased subject to their attachments; and second, that the judgments on which the sale was made were fraudulent, and that the purchaser took no title to the property purchased.

It appeared that prior to the time Schrank issued his execution he had taken a bill of sale from Raisch for the property levied on, and allowed him to remain in possession; and when it was seized in the attachment suits, Schrank brought trespass against the attaching creditors, and the officer who served the attachments, and also sued out a writ of replevin. These circumstances the defendants in the interpleader claimed were evidence of fraud in regard to the transaction between Schrank and Raisch.

The defendants offered in evidence the testimony of several persons taken before a referee in the attachment proceedings against Raisch, among which was the testimony of Schrank, among which was the testimony of Schrank, which was offered for the purpose of contradicting him in the present case. Objected to. Objection overruled. (First assignment of error.)

The defendants offered in evidence the bill of sale from Raisch to Schrank above referred to. Objected to. Objection overruled. (Second assignment of error.)

The plaintiff offered to prove by a witness, Valentine Wich: "That Fritz Raisch told him, the witness, who was a disinterested party, of the money that Raisch had received from George Schrank, now deceased; and also that George Schrank told him as to the amount of money that he had given to Raisch, and that Schrank also asked witness's opinion how to secure himself, as Raisch wanted more money; that he had now given him six or seven hundred dollars, and wanted to be secured in what money he had given; that this conversation took place in the month of March or April, 1886: to rebut any presumption from which fraud might be inferred." Objected to (1) as not rebuttal; (2) as immaterial; (3) as incompetent, and not being in the presence of either of the defendants. Objection sustained. (Fifth assignment of error.)

The Court charged, *inter alia*, as follows:—

"The defendants allege fraud, and to establish it they call your attention to several different facts and circumstances. 1st. To what is called the bill of sale which purports to have transferred

the title of this personal property from Frederick Raisch to George Schrank on the 2d of July, 1886; that paper has been read in your hearing; it is supposed to be a bill of sale; as such its effect would be to transfer the title to this personal property from the vendor to the vendee. Your attention is also called to the fact that notwithstanding this bill of sale, Raisch never surrendered possession of the property, but remained apparently its owner; that as such he went on with the business of butchering at the old stand; that he contracted debts for cattle in the line of his business, and sold to customers in the ordinary way; that there was no change of the sign over the door of his shop, as I understand it, or of the name and advertisement painted on the wagon with which the meat was peddled on the streets of the town." (Third assignment of error.)

"Furthermore, your attention is called to the fact of certain declarations made by Raisch to various parties who were called here as witnesses, or whose testimony we have from the record: that he was solvent and out of debt, excepting a very inconsiderable amount, at or about the time when he conveyed his personal property to Schrank for a presumed debt under a bill of sale." (Fourth assignment of error.)

Verdict for defendants and judgment thereon. Whereupon the plaintiff appealed, assigning for error the admission and rejection of the evidence given above, and the portions of the charges of the Court as above.

Michael Cannon and Gustav Hahn, for appellant.

The sale by the sheriff was regular and fair in all respects, and vested in the plaintiff in the interpleader a good and valid title to the property in suit.

Thompson v. O'Haulon, 6 Watts, 492.

Freeman v. Caldwell, 10 Id. 9.

Piper v. Martin, 8 Pa. 211.

That the property when purchased was left in the hands of Raisch, was not a badge of fraud nor evidence of it.

Maynes v. Atwater, 6 WEEKLY NOTES, 535.

Biabing v. The Bank, 93 Pa. 79.

Miller v. Irvine, 94 Pa. 405.

Spering v. Laughlin, 18 WEEKLY NOTES, 263.

Mead v. Conroe, Id. 178.

The proper course for the attaching creditors to pursue was to ask the Court for an order on the sheriff to pay the proceeds of sale into court.

Myers v. Harvey, 2 P. & W. 478.

Zeigler v. Pierce, 23 WEEKLY NOTES, 27.

The single issue in this case was as to the ownership of the goods at the time the levy was made by the appellees. This was shown to be in the appellant by virtue of a sheriff's sale, regularly made in good faith; and so the Court should have stated to the jury.

Whitney v. Moore, 77 Pa. 479.

Edmund G. Butler, for appellees.

May 4, 1891. **PAXSON, C. J.** This was a feigned issue under the Sheriff's Interpleader Act. The appellant claimed title under a sheriff's sale. It appears that the appellant's testator, George Schrank, held a judgment against one Fritz Raisch, upon which he issued an execution, levied upon the personal property of Raisch, and at the sale thereof became the purchaser. This gave him a good title to the property in the absence of fraud.

It is proper to mention that some time before Schrank issued his execution he had taken a bill of sale from Raisch for the same property levied upon, and allowed the latter to remain in possession. Afterwards certain creditors of Raisch issued attachments against him upon which the property was seized. Schrank, claiming it under his bill of sale, brought trespass against the plaintiffs in the attachments and the officer who served them, and also sued out a writ of replevin. Finally, he issued his *fi. fa.* as before stated, levied on the property subject to the writs of attachment, and became the purchaser at the sheriff's sale. The effect of this sale was to free the property from the lien of the attachments; the purchaser took a good title, and the lien of the attachments was transferred from the property to the fund.

These facts are mentioned, not as having any special importance in the case, but for the reason that they appear to have led to some confusion upon the trial in the Court below. The most that can be made of the bill of sale, the suit for trespass, and the replevin, is that the whole was a clumsy device of an ignorant man to secure himself against loss, assuming him to have been a *bona fide* creditor of Raisch.

Subsequently the attaching creditors obtained judgments and proceeded to levy upon the same property which the sheriff had previously sold to Schrank. This feigned issue was then framed to try the question of the ownership of the said property.

As before observed, the sheriff's sale gave Schrank a good title in the absence of fraud. If the judgment upon which his execution issued was *bona fide*, and for an honest debt, his title was good against the world. It follows that the only question properly before the Court below was the validity of that judgment.

The first assignment alleges that the Court erred in admitting the testimony of a number of witnesses, taken in another suit to which Schrank was not a party, to be read in evidence. Among those witnesses was Schrank himself, and his testimony was offered for the purpose of contradiction. So far as it tended to contradict his evidence given in the present proceeding, it was competent. The mere declarations of a party to a suit made out of Court may be used to con-

tradict his testimony in Court provided the proper ground be laid for their introduction. I am somewhat at a loss to know whether the testimony of John Utz, and the other witnesses referred to in this assignment, was admitted and read to the jury. The paper-book is not clear upon this point. If admitted, it was error, for the reason that it was taken in another proceeding to which the appellant was not a party and where the issue was entirely different; moreover, much of the testimony was irrelevant, even if otherwise admissible. As the case must be reversed upon other grounds these suggestions are made for the guidance of the Court below upon another trial.

We think it was error to admit the bill of sale referred to in the second assignment. It had no bearing upon the validity of the judgment. We are dealing with an allegation of actual fraud, and a bill of sale is only evidence of a constructive fraud when not accompanied with the possession of the property. It is good between the parties, yet when taken in the most perfect good faith, and based upon the fullest consideration, the law declares it a fraud against creditors when there is no corresponding change of possession. It is, however, a constructive fraud only, and is not of itself evidence of actual fraud.

Assuming that the bill of sale was a badge of actual fraud, the learned Judge fell into error in that portion of his charge embraced in the third assignment. It is as follows:—

"The defendants allege fraud, and to establish it they call your attention to several different facts and circumstances. (1) To what is called the bill of sale which purports to have transferred the title of this personal property from Frederick Raisch to George Schrank on the second of July, 1886; that paper has been read in your hearing; it is supposed to be a bill of sale; as such its effect would be to transfer the title to this personal property from the vendor to the vendee. Your attention is also called to the fact that notwithstanding this bill of sale, Raisch never surrendered possession of the property but remained apparently its owner; that as such he went on with the business of butchering at the old stand; that he contracted debts for cattle in the line of his business and sold to customers in the ordinary way; that there was no change of the sign over the door of his shop, as I understand it, or of the name and advertisement painted on the wagon with which the meat was peddled on the streets of the town."

All this was irrelevant to the issue before the Court, and the evidence of which it was predicated had no proper place in the cause. It related to matters which occurred prior to the sheriff's sale, which sale, as before observed, passed a good title to Schrank in the absence of

fraud. And that fraud, if it exists, must be found in the judgment, not in the clumsy and abortive attempt to hold the property by virtue of a bill of sale. Had Schrank claimed title by virtue of this bill of sale, it would have been a case of constructive fraud, and the charge of the learned Judge would have been correct. But his title had been perfected by a judicial sale, and the case has resolved itself into a question of actual fraud.

We cannot say that this ruling did the plaintiff no harm. On the contrary it was vital, and took the heart out of his case. Indeed, but for this, I do not see how the jury could have found for the defendants, as the integrity of the judgment was not assailed by a single witness, so far as I have observed, and I have read the testimony with some care. The testimony of both Schrank and Raisch, the parties to the judgment, fully sustains its consideration. The most that can be urged against it are some trifling contradictions in their testimony. Neither witness was impeached, or seriously contradicted.

We think it was error to call the attention of the jury to certain declarations of Raisch made to various parties as to his financial condition. That a defendant in a judgment cannot destroy it by his mere declarations is settled law. The latest case upon this subject is *Unangst v. Good-year's India Rubber Company*, decided at the present term and not yet reported. [Preceding case.] The holder of a judgment would have a very precarious security if his debtor could destroy it by his mere loose declarations. Aside from this, Raisch was not a party to this proceeding, and was a competent witness. His declarations were not competent.

The plaintiff has no reason to complain of the rejection of the testimony of Valentine Wich. (See fifth assignment.) He was offered to prove the declarations of the plaintiff himself, and of Raisch. If such testimony were competent, the parties to a suit could manufacture evidence without limit. This does not require discussion.

The judgment is reversed, and a venire facias de novo awarded. S. H. T.

July '90, 177.

January 23, 1891.

Kohl v. Sullivan, Harker & Co.

Act of June 16, 1836—Distribution of proceeds of sheriff's sale—Feigned issue—When allowable.

A s. fa. upon a judgment obtained subsequently to a sale by the sheriff upon a prior execution, binds the fund in the sheriff's hands left after satisfying the prior execution.

An execution issued against a defendant, T., upon a judgment confessed in favor of one, S. The sheriff returned that he had levied upon and sold the goods. K. then filed his petition for a feigned issue, alleging that he had a judgment against T., obtained subsequently to the above sale by the sheriff, and that the judgment confessed by T. in favor of S. was in pursuance of an agreement to hinder and delay creditors. The Court ordered the fund to be paid into Court, and granted the feigned issue which was found by the jury for the plaintiff, K. Whereupon the Court directed that the fund be paid to K.:

Held, not to be error.

S. claimed that a part of the fund in the sheriff's hands was produced by his advances in paying prior liens, and asked the Court to award to him, out of the fund, so much as would be necessary to repay him. This the Court refused to do:

Held, not to be error.

Appeal of John C. Sullivan, W. S. Harker, and Harry G. Hettrick, trading as Sullivan, Harker & Co., defendants, from the judgment of the Common Pleas No. 3, of Philadelphia County, in a feigned issue, wherein E. W. Kohl, trustee, was plaintiff, to try the validity of a certain judgment confessed to the defendants by Charles F. Tinker.

On the trial the following facts appeared: Charles F. Tinker, being indebted to Sullivan, Harker & Co., executed on February 23, 1888, a single bill with warrant of attorney to confess judgment for \$524.72, on which judgment was entered and execution issued the following day. The sheriff returned that he had levied, subject to a prior levy, in the case of Edmund Wright against the same defendant, and sold the goods for \$500 on March 5, 1888. On April 5, 1888, a petition of E. W. Kohl was filed, alleging himself to be trustee for various creditors of Tinker and that he obtained judgment in Common Pleas No. 4, on March 17, 1888 (twelve days after the sheriff's sale); that the judgment was confessed to the appellants in pursuance of an agreement to hinder and delay creditors, the alleged agreement, as set forth in the petition, being that the note was given by the defendant to Sullivan, Harker & Co.:

"At the earnest solicitation of one of them, namely, John C. Sullivan, and upon representations made at and before the signing thereof by him, and in furtherance of an agreement between them, as follows: That a certain judgment (C. P. No. 3, December Term, 1887, No. 1033) obtained against the said Tinker by Wright Bros. & Co. for \$31.20, on which there was a balance still due of \$11.20, having come to the notice of the other creditors of the said Tinker, they would at once press him for payment, and would probably recover judgment against him and sell him out at sheriff's sale, unless some plan should be adopted to prevent them; that if he would give the said Sullivan, Harker & Co. the note mentioned, they would hold it as collateral security, enter up judgment on it, and use it to 'pull him through' his financial difficulties; that they would not issue execution on said judgment, but would hold it against him so that should other credi-

tors threaten suit, he could convince them that it would be useless for them to sue or press him for payment as the said Sullivan, Harker & Co. already had judgment and could at any time sell him out; after giving said note to the plaintiffs he could refer such creditors to the said John C. Sullivan, and he would 'satisfy' them; and that the plaintiffs would not oblige the said Tinker to discharge his indebtedness to them at once; your petitioner further avers that the said note on which judgment has been entered as aforesaid was given and received by the parties thereto, not *bona fide*, but in pursuance of the agreement aforesaid, and with the purpose and intent on both sides to hinder, delay, and defraud the other creditors, among whom are this petitioner and his *cestuis que trust*."

The Court thereupon ordered the sheriff to pay the money into Court, and directed a feigned issue to try—

(1) Whether or not the above judgment was confessed by the said Charles F. Tinker to the said Sullivan, Harker & Co., under and in pursuance of an agreement between the said Sullivan, Harker & Co. and the said Charles F. Tinker, that the said Sullivan, Harker & Co. should not issue execution upon the said judgment, but should hold the said confessed judgment, and the said Charles F. Tinker should inform his other creditors that the said Sullivan, Harker & Co. held the said confessed judgment and would issue execution thereon if his other creditors pressed him for payment.

(2) Whether or not the said confessed judgment was given by the said Charles F. Tinker to the said Sullivan, Harker & Co. for the purpose of hindering and delaying the creditors of the said Charles F. Tinker.

Both issues were found for the plaintiff. A new trial having been refused, the Court directed, on April 19, 1890, that the fund be paid him; and it was paid accordingly.

The defendants, Sullivan, Harker & Co., on May 1st, obtained a rule to revoke the order directing the fund to be paid Kohl, alleging that the same had been improvidently made, because the execution on Kohl's judgment never was a lien on the goods which produced this fund, and that there had never been any proof that Kohl or his *cestuis que trust* were in anywise entitled to the same; that the defendants had assisted in producing the fund by paying certain prior liens, and that by reason of the action of the Court they had been deprived of an opportunity of showing their own superior title to the fund, notwithstanding the verdict, or in any case of obtaining reimbursement for their expenditure in producing the fund. This rule was discharged.

Whereupon the defendants took this appeal, assigning for error the action of the Court (1 and 2) in granting the feigned issue, (3 and 4) in directing the distribution of the fund in Court to the plaintiff, and (5) in not directing that so

much of the fund as had been produced by the appellants' advances in paying prior liens should be repaid to them out of the fund, and in discharging appellants' rule to restore the fund to the custody of the Court.

Allen H. Gangewer and Robert H. Neilson, for appellants.

The appellee's judgment not having been obtained until after the sale by the sheriff, he had no lien upon the fund, and not being interested was not entitled to an issue.

Act of June 16, 1836, § 39.

Trickett on Liens, § 267.

Stinson v. McEwen, 1 Tr. & H. Pr. 672.

Weis v. Weis, 3 WEEKLY NOTES, 76.

Weiss's Appeal, 5 Id. 423.

Smith v. Reiff, 20 Pa. 364.

Bachdell's Appeal, 56 Id. 386.

Rawley's Appeal, 40 Id. 73.

Walton v. West, 4 Wharton, 221.

The facts set up in the petition do not amount to fraud.

Walker v. Bank, 98 Pa. 574.

1 Tr. & H. Pr. 608.

The fund should not have been distributed without a reference to an Auditor, to ascertain who were entitled to it. The whole subject of distribution is not comprised in the feigned issue.

Shertz v. Herr, 19 Pa. 34.

Christopher v. Selden, 28 Id. 155.

Garrison's Appeal, 38 Id. 531.

Barrett's Appeal, 71 Id. 317.

Miller's Appeal, 119 Id. 620.

Deitler v. Mishler, 37 Id. 82.

Frazer v. Halliwell, 1 Binney, 126.

Where an erroneous order has been made directing a feigned issue to try the validity of a judgment, this Court will reverse the order, even though the issue has been tried and resulted in a verdict for defendant.

Weigley v. Conrade, 132 Pa. 147.

Scott's Appeal, 123 Id. 155.

Harold Goodwin and Theodore F. Jenkins, for appellee.

If the petition to pay the money into Court and for an issue is made by a proper party, and alleges material facts in dispute, the issue is of right and must be ordered.

Act of June 16, 1836, § 87. Purd. 763, pl. 117.

Act of April 20, 1846, § 2. Id. 764, pl. 118.

Dickerson's Appeal, 7 Pa. 258.

Overholt's Appeal, 12 Id. 323.

Sonder's Appeal, 57 Id. 503.

Providence, etc., Co. v. Chase, 108 Id. 323.

Ryman's Appeal, 124 Id. 635.

Schwartz & Graff's Appeal, 21 WEEKLY NOTES, 246.

A creditor having a lien on the fund is a proper party, and such was the appellee, Kohl, if a surplus in the hands of the sheriff on an execution adverse to the defendant may be levied on, and that it may be settled by—

Herron's Appeal, 29 Pa. 240.

Rudy v. Comm'th, 35 Id. 166.

Money of the defendant, not on his person, may be seized and taken in execution.

Act of June 16, 1836, § 22, *Purd.* 741.

The judgment confessed to appellants was vicious beyond redemption, and the affidavit of the appellee set forth all the facts in dispute, showing the fraudulent intent.

Weir v. Hale, 3 W. & S. 288.

Bunn v. Ahl, 29 Pa. 387, 390.

Robinson's Appeal, 36 Id. 87.

Garrison's Appeal, 38 Id. 531.

February 16, 1891. *PER CURIAM.* If the Court below was right in awarding the feigned issue, the distribution of the fund is also correct, as it was made in strict accord with the finding of the jury. The application for the issue was made by Kohl, as trustee for certain judgment creditors of Charles F. Tinker, and the ground of it was that the judgment confessed by Tinker to the appellants was collusive, and given for the purpose of hindering and delaying the creditors of Tinker. The jury have found that it was given for such purpose. It was urged, however, that the judgment creditors had no standing to claim an issue for the reason that they had no lien upon the fund made by the sheriff and paid into Court. It is true the appellee's judgment was not obtained until after the sale of the personal property by the sheriff. But we are of opinion that the *fi. fa.* issued upon appellee's judgment bound the fund in the sheriff's hands. It was the money of the defendant in the execution; but money made by the sheriff upon an execution in which he was the plaintiff. Money of a defendant, not on his person, may be seized and taken in execution. (See 23d section of Act of June 16, 1836; also *Herron's Appeal*, 29 Pa. 240; *Rudy v. Com.*, 35 Id. 166.)

Nor are we convinced that the Court erred in refusing to order that so much of the fund as had been produced by appellants' advances in paying prior liens should be repaid them out of the fund. (See fifth assignment.) These payments were made by the appellants the better to enable them to perpetrate the fraud found by the jury, that is, to hinder and delay the creditors of Tinker. Under such circumstances the law will not help them. It is true these payments have increased the fund for distribution, and to this extent the appellee is benefited. It is equally true the appellants intended no such result. On the contrary the money was paid in an attempt to prevent appellee from getting his honest dues. This distribution was made under the equity powers of the Court, and these appellants have no equity.

The decree is affirmed, and the appeal dismissed at the costs of the appellants. S. H. T.

[See *Moore v. Dunn*, *post*, p. 63.]

July '87, 44.

May 27, 1887.

Irvin's Appeal.

Acts of June 16, 1836, and April 20, 1846—Petition for feigned issue—Requisites of affidavit for.

Under the Act of April 20, 1846, it is necessary for the petitioner for a feigned issue to satisfy the Court that there is a material fact in dispute. The issue is no longer a matter of right, as it was under the Act of June 16, 1836, but the Court may determine whether it will grant the issue or not.

Under these Acts, an affidavit of facts not within the knowledge of the affiant but upon information derived from others, is not sufficient to justify the Court in granting the issue unless evidence is laid before the Court so that it may determine the propriety of granting or refusing the issue.

Appeal of Samuel H. Irvin from the decree of the Common Pleas of Huntingdon County, refusing to direct issues to determine certain disputed and material facts in the distribution of the proceeds of the sheriff's sale of the real estate of John W. Mumper, and dismissing exceptions to and confirming the report of David Caldwell, Esq., the Auditor appointed to distribute said proceeds.

The facts of the case will be found fully set forth in the following portion of the opinion of FURST, P. J.:—

"We come now to consider the application before the Auditor for issues to try the validity of said judgments and the petition presented to the Court upon the filing of his report, upon which rules were granted upon Mary A. Mumper and the Provident Life and Trust Company of Philadelphia to show cause why said issues should not be awarded. These cases were all heard in connection with the exceptions to the Auditor's report.

"Mary A. Mumper obtained, by confession, a judgment, in the Court of Common Pleas to No. 82, April Term, 1883, against John W. Mumper, on the 12th April, 1883, for the sum of \$20,951.86. This judgment was entered upon a bill signed, dated February 13, 1883, for an indebtedness accruing prior to the partnership of John W. Mumper & Co., which partnership began in the year 1881.

"She also obtained a judgment against John W. Mumper and H. L. Beltzhoover, trading as John W. Mumper & Co., upon a bill signed on the 25th April, 1883, for \$9764.50, to No. 129, April Term, 1883.

"Before the Auditor two petitions were presented by the attorneys of certain creditors of John W. Mumper & Co., namely, Jones, Hoar & Co., H. H. Kline, Henry & Co., S. H. Irvin, and others, praying for issues to be directed by

the Court of Common Pleas to try the validity of these judgments.

"Afterwards a petition was presented to the Court on behalf of all the creditors, asking for like issues, etc. These several petitions have the names of the creditors, signed by their several attorneys. They are attached to the Auditor's report.

"The material allegations of fact are contained in the petition presented to the Court, and are set forth in three distinct divisions.

"First. That petitioners believe that the aforesaid judgments were without consideration, fraudulently and collusively confessed by and between the parties thereto, for the purpose of hindering, delaying, and defrauding the petitioners, etc.

"Second. That judgment No. 82, April Term, 1883, against John W. Mumper for \$20,951.86, was fraudulently confessed for a larger sum than was due, etc.

"Third. That if there was any consideration whatever for said judgment No. 82, or if John W. Mumper was, at the execution of the note, in any manner indebted to said Mary A. Mumper, such indebtedness, petitioners are advised and believe, was fully paid and satisfied prior to the sale of the real estate of John W. Mumper, etc.

"This petition is verified by three of the creditors in the following manner, namely: 'B. F. Isenberg, one of the members of the firm of Henry & Co., being duly sworn according to law, doth depose and say the facts set forth in the foregoing petition are true, to the best of his knowledge, information, and belief.'

"Upon the filing of this petition in Court, a rule was granted to show cause why a feigned issue should not be awarded, etc. Thus a full opportunity was given to the petitioners to show to the Court by deposition, or in any other proper manner, some fact or facts that were material and in dispute. They failed to show a single fact; and although the case was before the Auditor for over a year, not a single fact was shown before him as to the fraudulent character of either of said judgments, or that the judgments were paid as alleged in the third paragraph of petition.

"Upon the other hand, it was shown by the deposition of Mary A. Mumper and John W. Mumper that the judgment for \$20,951.86 (the other judgment was not attacked at the same time the deposition was taken) was given for a good and *bona fide* consideration, which existed for more than a year prior to the formation of the partnership between John W. Mumper and H. L. Beltzhoover, the nature and character of the indebtedness being fully set forth both in the depositions, and in the answer referred to therein, in the equity proceeding between these same

parties. It was further shown that the Provident Life and Trust Company of Philadelphia, which corporation was the guardian of the minor son of Mary A. Mumper and a part owner of the same real estate, had made a full investigation into the consideration of said judgment, and thereupon had advanced the money to purchase the real estate at the sheriff's sale, taking an assignment of this judgment as security, etc. According to the facts shown in the answer and depositions, none of these petitioners could have had any personal knowledge of the facts set forth in these several petitions.

"This is also apparent from the manner in which the petitions are drawn. They are signed by the counsel for the petitioners. There is no allegation in any one of the petitions, that any petitioner or creditor has knowledge of the facts therein stated. And this is also further apparent by the careful manner in which the affidavits are made—'upon information.' So that these affidavits to the petition merely amount to hearsay derived from others; the source of which information is withheld from the Court by a refusal to produce the same in evidence upon the rule to show cause.

"The question then is simply this: Do these petitions, in the manner in which they are verified, show a material fact in dispute, which should determine or influence the Court to grant the issue. The 87th section of the Act of June 16, 1836 (Purdon's Digest, 763, pl. 117), provides, 'If any fact connected with such distribution shall be in dispute, the Court shall, at the request in writing of any person interested, direct an issue to try the same, etc.' Under this Act the law was mandatory, and the issue in this case would have to be granted, and to this effect are a number of decisions of the Supreme Court. Issues could be obtained upon the written request of an interested party, upon the allegation of a fact in dispute. The result was an endless variety of issues resulting in serious delays and expensive litigation.

"To meet this, the Act of April 20, 1846, was passed. The 2d section (Purdon's Digest, page 764, pl. 118) provides as follows: 'Provided, that before an issue shall be directed upon the distribution of money, arising from sales under execution, or Orphans' Court sales, the applicant for such issue shall make affidavit that there are material facts in dispute therein, and shall set forth the nature and character thereof; upon which affidavit the Court shall determine whether such issue shall be granted, subject to appeal or writ of error, etc., if issue be refused.' Are the affidavits to these petitions made in accordance with the Act of 1846, and do they of themselves afford sufficient evidence to the Court of the existence of a material fact in dispute?

In Knight's Appeal (7 Harris, 493), Chief Justice BLACK delivering the opinion of the Court, says: 'A fact is properly said to be in dispute when it is alleged by one party and denied by the other, and by both with the same show of reason. A mere naked allegation without evidence, or against the evidence, cannot create a dispute within the meaning of the law. If it could, a party might stop the distribution whenever he chooses to make a groundless assertion. The Court was right in refusing the issue.'

"In Robinson, Minis & Miller's Appeal (12 Casey, 83), Justice WOODWARD says: 'It is not enough for a creditor to swear that the judgment, which is in his way, was confessed by collusion between the parties thereto, and for the purpose of hindering and delaying certain other creditors, but he must set forth in his affidavit that there are material facts in dispute, and also the nature and character of such facts. Even under the Act of 1836, such an affidavit as we have upon record would have been insufficient. (Dickerson's Appeal, 7 Barr, 258, and the cases therein cited.) Much more is it insufficient under the Act of April 20, 1846, which instead of granting the creditors an issue as matter of right, restricts it to the terms and conditions stated.'

"Where material facts are stated positively, and are shown to be within the party's knowledge stating them, and it is further shown that they are in dispute, it would then be the duty of the Court, if they deemed them material, to award the issue. But when the party does not state facts within his own knowledge, but upon rumor or hearsay, or information derived from others, we think, before the Court should arrest the distribution and grant the issue, the evidence should be laid before the Court, so that the Court may have facts upon which to determine the propriety of granting or refusing the issue.

"This principle is fully recognized in the authorities cited, and also in the case of *Christophers v. Selden* (4 Casey, 165), and *Dormer v. Brown* (22 P. F. S. 404).

"The cases of *Bichal v. Rank* (5 Watts, 140), *Trimble's Appeal* (6 Id. 133), and *Reigart's Appeal* (7 W. & S. 269), were all decided under the Act of 1836, and therefore cannot affect the question under the Act of 1846.

"The practice indicated of requiring the facts to be shown to the Court, before an issue is granted or refused, we think has received the sanction of the Supreme Court in a number of recent cases, all of which show the wisdom of requiring this preliminary proof before subjecting parties or estates to tedious and expensive litigation.

This practice obtains now in the Orphans' Court, under the several Acts of Assembly,

which are quite as mandatory upon the Court, if not more so than the Act of 1846.

"By the 41st section of the Act of March 15, 1832 (Purdon's Digest, page 1476, pl. 20): 'Whenever a dispute upon a matter of fact arises before any Register's (now Orphans') Court, the said Court shall, at the request of either party, direct a precept for an issue to the Court of Common Pleas of the county, for the trial thereof in the form herein before prescribed for the direction of registers, changing such parts thereof as should be changed, and the facts established by the verdict returned shall not be re-examined on any appeal.'

"In *Harrison's Appeal* (4 Out. 458), tried before Judge ELWELL, whose able opinion was adopted as the opinion of the Supreme Court, referring to the section cited, the Court says: 'This section is imperative in its terms, and makes a request for an issue a matter of right in any case within its purview.' (*Cozzens' Will*, 11 P. F. S. 196; *Graham's Appeal*, Id. 43; *DeHaven's Appeal*, 25 Id. 337.)

"The important question, with which we have now to deal, is, when, within the meaning of the statute, may a dispute be said to arise? Is it whenever facts are alleged by the contestant, and suggested upon the record; or is it when evidence has been given from which it appears that there is a conflict in the testimony, and a substantial dispute upon material facts?

"By the 13th section of the Act in question, the register is authorized to direct an issue when a person entering a caveat shall allege matter of fact touching the validity of a will.

"The 41st section requires that a dispute in matter of fact shall have arisen, before the Court can be required to direct an issue.

"Now, if nothing more was intended to be required by the latter section than a specification of facts alleged to be in dispute, it is difficult to understand why the phraseology of the two sections is different. But if we consider that the register is not necessarily learned in the law, we may find satisfactory reasons why he may send the case to the Court upon an allegation of fact.

"But the same course of reasoning does not apply to the Court, and therefore the law requires that it must appear that a dispute has arisen, before the case can be properly sent to a jury for trial. . . . The construction of the Act of 1832 was under consideration by the Court soon after its passage. In 1845, Judge KING, sitting in the Register's Court in Philadelphia, in which the inquiry was in regard to when a dispute may be said to arise, said: 'The dispute as to facts must arise when the cause is on hearing before the Court. That is the time when the Court is to judge whether there are truly any facts in dispute. What a party may call a dis-

puted fact may, if the Court proceeds, never appear in proof, or may be immaterial to the question before the Court, etc.' (Bradford's Will, 1 Parsons, 153.)

The case of Harrison's Appeal (4 Out. 458) was an application to the Court for an issue *devisavit vel non*, to test the validity of the will of William Cameron. The request for the issue was first dismissed, upon the ground that it was premature and inadmissible. Afterward voluminous testimony was taken, and the application was again made to Judge ELWELL for the issue, based upon the facts as proved before the Examiner, who, upon full consideration thereof, refused to grant it.

"The Acts of Assembly are so nearly alike in their requirements, as to the manner of granting the issue, and the grounds upon which the Court should determine the propriety of either awarding or refusing it, that it seems to us this case should settle the practice of establishing uniformity of procedure in both Courts. To the same effect is Schilke's Appeal (4 Out. 628).

"Applying these principles to the case under consideration, we have only an affidavit made upon information, which is vague, uncertain, and indefinite, in the facts stated; not made in conformity with the Act of 1846; it is not supported by a single fact or circumstance shown to the Court, upon which we can form an intelligent conclusion, as to whether there is a fact in dispute. Ample time has been given—both before the Auditor to show payment of judgment, if such fact existed, and in Court upon the rule to show cause, to produce some evidence that facts exist which are material, involving the integrity of the judgments. Nothing has been shown, and we are led to the conclusion that this application is based upon suspicion or mere allegation. At least we are furnished with no facts in dispute upon which we can judicially act. At the same time, the parties opposing this issue have shown facts before the Court, which fully sustain the validity of the judgment, and which in detail show the consideration thereof. Cross-interrogatories were filed and answered by both Mary A. Mumper and John W. Mumper, which in no manner impeach the integrity of this judgment. This testimony is not contradicted by any evidence in the cause. The only attack upon it is contained in allegations made upon information alone.

"As to judgment No. 129, April Term, 1883, before the Auditor no claim was made; according to the evidence submitted to us, the lien of this judgment was released as to all the money in Court, and also as to any real estate in Huntingdon County, upon which contesting creditors had liens. This judgment, therefore, does not in any manner stand in the way of petitioners.

"For the reasons given, the exceptions to the Auditor's report are overruled and the report confirmed, and the rules for feigned issues are discharged and issues refused."

Upon the Court discharging the rules for feigned issues, one of the petitioners and creditors took this appeal, assigning for error this action of the Court.

M. M. McNeil and R. Bruce Petriken (Myton & Schock and Stevens & Owens with them), for appellant.

Under the Acts of June 16, 1836, and April 20, 1846, an issue to try disputed facts is a matter of right, upon the petitioner complying with the several requirements—*i. e.*, by setting forth in an affidavit that there are material facts in dispute, with the nature and character of the same.

Sonder's Appeal, 57 Pa. 503.

De Haven's Appeal, 75 Id. 341.

Dormer v. Brown, 72 Id. 404.

Knight's Appeal, 19 Id. 494.

Benson's Appeal, 48 Id. 159.

Christophers v. Selden, 28 Id. 165.

Robinson's Appeal, 36 Id. 83.

Reigart's Appeal, 7 W. & S. 267.

Bichal v. Rank, 5 Watts, 140.

Trimble's Appeal, 6 Id. 133.

Robinson v. Vandiver, 2 Pearson, 96.

George B. Orlday and R. Milton Speer, for appellees, cited—

Dickerson's Appeal, 7 Pa. 258.

Montgomery's Appeal, 5 Cent. Rep. 200.

October 3, 1887. *PER CURIAM*. We affirm the decree in this case for reasons stated in the well-considered opinion of the Court below.

Decree affirmed at costs of appellant.

[*Cf. Schwartz & Graff's Appeal*, 21 WEEKLY NOTES, 246, and *Moore v. Dunn*, next case.]

S. H. T.

Common Pleas.

C. P. No. 4.

Feb. 21, and March 7, 1891.

Moore v. Dunn and Fell.

Opening judgment—Practice—Subsequent execution creditors.

A rule by a subsequent judgment creditor to have a prior judgment opened, is contrary to established practice and the right of the plaintiff. It is a mistaken notion that a subsequent execution creditor can intervene in a suit between his judgment debtor and another plaintiff.

The proper practice is to apply for a rule on the plaintiff and sheriff to show cause why the money produced by the sheriff's sale on the prior execution, should not be

paid into Court, and dispute the validity of the judgment before an Auditor, or apply for an issue to be tried in Court.

To obtain an issue, the complaining creditor should file an affidavit, alleging material facts in dispute and stating the nature and character thereof. On this an answer should be filed, denying the averments; depositions should be taken, and on them the Court will determine whether the issue shall be granted.

Sur rules by subsequent judgment creditors, and by defendants, to open the judgment and let them into a defence.

Sur rule on the plaintiff and sheriff to show cause why the proceeds of the sheriff's sale should not be paid into Court.

James A. Develin, for the rules.

Henry M. Tracy and *N. H. Larselere*, contra.

March 14, 1891. **ARNOLD, J.** So many applications like the present have been made of late, that we deem it proper to write our reasons for refusing them. The rule to open the judgment at the instance of the subsequent judgment creditor, must be discharged as a matter of course, because it is contrary to established practice and the right of the plaintiff. It is a mistaken notion that a subsequent execution creditor can intervene in a suit between his judgment debtor and another plaintiff. The proper practice is to apply for a rule on the plaintiff and sheriff to show cause why the money produced by the sheriff's sale on the prior execution should not be paid into Court, and dispute the validity of the judgment before an Auditor, or apply for an issue to be tried in Court.

In *Shulze's Appeal* (1 Pa. 251), Chief Justice GIBSON said of the case of *Whiting v. Johnson* (11 S. & R. 328), in which the judgment was opened at the instance of a subsequent creditor: "At that time (1824) the practice was not to award a collateral issue, but to *open* the judgment. . . . The proceeding was one of those miserable shifts to which we were driven for want of the powers of a Court of chancery. The statute (of June 16, 1836) on which the present proceeding is founded, directs that a suggestion of fraud be tried in a collateral issue to which the parties may be fabulous; but it seems to be forgotten that as the whole is a chancery proceeding, the names of the actual parties ought to appear as complainants and defendants." For none but the parties to the issue can take any benefit from the result, as was decided in *Tomb's Appeal* (9 Pa. 61), on the same judgment, and other cases hereinafter referred to; nor can the defendant avail himself of the result of an issue between his creditors (*Ferree v. Thompson*, 52 Pa. 353); and the inquiry is, whether the judgment is a fraud upon the other judgment creditors of the defendant, and not merely a fraud

on the debtor—a harsh rule, it must be admitted, for a fraud on the debtor is none the less a fraud on his creditors. But the rule is firmly established in a line of cases, of which *Dougherty's Estate* (9 W. & S. 189), *Brown v. Parkinson* (56 Pa. 336), *Thompson's Appeal* (57 Id. 175), and the *Appeal of the Second National Bank of Titusville* (which is twice reported, first in 85 Pa. 528, and again in 96 Id. 460), are conspicuous examples; although there are some precedents the other way, as *Greene v. Tyler* (39 Pa. 361), *Bachdell's Appeal* (56 Id. 386), and the *Miners' Trust Co. v. Roseberry* (81 Id. 309), which were explained and distinguished in the *Appeal of the Second National Bank of Titusville* (*supra*), so as to establish the rule to be, that subsequent creditors may attack a prior judgment or mortgage to the extent of usurious principal, but not as to usurious interest; and it was ruled the same way in *Lennig's Appeal* (93 Pa. 301), settling the question which was left undecided in *Verner v. Carson* (66 Id. 440). Perhaps if the debtor were to refuse to move for the benefit of his creditors, they would be permitted to move in his name. I say perhaps, because the point was not positively ruled in *Lewis v. Rogers* (16 Pa. 18), or *Clarke v. Douglass* (62 Id. 408), although creditors did get the benefit of a defendant's rights in *McNaughton's Appeal* (101 Pa. 550), and they may show that the debt secured by the judgment has been paid (*Smith's Exec'rs v. Wagenseller*, 21 Id. 491).

An application similar to the one before us was made and refused in *Gates v. Johnston* (3 Pa. 52), of which Chief Justice GIBSON said: "It redounds greatly to the credit of the Judge, however, that he did not follow the old, clumsy, unprofessional, and barbarous practice of *opening* the judgment between the original parties, who must be bound by it between themselves, whatever may be the event between the plaintiff and the creditors; but awarded a collateral issue to try, not, indeed, whether it was *collusive*, as it ought to have been, but whether it was good for any part of the debt," etc., which was wrong, for the reason that if the judgment was fraudulent in part, it was void in the whole, as against other creditors.

An exception as to partly good and partly bad judgments, must be noticed in cases of judgments held by married women against their husbands. in which the excessive part will not be attributed to bad faith, but will be presumed to be a mistake, or included in good faith, as was done in *Gicker's Admin'rs v. Martin* (50 Pa. 138); *Meckley's Appeal* (102 Id. 536); *Howard Watch Co. v. Bedillion* (131 Id. 385). This, no doubt, is because of a courteous presumption in favor of the integrity of all dealings between a failing debtor and his wife—a pre-

sumption which other creditors may rebut if they can, but which they seldom can rebut if they would. On this point Judges and jurors seem to agree.

Concerning the lien of judgments upon real estate, the Chief Justice said in *Watson v. Willard* (9 Pa. 89), that the proper practice for subsequent creditors is not to intervene, but to purchase the equity of the defendant on their judgments, and try title with the holder of the legal estate, who in that case claimed unpaid purchase-money; although he admitted that the practice had been otherwise. "But," said he, "our irregular practice, growing as it does, out of our mixed system, and our consequent disregard of common law forms, has been in most cases to let the creditors intervene; and it is too deeply seated to be torn up. It is not to be commended for simplicity; for it has all the hitches and entanglements of confusion, inasmuch that judgments unimpeachable by the parties to them, have been opened on an allegation of collusion at the instance of creditors, and never closed against the defendants, who were entitled to no relief whatever." For, said he, in *Donaldson v. The West Branch Bank* (1 Pa. 294), "so true it is, that he who forgets the forms of the law, will soon forget its principles." In the *Miners' Trust Co. v. Roseberry* (81 Pa. 309), it does not appear that the judgment was opened, but an issue was awarded to determine how much was due on the judgment, which seems to be the approved practice. Other cases on this frequently adjudged point may be found in *Muhlenberg v. Brock* (25 Pa. 517); *Schick's Appeal* (49 Id. 380 and 384); *Clark v. Douglass* (62 Id. 408), and *Fowler's Appeal* (87 Id. 449).

The foregoing disposes of the rule by James E. Wilkinson, a subsequent judgment-creditor of the defendants, as trustee for the benefit of their creditors, to open the judgment and let him into a defence, which will be discharged as of course.

Upon the rule by the defendants for the same relief, we have to say that the evidence shows that the amount of the judgment for which the plaintiff has issued execution, is justly due and owing, and their rule will also be discharged.

Mr. Wilkinson has also obtained a rule to show cause why the sheriff should not pay the fund realized by the sale under the plaintiff's execution, into court for distribution by an Auditor, so that an issue may be framed to determine to whom the money should be paid. It is alleged that the plaintiff was a partner with the defendants; or if not a partner, that he lent the amount of his claim to the defendants, on an agreement that he should receive a share of the profits of their business, in lieu of interest as authorized by the Act of April 6, 1870 (P. L.

56); that he is liable as a co-partner in such business to the extent of the money so lent, and that, consequently, he cannot take it out until the other creditors have been paid; for if he does he will be liable in a suit therefor by other creditors of the business, according to *Poundstone v. Hamburger* (27 WEEKLY NOTES, 220).

We will first consider the practice on this branch of the case. It is enacted by the Act of June 16, 1836, § 87 (P. L. 777), before noticed, that in the distribution of the proceeds of sheriff's sales, if any fact connected with such distribution shall be in dispute, the Court shall, at the request in writing of any person interested, direct an issue to try the same; to which a proviso was added by the Act of April 20, 1846, § 2 (P. L. 411), that before an issue shall be directed, the applicant shall make affidavit that there are material facts in dispute, and shall set forth the nature and character thereof, upon which the Court shall determine whether such issue shall be granted.

It is sometimes urged at bar that an issue is a matter of right on filing an affidavit that there are material facts in dispute, without stating what they are, notwithstanding the Act requires the applicant to set forth the nature and character of those facts. This urgency overlooks the fact that the decisions are the other way, although there is a case which seems to be out of trim with the general rule, but which is not, as I shall presently show.

The rule was early established that "a mere naked allegation, without evidence, or against the evidence, cannot create a dispute within the meaning of the law. If it could, a party might stop the distribution whenever he chooses to make a groundless assertion." (BLACK, C. J., in *Knight's Appeal*, 19 Pa. 493.) The applicant must set out the specific facts in dispute, on which he bases his claim to an issue: *Dickerson and Haven's Appeal* (7 Pa. 255), in which Mr. Justice BELL said: "The Act of Assembly (of 1836) was not formed to enable a litigious party to demand an issue, under all circumstances, and thus take his chances before a jury, when there is nothing in the case to call for its intervention." These cases are cited and approved in *Overholt's Appeal* (12 Pa. 222); *Schertzler's Exec'ts v. Herr* (19 Id. 34); *Seip's Appeal* (26 Id. 176); *Russell v. Reed* (27 Id. 146); *Christophers v. Selden* (28 Id. 165); *Robinson et al.'s Appeal* (36 Id. 81); and the *Providence Steam and Gas Pipe Co. v. Chase* (108 Id. 319). In *Benson's Appeal* (48 Id. 159), it was said that if the issue must necessarily prove unavailing, the Court would not be bound to grant it, for the law does not require vain things; and in *Souder's Appeal* (57 Pa. 498), it was ruled that the demand may be refused, where it embraces ques-

tions of law rather than of fact, or it is manifest that the matter to be tried cannot affect the decision. *Martin's Appeal* (97 Pa. 85), and *Montgomery's Appeal* (5 Cent. Rep. 200), are to the same effect; and the general rule as above stated was re-affirmed as late as 1887 in *Irvin's Appeal* [preceding case], and again in 1889 in *Ryman's Appeal* (124 Pa. 635).

The argument that the Court must grant an issue in every case in which an averment is made that the prior judgment is without *bona fide* consideration, and was made for the purpose of hindering, delaying, and defrauding creditors, is based on the case of *Schwartz and Graff's Appeal* (21 WEEKLY NOTES, 246; A. D. 1888). A careful reading of that case will show that what was decided is, that an allegation that a judgment is fraudulent and without *bona fide* consideration, and was confessed and is being used for the purpose of hindering, delaying, and defrauding other creditors, is a sufficient averment of material facts in dispute, and that it is not necessary to state in the affidavit the means by which the want of consideration is to be proved. That is to say, the applicant is not bound to give his evidence in his affidavit. It will be noticed also that it does not appear that the allegations of the petitioner for the issue were denied, but it does appear that the creditor whose judgment was disputed, was not willing to contend in the Supreme Court, and hence the Court had nothing to do but to grant the issue as of course.

But if the plaintiff, whose judgment is attacked, denies the averments of the applicant for an issue, then depositions should be taken to be used on a further hearing of the rule, as was done in *Stanley v. Ritter* (26 WEEKLY NOTES, 188), to enable the Court to determine whether an issue shall be granted; for it seems illogical to say that the Court shall determine or adjudge a matter, and yet that it must grant an issue on the averments of the applicant, without regard to the denial of the other party, and in disregard of the evidence, and the test whether a verdict, if rendered in favor of the applicant, would be allowed to stand. If that is the meaning of the Act, the Legislature has not been happy in the choice of words to express it. That it is not I will show by reference to the foundation of those cases in which it was decided that an issue is a matter of right on filing a written request. They were based on the Act of April 14, 1827, § 2 (9 Smith's Laws, 433), which provided that in the distribution of the moneys arising from sheriff's sales, when the facts are disputed, the Court, at the request in writing of any party in interest, shall direct an issue to try the same. This was substantially re-enacted by the Act of 1836, before cited. But this positive right was modified by the Act of 1846, before

cited, which requires the applicant for an issue to set forth in his affidavit the nature and character of the facts in dispute, upon which the Court shall determine (that is, decide or adjudge) whether the issue shall be granted. It was upon these Acts of 1827 and 1836 that the decisions favoring an absolute right to an issue were rendered, most of them prior to 1846, and some since, the latter entirely overlooking the change in the law made by the Act of 1846. They are *Bichal v. Rank* (5 Watts, 140); *Trimble's Appeal* (6 Id. 133); *Reigart's Appeal* (7 W. & S. 267); *Souder's Appeal* (57 Pa. 498). The same was said in *Dormer v. Brown* (72 Id. 404), although the point in controversy and decided was that when issue has been granted, it is erroneous to strike it off after a jury has failed to agree on it.

It is sometimes said that the demand for an issue is a demand for a constitutional right. Respect for the great and learned men who have said this, forbids me from deciding otherwise; but I may be permitted to say that it seems to be a statutory, rather than a constitutional right, for it did not exist prior to the Act of 1827. Chief Justice Gibson called an issue a chancery proceeding in *Shultz's Appeal*, before cited. If there had been a Court of Equity in this State before 1836, when equity powers were conferred upon the Courts, the right to relief would have been secured by bill in that Court; and a verdict on an issue, if granted, would not have been binding on the Chancellor, who might have decreed contrary to the finding thereon; he could have disregarded the verdict as his conscience would not be bound by it (*Baker v. Williamson*, 4 Pa. 469; *Johns v. Erb*, 5 Id. 232). But under the Act of Assembly the verdict is conclusive and cannot be disregarded (*Garrison's Appeal*, 38 Pa. 531), although it may be directed by the Judge or set aside and a new trial granted (*Dormer v. Brown*, *supra*); hence it has been said that it is better not to award an issue, when the fact can be sufficiently and satisfactorily ascertained by the Court itself (*Baker v. Williamson*, 2 Pa. St. 116; *Johns v. Erb*, *supra*).

The right to a trial by jury is secured only in cases at common law, and it is generally supposed to pertain only to the main issue in dispute and preliminary to judgment, but not subsequent thereto (*Banning v. Taylor*, 24 Pa. 289). It does not pertain to matters of execution or arising therefrom, as on a claim of exemption (*Williamson v. Krumbhaar*, 132 Pa. 455; overruling *Tasker v. Sheldon*, 115 Id. 107). The Legislature may extend trial by jury to some such matters, in which case, it may, as it did in the Act of 1846, prescribe the terms on which the right may be secured, or make it subject to judicial determination whether a trial by jury may be had in any particular case.

None but judgment creditors have a right to be heard on the distribution of the proceeds of sheriff's sales. Creditors who have not obtained judgments, cannot (*Smith v. Reiff*, 20 Pa. 364; *Rudy's Appeal*, 94 Id. 338); but an assignee in bankruptcy may (*Rohrer's Appeal*, 62 Id. 498), or an assignee for the benefit of creditors (*Bartlett's Executor's Appeal*, 71 Id. 317). This is because an assignment is a grand judgment and execution. So may an attaching creditor under the Fraudulent Debtor's Act of March 17, 1869 (*Schwartz and Graff's Appeal*, 21 WEEKLY NOTES, 246).

To summarize the matter, the proper practice to obtain an issue is for the complaining creditor to file an affidavit that the attacked judgment is fraudulent and collusive, and without consideration, and that it is intended to hinder, delay, and defraud creditors. On this, the plaintiff in the attacked judgment may file an affidavit denying the averments; but if he will not, the Court should grant the issue as a matter of course. If the plaintiff files a denial, depositions should be taken, and on them the Court will determine whether the issue shall be granted, subject to an appeal, if the issue be refused, as provided by the Act of 1846. If a denial is filed and the applicant will not take depositions, the issue should be refused on the analogy of a bill and answer in equity, where the answer, if responsive, overcomes the bill, unless it is supported by evidence. This is the same as the practice on a rule to dissolve an attachment under the Act of 1869 (*Biddle v. Black*, 99 Pa. 380; *White v. Thielens*, 106 Id. 173); and in foreign attachment (*Steel v. Goodwin*, 113 Id. 288).

In the present case, the plaintiff resists the application of the petitioner, and sustains his judgment by depositions which prove that it is a *bona fide* judgment for the sum of \$2500, for which execution was issued; that he was not a partner with defendants, nor did he lend his money to them on an agreement for a share of the profits in lieu of interest; but that he lent his money to the defendants at six per cent. interest, with an agreement that he should have the privilege of becoming a partner on or after April 1, 1891, if his health would permit. Both the defendants admit that the plaintiff was to receive legal interest, and one of them admits that a partnership was not mentioned, that is, formed, when the money was lent; but that it was to commence at the end of a year or after a year's trial. As the money was lent in October, 1890, and the defendants failed in January, 1891, the trial has not been satisfactory, and the partnership has not been formed. On this evidence, it would be unjust to require that the small amount, \$526, produced by the sheriff's sale, should be paid into Court, and consumed in a fruitless effort to

prove the plaintiff to have been that which we are convinced that he was not, either a partner or a lender of his money at the risk of the business.

Allegations that judgments are collusive and fraudulent are made with great facility. Being a matter of opinion, the conscience of the deponent is not subjected to any great strain in making the allegation. A disappointed creditor is easily convinced that he has been defrauded, and will readily depose to that effect. But when his adversary comes with his array of facts, it is the duty of the Court to give effect to them, and determine accordingly.

We see no reason to order the fund in this case to be paid into court, and therefore discharge the rules.

J. P. C.

[See two preceding cases.]

Orphans' Court.

April 22, 1891.

Lombaert's Estate.

Wills—Requisites of—Need not be of testamentary form—Signed checks fastened to stub of check-book, on which stub is explanatory writing, unsigned, admitted to probate as codicil.

Sur certificate from register of wills of Philadelphia County.

Sarah Lombaert died January 11, 1891, leaving a will and codicil thereto, both dated April 29, 1885, which were duly admitted to probate. Subsequent to testatrix's death her check-book was found to contain upon one sheet thereof the following:—

<p>No. 280. January 8, 1890. Drawn to the order of Sallie E. Lombaert being exceeding \$1 at the time these checks were drawn— if I get well they may not get the money, if I do not.</p>	<p>No. 280. Philadelphia, January 8, 1890. The Fidelity Insurance, Trust and Safe Deposit Co. Pay to the order of Sallie E. Lombaert or Bearer One thousand Dollars—$\frac{x}{100}$ Dollars. \$1000.00. SARAH LOMBAERT.</p>
<p>No. 281. I will be most glad it will come into their possession this matter has given me much anxiety for fear I would not get it fixed as I wanted it to be.</p>	<p>No. 281. Philadelphia, January 8th, 1890. The Fidelity Insurance, Trust and Safe Deposit Co. Pay to the order of Bessie E. Lombaert or Bearer One thousand Dollars—$\frac{x}{100}$ Dollars. \$1000.00. SARAH LOMBAERT.</p>
<p>No. 282.</p>	<p>No. 282. Philadelphia, January 8, 1890. The Fidelity Insurance, Trust and Safe Deposit Co. Pay to the order of Emma A. Holden or Bearer One thousand Dollars—$\frac{x}{100}$ Dollars. \$1000.00. SARAH LOMBAERT.</p>

These checks, with the annexed stubs composing one sheet, were submitted for probate as a codicil to the will of testatrix.

The lawful and continuous custody of the check book, from the time decedent last had it in her possession up to the time of submission thereof for probate, the delivery of the checks and testatrix's verbal direction to have them handed to the respective payees, and the handwriting upon both checks and stub of decedent, were all duly proved.

Upon request of counsel, according to the Act of March 15, 1832, § 25 (P. L. 135) (*vide* Commonwealth *ex rel. v.* Register, 10 Phila. 419; Fow's Estate, 27 WEEKLY NOTES, 373), the register certified the check-book and the testimony to the Orphans' Court for its decision as a "difficult or disputable matter."

Joseph De F. Junkin, for proponents.

Testatrix intended her daughters to receive \$1000 in addition to benefits under her will; *i. e.*, her intention was testamentary; the stub shows this.

Appeal of Waynesburg College, 1 Amer. 130, 133.

Bartholomew *v.* Henley, 3 Phillimore, 317.

Jones *v.* Nicholay, 2 Robertson, 288.

Gladstone *v.* Tempest, 2 Curteis, 650.

The only requisites of a will in Pennsylvania are that it be in writing and signed at the end thereof.

Act of April 8, 1833, § 6.

Taking the paper as a whole, the end is at the bottom of the last check. The intention of the writer of the checks was to write into each check in thought, the stub entry; and it is not straining the position to begin the reading of the page at the upper left hand corner, and read down the stub column, separated from the checks by a perforated line, and then continue the reading down the check column, thus making one intelligible and homogeneous whole of the entire page. It then fulfils every requisite of a will, in that it is testamentary in phraseology, and signed at the end thereof.

The English case of Bartholomew *v.* Henley (*supra*), is almost identical with this one as to facts, excepting that the facts here are much stronger, in that the entries were made and the checks drawn within three days of death; while in that case one of the checks was made a year or more prior to death.

In the other two English cases (Jones *v.* Nicholay, and Gladstone *v.* Tempest, *supra*) no marginal entries appear at all, and the testamentary disposition is inferred by the Prerogative Court from extraneous facts.

George Junkin, for the Fidelity Insurance, Trust, and Safe Deposit Company, executors under will, *contra*.

May 2, 1891. PENROSE, J. The entries by the testatrix in her check-book contain all the essentials of a will. They clearly express her wishes with regard to the money to be paid to her daughters after her death; and treating the checks, as we must do, as an integral part of the entire act—the whole contained on a single page and written, continuously, with her own hand—we have a literal compliance with the statutory requirement that it shall be signed at the end thereof. The place in which the writing is found is, of course, immaterial, and its informality is of no importance whatever. "It is not necessary that an instrument should be of a testamentary form in order to operate as a will; indeed it may be considered a settled point that the form of a paper does not affect its title to probate, provided it is the intention of the deceased that it should operate after his death." (Williams on Executors, 139, citing very many authorities. See *Habergham v. Vincent*, 2 Ves. 231; *Jones v. Nicholay*, 2 Robertson, 288; *Doe v. Cross*, 8 Q. B. 714; *Wikoff's Appeal*, 3 Harris, 281; *Frew v. Clark*, 30 Smith, 170; *Wilson v. Van Leer*, 7 Outerb. 600.)

The testamentary purpose is much more obvious than it was in *Masterman v. Maberly* (2 Hagg. 235) or *Bartholomew v. Henley* (3 Phillim. 317); and there is no separation of the parts of the instrument, as there was in *Fosselman v. Elder* (2 Outerb. 159), where it was held that the fact that the identification of the legatee was found only in the address on the envelope inclosing the paper signed by the testatrix did not affect its validity as a will.

The principle of *Bond v. Bunting* (28 Smith, 210), is one of universal application: "It is certainly the tendency of all modern authorities to maintain the general doctrine, which may indeed be stated as a formula, that wherever a party has the power to do a thing (statutory provisions being out of the way), and means to do it, the instrument he employs shall be so construed as to give effect to his intentions. It is but the application of the old maxim, *interpretatio chartarum benigne facienda est ut res magis valeat quam pereat—quando res non valet ut ago, valeat quantum valere potest*."

The register is directed to admit to probate as a codicil to the will of the testatrix the entries referred to in the testimony accompanying his certificate.

H. D.

WEEKLY NOTES OF CASES.

VOL. XXVIII.] FRIDAY, MAY 22, 1891. [No. 5.]

Supreme Court.

July '90, 103; Jan. 91, 51, 243, 262. Jan. 22, 1891.

Van Haagen Soap Mfg Co.'s Estate.**Third National Bank's Appeal.****Rutschman Brothers' Appeal.****Maguire & Sons' Appeal.****Fourth Street National Bank's Appeal.**

Evidence—Money loaned to corporation upon security of note given by officers thereof—Presumption in such cases—Parol evidence admissible to show that note was not taken in satisfaction.

Where the note of a third party is given to the lender of money contemporaneously with the loan, the presumption is that the note was discounted, or given as a consideration, and not as security for the money. This presumption may be rebutted, however, by showing the actual intent of the parties to have been otherwise.

Maffet & Rhoads v. Leuckel (93 Pa. 468) followed.

If a partner borrows a sum of money, and gives his own security for it, it does not become a partnership debt merely because it is applied to partnership purposes.

At the audit of the account of the assignee for the benefit of creditors of the V. Company, claims were presented by the S. Bank and by L. for money loaned to the company. The S. Bank held the note of V., the manager of the company, for the amount of its loan indorsed by H., the president, and L. held the note of H. for the amount of his loan, both notes being given at the time the loans were made. The claims were objected to upon the ground that the loans were made to V. and H. respectively, and not to the company. It appeared that both loans were solicited by V., to provide means for the purchase of stock and materials for the company, and that all parties so understood the transaction. The money was paid to H., who owned nearly all of the stock of the company, the funds of which were supplied from, and deposited in his private account book. V. and H. had power to bind the company for borrowed money, and these loans were used by the company:

Held, that the evidence was sufficient to show that the transaction was not the discount of notes, but a loan of money to the company, which was liable therefor, the notes being in the nature of collateral security merely.

Appeals of the Third National Bank of Philadelphia, of Francis S. Rutschman and John A. Rutschman, trading as Rutschman Brothers, of James Maguire and Charles A. Maguire, trading

as Daniel Maguire & Sons, and of the Fourth Street National Bank, from the decree of the Common Pleas No. 1 of Philadelphia County, sustaining exceptions to the report of an Auditor making distribution of the fund in the hands of the assignee of the Van Haagen Soap Manufacturing Company.

Before the Auditor (William M. Smith, Esq.) appointed to make distribution of the fund in the hands of John H. Connellan, assignee for the benefit of creditors of the Van Haagen Soap Manufacturing Company, a claim of \$5000 for money loaned to the company was made by the National Security Bank, and a similar claim for a like amount by William H. Lambert. The Auditor disallowed both claims, whereupon claimants excepted. The exceptions were sustained in both cases, ALLISON, P. J., delivering the opinion of the Court, in which the facts are fully stated, as follows:—

"The Auditor finds that the Van Haagen Soap Manufacturing Company was incorporated on the 20th of June, 1884, with a capital stock of \$50,000, divided into one thousand shares of the par value of fifty dollars each. The Auditor states that it appears from the testimony of John Hunter, that Van Haagen was the promoter of the enterprise, and it was agreed that the company was to be organized on the basis of \$50,000 of capital stock, but that Hunter, to insure the success of the company, agreed to advance cash to the amount of \$100,000. That in point of fact Hunter appears to have been the sole contributor, and to have furnished all the working capital.

"The company carried on business for several years, then failed, and made an assignment for the benefit of its creditors to John H. Connellan. It is on exceptions to the report of the Auditor, appointed to audit, settle, and adjust the account of the assignee, that the matter has come before the Court.

"The exceptants are the National Security Bank of Philadelphia and William H. Lambert. Each claim is for a sum of \$5000, which, they severally assert, were loans made to the company, at the instance and request of Van Haagen and Hunter, on behalf of the company; that the money was borrowed with a full understanding on the part of both the borrower and the lender that it was a raising of money in this way with which the corporation could purchase stock, and thus be enabled to carry on its business, which it in all probability would not have been able to do if these loans had not been procured.

"The loan by the bank, it is claimed, was secured by a note drawn by Van Haagen to the order of John Hunter, and by him indorsed. And the loan by Lambert, it is also claimed, was secured by a note drawn by John Hunter to his, Lambert's, order.

"Both of these notes were renewed from time to time until shortly before the company failed, and it is quite clear, as shown by the testimony, that each of the loans was negotiated by Van Haagen, and at his request and solicitation, whose sole interest in the company was the situation which he occupied as superintendent or manager of the business of the corporation.

"Both of these claims were objected to on the ground that they were loans to Van Haagen and Hunter individually and not to the company, and this view of the contention having been adopted by the Auditor, they were rejected as not entitled to share in the distribution of the fund in the hands of the assignee.

"The rejection of these claims is mainly rested on the well-established legal principle that where the note of a third party is taken for a contemporaneous or pre-existing debt, the presumption is that the transaction on the part of the person receiving the note is a merging of the debt into the note, and to the note recourse must be had for recovery. This, however, is a statement of a legal proposition without its proper qualification, which is that this presumption may be rebutted by showing the actual intention of the parties to have been otherwise. This principle is recognized in *Mason v. Wickersham* (4 W. & S. 100), in which the question was whether a note given by one partner, after dissolution, for a debt of the firm, is or is not an extinguishment of the original debt so as to discharge the other partner. *Prima facie* it is not, but it would have that effect if such was the agreement when the note was given. The Court say: 'The time was when the act done, determined the legal effect of what was done in all cases and under all circumstances. Courts have long since decided that the intention with which an act was done and accepted, the circumstances with which the doing was attended, the consideration for doing it, are what give effect to it and determine its legal effect and character.' This principle is clearly and tersely stated by TILGHMAN, Chief Justice, in the case of *Leas v. James* (10 S. & R. 314), in which he says: 'The principal dispute between the parties was whether the bond was received by the plaintiff as an absolute payment or only as collateral security. . . . It was open to the plaintiff to prove by parol evidence on what terms it was accepted.'

"The cases of *Mason v. Wickersham* (*supra*) and *Tams v. Hittner* (9 Barr, 441-8) are cited and relied on by the referee in *Maffet & Rhoads v. Leuckel* (12 Norris, 468), in support of his ruling upon the case before him. A. loaned to B. a certain amount, taking his individual note. B. stated at the time that the note was given that the money was to be expended for the purposes of a firm of which he was a partner, and it was

so expended. The referee held that A. could show these facts, and that he relied upon the firm for repayment, and thereby fix the liability of the firm. This decision of the referee was affirmed by the Supreme Court, the Court saying that there was nothing in the form of the note to preclude the plaintiff from showing that it was given for a partnership debt; that it was not accepted in satisfaction, but merely as collateral security.

"This is what the exceptants contend they have established in this case by the testimony which was before the Auditor, and that, instead of giving effect to this testimony, the Auditor has to a great extent disregarded the proofs as to the facts connected with the creation of the two loans, and has held that the loans were not made to the company for the uses and purposes of the corporation; that such was not the understanding of the parties at the time, and that they were individual transactions between the bank and Lambert and John Hunter.

"The testimony clearly establishes that when each of these loans was made the company was greatly in need of funds to enable it to carry on its business; that there was reason to fear that, if money was not speedily procured with which to purchase materials, the business could not be much longer continued. This is shown beyond contradiction by the testimony of Van Haagen, Hunter, Maguire, and Lambert.

"Van Haagen was dependent on his salary for his support; had no means of his own, and it was important for him that the factory should not stop. Hunter, who was the only person of financial ability connected with the concern, showed by his own testimony, and it also appears by the testimony of Van Haagen, that there was a constant demand on him for money, which he found it difficult to supply; Hunter had even authorized Van Haagen to borrow money upon his 'big farm,' as it is called. Hunter says: 'Practically I owned all the stock of the corporation; I was advancing money to it myself as stockholder and practical owner; it was needing money for its business; it was very much in need of money; always needing money; I don't remember especially that it was short of stock and material; it was a chronic complaint; Mr. Van Haagen had often urged upon me the importance of getting money to meet these demands.' This is most strongly confirmatory of Van Haagen's testimony in relation to his interviews with Hunter, preliminary to the obtaining each of these two loans, and that it was to meet an urgent necessity that he obtained the consent of Hunter to borrow each of these amounts for the use of the factory. The Auditor has not marshalled the testimony with any degree of fullness or particularity. With reference to the claim of

Lambert, there is a general but cursory allusion to it. The claim of the bank is dismissed with the remark that the testimony as to this claim varied slightly in some respects from that produced in the Lambert case, but the difference was not such as to lead the mind of the Auditor to a conclusion other than that arrived at in the case of Lambert.

"On page 9, etc., of the testimony, will be found what Van Haagen said when examined as a witness in support of the claim of the bank. He says: 'In the early part of 1885 the company was sadly in need of money; I called on the president of the National Security Bank, stating the case of the company to him; asked him whether he thought his bank would be willing to discount a note of \$5000 for the company; he said they would; to send him my note with Mr. Hunter's indorsement; the note was sent and discounted, and Hunter sent Mr. Maguire, who was the secretary and treasurer of the corporation, to receive the proceeds of the note.' He says that before he called on the president of the bank, Mr. Gelbach, he called on Hunter, and got his consent to the transaction. Afterwards he said he thought he had spoken to Mr. Gelbach first. That this loan was solicited for neither his own nor for Mr. Hunter's private purposes; simply for the welfare of the company.

"Now, here is testimony of a witness whose integrity has in no way been impeached or questioned, who was the chief actor in the borrowing of this money, and in the most positive manner testifies that this was a loan to the company, for the use of the company, and that it was not for the individual use of himself or Hunter, who were the parties to the note.

"The testimony of John Hunter, when called as a witness in support of this claim of the bank, although evasive, and persistently so, is, in our judgment, most strongly corroborative of Van Haagen's testimony, in relation to this loan having been obtained for the company with the knowledge and consent of Hunter. To the perfectly plain question, varied in form seven or eight times, as to whether Van Haagen had not called on him in June, 1885, stating the need of the company to obtain tallow and other materials, and asked witness's consent to an endeavor on his part to obtain a loan of \$5000 from the bank with which to purchase materials, an answer, yes or no, was steadily refused. In each instance the reply was not responsive to the question, but wholly irrelevant and irresponsive to the inquiry. To the further question, repeated in substance five times, whether, after the failure of the company, he had not said to Mr. Van Haagen and to John H. Connellan that the money received from the bank was raised to buy materials for the soap factory, and that it ought to have been made a

preferred creditor, as this was borrowed money, there was the like refusal to answer yes or no, or, indeed, to make any direct answers.

There is, we think, but one proper inference to be drawn from this refusal to make proper answers to the questions propounded, and that is, that if the witness had answered according to his knowledge he would have given in each instance an affirmative reply, as the special object of the inquiries was to elicit an affirmative response; but, for a reason not disclosed, he refused to make any other than evasive statements, which had no direct bearing on the several matters to which the questions pointed. The matters inquired about and the form of the questions were as plain and easily understood as they well could be, and called for no more than yes or no, but such an answer the witness would not give.

"This refusal makes applicable the principle which adopts every presumption against the person who withholds evidence by which the nature of the case would be made manifest. Hunter would not make proper answers of that which was within his knowledge, one way or the other. His refusal is therefore to be taken as a withholding of evidence, which, if it had been given, would have favored the contention of the bank.

"There is the further testimony of George W. Cox, the cashier of the bank, which is that in February, 1887, John H. Maguire, the salaried treasurer of the company, presented the note for the last renewal. In answer to the question how the soap company were getting on he replied: 'They are doing very well and won't want the note renewed again; this is the last time.' And to the question, 'Are you positive he said the company would not require another renewal?' or 'That the parties would not require another renewal?' he replied he used the word company and not the parties. He did not use the word parties.

"Under examination by the Auditor he is reported as saying, without objection, that the president of the bank had said to him that he had loaned Van Haagen \$5000 for the benefit of the company; that Hunter and Van Haagen were the company.

"This is all the testimony which has any material bearing on the contract of loan made by the bank, for what purpose, for whose benefit, and under what circumstances it was made, except the testimony of John Hunter. Mr. Gelbach, at the time the testimony was taken, was dead, and it is not claimed that Maguire had any knowledge on the subject.

"Hunter says this transaction was made by Van Haagen on his note at four months, to the order of John Hunter, and by him indorsed; the proceeds of both transactions went into my account, to me personally. Upon this statement of

John Hunter, considered in connection with the note and the legal effect to be given to it, the Auditor mainly relies in reaching the conclusion that the claim of the bank must be excluded from the distribution. But this statement by Hunter, though strictly in accordance with the facts as they actually occurred, does not imply, nor does he say, that the loan was not to the company; that it was not made to meet its then urgent exigencies, and that his indorsement of the note was not given to the bank to secure the debt contracted for the use and benefit of the company, as testified to by Van Haagen when he swore that he called on Mr. Gelbach, the president of the bank, stating the case of the company to him, and then asked him whether he thought his bank would be willing to discount a note for \$5000 for the company, and that he said they would—to send him my note with Hunter's indorsement. This is so, because John Hunter was in fact the company. He owned all its capital stock; had furnished every dollar of money that was put into the enterprise. When he said the proceeds of the note went into his individual account, to him personally, he said what was strictly true. But John Hunter was at the time not only the president of the company; he was its *acting* treasurer; the money of the company was paid to him and by him deposited in his individual bank account, and out of that account all money was drawn which, up to this time, June, 1885, was paid by Hunter to the company.

"If, however, the loan, by the consent and understanding of all the parties to the transaction, was a loan to the company and for its use, it could not change the character of the contract—that when the money was received from the bank it was handed to John Hunter and was by him placed in his individual account. That, of course, gave him the control of the money, against which he could check as he pleased; but as between himself and the company it was the money of the company, which, both in morals and in law, he would be bound to hold for the objects for which it was obtained. His answer, therefore, that it was placed to his personal credit, or went to him personally, does not change the real character of the transaction in any way or in any degree.

"The testimony shows that for a year after the company went into operation it had no bank account; that when money was received it was taken to Hunter to deposit in his individual account; the proceeds of the notes of Van Haagen and Lambert were given to him under the circumstances stated above. The company had a clerk and treasurer, John H. Maguire, a nephew of Hunter, but his duties as treasurer, covering the time of this loan, were to pay money re-

ceived by him to Hunter and obtain money from Hunter with which to pay the running expenses of the company.

"The statement of Hunter, therefore, that the proceeds of the note given to the bank went into his individual account has no bearing on the vital question, Was this a loan made to the company, and for the use and benefit of the business, or was it a personal and independent contract with John Hunter, and was his indorsement of the note of Van Haagen for his benefit? That the note with Hunter's indorsement was taken by the bank for its greater security need not be questioned, but if the contract was with and for the company, the note would stand in the transaction as a collateral security for the debt of the company.

"In just what light Hunter regarded both the loan of the bank, and the loan of Lambert, is plainly apparent. He says that after the failure he was willing that both these claims should be allowed to share in the distribution. The reason given does not satisfy the requirements of reason or the rightful apportionment of the fund among the creditors. It could matter nothing what Van Haagen desired; if these were not the debts of the company, how could any one consent that the money which belonged to one set of creditors should be taken from them and given to others who had no lawful claim? Yet this, upon his present statement that the debts were individual debts, is just what John Hunter says he would have allowed to have been done, when he says that he would have made no objection to their allowance.

"The Auditor has not given to the testimony, in so far as it relates to the claim of the bank, its due weight; nor, in view of what that testimony establishes, has he properly applied the law to the facts, which, in our opinion, are established by the proofs, namely, that this was a loan to the company, made solely for the benefit of the company, and that the money having been passed over into the hands of the acting treasurer, the presumption is that it was used for the purposes for which it was procured, the business having been carried on for several years thereafter. And also that the note given to the bank, drawn by Van Haagen to Hunter's order and by him indorsed, was given as collateral to the loan and to secure its return to the bank.

"We are equally clear in our judgment that for reasons substantially similar to those which we have stated, as applicable to the National Security Bank, we are unable to agree with the conclusions of the Auditor in relation to the claim of William H. Lambert. In one respect the claim of Lambert is more strongly supported by the testimony than is the claim of the bank. Both of the witnesses to the circumstances under

which the loan was made have testified that it was a loan to the company. Van Haagen, who was Lambert's father-in-law, made known to Lambert that the company was short of stock; that unless money could be raised they would probably be obliged to shut down. Lambert then, according to his testimony, offered to loan them \$5000. He says: 'I told Van Haagen that I would loan the company the money.'

"Van Haagen says that, having tried to borrow money in several places, he presented the matter to Mr. Lambert and asked him if he could help by loaning us some money; to which Lambert replied he had \$5000 on hand which he could loan. Lambert says: 'Before I saw Mr. Hunter about this loan I told Van Haagen that I would loan the company the money.'

"There was a subsequent interview between Van Haagen, Lambert, and Hunter, at the tax office, when the matter was definitely agreed on, Hunter agreeing to give his note to Lambert for the amount. Hunter's testimony shows that at this interview, which was the consummation of the agreement previously entered into between Lambert and Van Haagen to borrow for and to loan the \$5000 to the company, that he, Hunter, proposed to Lambert that he should take Van Haagen's note, or the note of the company, which Lambert refused to do, Hunter finally giving to Lambert the assurance that he was abundantly able to make the loan secure to him, under any circumstances, out of his individual estate. The money was paid to Maguire, the treasurer of the company.

"If this was a loan to Hunter individually, and not to the company, it is difficult to find a reason for Hunter's proposal that the note of the company should be accepted by Lambert in return for the individual debt of Hunter. This, of itself, would seem almost, if not altogether, conclusive of the understanding which Hunter at the time had of the nature and character of the contract of the loan previously agreed on by Lambert and Van Haagen.

"This money is shown by letter of Van Haagen to Lambert, of May 14, 1885, to have been paid to Maguire, who was introduced as 'our secretary and treasurer,' and was as such sent to receive Lambert's check for the amount which was given to him, and which Maguire says he gave to Hunter.

"The testimony of Lambert and Van Haagen is properly subject to the criticism that the former is an interested witness, and the latter may be regarded as having a bias in Lambert's favor. Yet this does not more than require that their testimony should be carefully scrutinized; but if not contradicted by other testimony in the cause and no question raised as to their veracity, the fact of interest and relationship is not a sufficient justi-

fication for rejecting what they have sworn to. They stand in the cause unimpeached and uncontradicted.

"For reasons already stated, John Hunter's affirmative answer to the leading question: It was an individual transaction between yourself and William H. Lambert, was it not? does not contradict or tend to contradict the positive oaths of Lambert and Van Haagen, that the money was loaned to the company.

"It is true, Maguire says that Lambert did not loan the company \$5000; but this is entitled to no consideration, he having no knowledge of what took place at the interviews between Van Haagen and Lambert, or the subsequent interview between Hunter and Lambert and Van Haagen at the tax office.

"In addition to what we have stated is the testimony of Hunter that this money ultimately went into the soap works company.

"But it would be a waste of time and labor to elaborate the question in relation to this claim further. We have said enough to show on what ground the report of the Auditor, in our judgment, cannot be sustained, being contrary to the testimony. And if there was need for further statement of our views in relation to the claim of William H. Lambert, it is sufficient to say that we find ourselves entirely in accord with the views of the counsel representing this demand, that to go into more particular discussion of it would be little different from a repetition of what they have so clearly stated in their printed argument in support of this claim.

"The exceptions to the rejection of each of these claims are sustained, and it is ordered that the distribution reported by the Auditor be so amended as to allow a *pro rata* dividend of the fund in the hands of the assignee to the National Security Bank and to William H. Lambert, excepting creditors."

Whereupon the Third National Bank, Rutschman Brothers, Daniel Maguire & Sons, and the Fourth Street National Bank, creditors of the company, appealed, assigning the findings and decree of the Court for error.

Theodore F. Jenkins, for Third National Bank; *E. Cooper Shapley*, for Rutschman Brothers; (*George Northrop*, for James Maguire *et al.*; *James F. Bullitt* and *Richard C. Dale*, for Fourth Street National Bank, with them), appellants.

The facts found by an Auditor are conclusive unless clear mistake be shown.

Bedell's Appeal, 87 Pa. 510.

If the facts found by the Auditor in this case are correct, there is no doubt as to the law.

If there is no antecedent debt, and A. carries a bill to B. to be discounted, and B. does not take A.'s name upon the bill, if it is dishonored,

there is no demand, for there was no relation between the parties except that transaction, and the circumstance of not taking the name upon the bill is evidence of a purchase of the bill.

Ex parte Blackburne, 10 Vesey, 204.

If money is borrowed or goods bought or any other contract is made by one partner upon his own exclusive credit, he alone is liable therefor, and the partnership, although the money, property, or other contract is for their proper use and benefit, or is applied thereto, will in no manner be liable therefor; and where there is no antecedent debt, but the bond of a partner is taken at the time the money is loaned to the partnership, and as the consideration for loaning the money, it can hardly be treated as a collateral security. It must be considered as all one transaction, and the bond is the only security contemplated, unless perhaps there were strong and positive evidence to show an express agreement to the contrary by all parties.

North Penna. Coal Co.'s Appeal, 45 Pa. 181, 185.

If a partner borrows a sum of money and gives his own security for it, it does not become a partnership debt by being applied to partnership purposes.

North Penna. Coal Co.'s Appeal, *supra*.

Bond v. Aitkin, 6 W. & S. 165.

Graeff v. Hitchman, 5 Watts, 454.

It is entirely competent for one partner to borrow money, or to buy goods, or to enter into contracts on his sole and exclusive credit with third persons; and, on the other hand, it is equally competent for them to rely on that exclusive credit, and either to refuse to contract with the firm, or to exonerate the firm from all liability upon any contract, which would otherwise bind the firm as being for their account and benefit. For the maxim of the common law here applies with its full force, *modus et conventio vincunt legem*, and either party may at his pleasure waive or relinquish his rights to which he would otherwise be entitled.

Story on Part., §§ 134, 136.

Edward H. Weil, for National Security Bank; *Henry N. Paul, Jr.* (*Samuel S. Hollingsworth* with him), for Wm. H. Lambert, appellees.

The general rule as to the receipt of a note or check, either of the debtor or a third party for a debt, is unquestionably that it does not operate as payment or satisfaction unless expressly so agreed. In case the note or check is disallowed the original indebtedness revives.

Sheehy v. Manderville, 6 Cranch, 253, 264.

Hart v. Boller, 15 S. & R. 162.

Davis v. Desauque, 5 Wh. 530.

Weakly v. Bell, 9 Watts, 280.

Mason v. Wickersham, 4 W. & S. 100.

Leas et al. v. James, 10 S. & R. 307, 315.

Tams v. Hitner, 9 Barr, 441, 448.

McIntyre v. Kennedy et al., 5 Case, 448.

Tyson v. Pollock, 1 P. & W. 376.

Patton v. Ash, 7 S. & R. 116.

Stone v. Miller, 4 Harris, 450.

And even a higher security for a debt given by different parties, or for a different sum, in the absence of proof of the intention of the parties, will be presumed to have been accepted as collateral security, and not in satisfaction of the debt.

Jones v. Johnson, 3 W. & S. 276.

Eby v. Eby's Assignee, 5 Barr, 440.

Eby v. Hoopes, 1 Pennypacker, 175.

Some cases have recognized an exception to this rule when the note of a *third party* is taken for a *contemporaneous* debt, holding that a presumption arises that the note was taken in payment of the debt, and that the debt was merged into the note; the idea being that when goods are sold and a third party's note given undorsed, it is presumably a barter or exchange of the goods for the note.

This, however, is only a presumption. It may be rebutted by showing the actual intention of the parties to have been otherwise. In other words, by showing that it was intended that the primary debt should remain, and that the note was only given as an additional security for the same.

Rew v. Barber, 3 Cow. 279.

Torry v. Hadley, 27 Barb. 196.

Gordon v. Price, 10 Ired. Law R. 388.

Youngs v. Stahllein, 34 N. Y. 258, 265.

Bond v. Aitkin, 6 W. & S. 165, 168.

Bayard v. Shunk, 1 Id. 92, 95.

Many cases, however, are to the effect that no such distinction as to the presumption of payment exists.

Johnson v. Weed, 9 Johns. 310.

Porter v. Talcott, 1 Cowen, 359, 383.

Munroe v. Hoff, 5 Denio, 362.

The authorities establish the following propositions:—

(1) The question of whether a note is given as collateral security or in payment is in all cases a question of *intention*.

(2) In the absence of all evidence of intention the presumption always is that the note is given as collateral security rather than in payment, except, perhaps, in the case of a note of a third party given for a contemporaneous debt. But this exception is exceedingly doubtful under the latest authorities, and no good reason can be given for its existence.

(3) In cases which recognize the supposed exception, the note of an agent is not the note of a third party, such as to bring a case within the exception.

Maffet & Rhoads v. Leuckel, 93 Pa. 468.

APPEAL OF THIRD NATIONAL BANK.

April 6, 1891. CLARK, J. The controversy in this case arises upon the distribution of the assets of the Van Haagen Soap Manufacturing Company in the hands of John H. Connellan, assignee for creditors, in the Common Pleas No. 1, of Philadelphia. At the hearing before the

Auditor, the National Security Bank of Philadelphia presented a claim for \$5000, the amount of a loan alleged to have been made to the company in June, 1885, for which the bank, at the time of the loan, took the note of Anthony Van Haagen, payable to the order of John Hunter, and by him indorsed. William H. Lambert also presented a claim for \$5000, a loan alleged to have been made on the 15th of May, 1885, for which he took the note of John Hunter. Both of these notes were from time to time renewed until February, 1887, the interest thereon being paid by John Hunter. Both claims were objected to on the ground that they were loans not to the Van Haagen Soap Co., but to Anthony Van Haagen and John Hunter respectively, and that there was no liability on part of the soap company to pay them.

The appellees' contention, however, is that the respective loans were, in fact, negotiated for and in behalf of the company, and although the notes of Van Haagen and Hunter were, for supposed prudential reasons, taken as security for payment thereof, the company actually incurred the debt and is liable therefor, and that the claims should therefore be allowed in this distribution.

The Auditor, apparently, determined the question of the company's liability upon the fact that upon neither of the notes did the name of the Van Haagen Soap Manufacturing Company appear, either as maker, indorser, or otherwise. He was of opinion, therefore, "that the relation of debtor and creditor was not created and at no time existed between these claimants and the soap company." Referring to the Lambert claim he says, in substance, there was some testimony that the money was wanted for the soap company; but as the company was known to be in a not very promising state he could readily understand why, although having a friendly feeling for the company, Lambert would see to it that the person to whom he advanced the money would be able to repay it when it became due. This, he thinks, Lambert did. "At the date of these transactions," he says, "Mr. John Hunter's name and credit in the commercial world was without blemish. He occupied the position of receiver of taxes of Philadelphia, was in receipt of a large annual salary, and was otherwise supposed to be a man of great influence and large wealth. It is very certain that at the time indicated he had not the slightest premonition of the financial and family calamity by which he was subsequently overwhelmed. It is quite natural, therefore, that individuals and banks could be found who would be willing to lend their money upon the faith and credit of John Hunter's paper whilst they would be unwilling to advance it to a corporation which was admittedly hanging

on the ragged edge of a stoppage of its operations. . . . A man who lends his money to another may or may not approve of the use to which his debtor intends to devote the money, but he has the right to say before he parts with the cash, and he generally does say, upon what terms and on what security he will make the loan. When he stipulates and exacts terms and security clearly and distinctly expressed in writing, it would be taking great liberty with him and his contract to say that he did not mean what he had caused to be written but he meant something else of an entirely different character." This is substantially the view taken by the Auditor. He fails to find, in any explicit form, what is the controlling fact in the case; whether the loan of the money in each case was in fact to the company or to the parties on the note—that is to say, whether the notes were received as a consideration for the money or as a security merely.

It is undoubtedly true if, in June, 1885, Hunter had taken the note of Van Haagen to the bank and there had it discounted, the proceeds passing to his individual credit, without more the bank would have been obliged to rely upon the parties to the note for payment; or, as stated in *Ex parte Blackburne* (10 Vesey, 204), cited by the appellants, "if there is no antecedent debt, and A. carries a bill to B. to be discounted, and B. does not take A.'s name upon the bill, if it is dishonored there is no demand, for there was no relation between the parties except that transaction, and the circumstance of not taking the name upon the bill is evidence of a purchase of the bill." It is true, and the appellants contend, that an analogous principle should prevail here, that if a partner borrows a sum of money and gives his own security for it, it does not become a partnership debt merely because it is applied to partnership purposes. (*Graeff v. Hitchman*, 5 Watts, 454.) "It is entirely competent for one partner to borrow money or to buy goods or to enter into contracts on his sole and exclusive credit with third persons; and, on the other hand, it is equally competent for them to rely on that exclusive credit and either to refuse to contract with the firm or to exonerate the firm from all liability upon any contract which would otherwise bind the firm as being for their account or benefit." (*Story Part. 134-6*.) It may be also, as was held in *Bond v. Aitkin* (6 W. & S. 165) and *North Penna. Coal Co.'s Appeal* (45 Pa. 181), that when there is no antecedent debt and the partner executes his bond, which is a security of a higher nature, as a consideration for money loaned, it would require stronger proof to establish an express agreement by parol that the partnership was nevertheless to be held for the debt.

Similar principles perhaps apply in certain cases to companies or corporations. "It may

therefore be taken to be established," says Lindley on Partnership, 364, "that a partnership or company not liable on a contract when entered into, does not become liable upon it by reason of having benefited by it; and further, that a company or partnership which has benefited by a contract not binding on it, is not to be deemed to have thereby ratified that contract, nor to have incurred an obligation *quasi ex contractu*, similar to that which would have been incurred if the contract had been binding on the firm or company in the first instance."

As the giving of the note was in this case contemporaneous with the creation of the debt, the presumption, we think, was, that the note was discounted, or that it was given as a consideration, and not as a security for the money. But this is only a presumption of fact, and may be rebutted, by showing the actual intent of the parties to have been otherwise. It is not disputed that Van Haagen and Hunter had the power to bind the company for borrowed money; it was competent, therefore, for the National Security Bank to show that the money was, in fact, loaned to the company for the company's use; that the transaction was not the discount of a note, but a loan of money to the company, the note being in the nature of a collateral security for the payment thereof (*Maffet & Rhoads v. Leuckel*, 93 Pa. 468). In the case cited the facts found by the referee were as follows:—

Maffet & Rhoads, the defendants, during the year 1866 were partners, engaged in building a section of the Lehigh and Susquehanna Railroad. Rhoads applied to the plaintiff, Leuckel, for \$200, representing that he wished the same for the purpose of paying the men in the defendants' employ, and thereupon the said amount was advanced by the plaintiff, and the sum was used by Rhoads for the purpose mentioned, he giving the plaintiff his own individual note for the amount. Suit was brought, not upon the note, but for the recovery of the money advanced, and judgment was entered for the plaintiff. When the cause came here this Court, in a *per curiam*, said: "There was nothing in the form of the note produced in evidence to preclude the plaintiff from showing that it was given for a partnership debt, that it was not accepted in satisfaction, but merely as collateral security. It matters not that the making of the note was contemporaneous with the partnership debt. On the facts found by the referee, we are of the opinion that the judgment was right."

There can be no doubt but that the money in both cases at bar was borrowed for the use of the company. Both loans were solicited in the first instance by Van Haagen, to provide means for the purchase of stock and materials for the company. It is of no consequence that the money

was put to the credit of John Hunter, for John Hunter was the company's banker. He owned practically all of the stock, and the company's funds were, up to that time at least, supplied from, and deposited in, his private account. The testimony of Van Haagen, Lambert, and Connellan, in the one case, and of Van Haagen, Maguire, Connellan, and Cox the cashier, in the other, is clear and convincing on this point. The only contradiction is by John Hunter, whose answers to questions put to him are so manifestly equivocating and evasive as to render his testimony very unsatisfactory. But from the tenor of the testimony, as a whole, there can be no conclusion of fact more clear than that both of these loans were effected for the use and benefit of the Van Haagen Soap Manufacturing Company. It is equally clear, not only from what occurred at the time, but before and after, that this was the understanding of all the parties concerned, not only of Van Haagen, Hunter, and the soap manufacturing company on the one side, but of the bank and Lambert on the other; and also, that the money ultimately went into the company and was used in the business. It is unnecessary for us to refer in detail to the evidence; in so doing we would be obliged to extend the bounds of this opinion to an undue extent. What we have said is the result of a careful study of the testimony, and it is only required that we should state our conclusions.

In rebuttal of the presumption which is supposed to arise, in such a case, we have to begin with the fact, that the loans were for the company's use, that all the parties concerned so understood it, and that the money was in fact so applied. As to the contemplated liability of the company to repay the debt, we may in addition to what has already been said, refer briefly to the testimony. The bank officers regarded Van Haagen and Hunter as a company. Mr. Gelbach, at the time of the loan, when Cox, the cashier, expressed surprise that the company's name was not on the paper, replied that the parties to the note were the whole company. When Maguire came to renew the note, the last time, he asked Cox if the bank would be willing to renew it. Mr. Cox inquired how the Soap Manufacturing Company was getting along. Maguire replied that they were getting along very well, and that the "company" would not want the note renewed again; that this was the last. Mr. Connellan, the assignee, testified that shortly after his appointment as assignee, in June, 1889, he had a conversation with Mr. Hunter in the president's room of the Keystone National Bank, and that Hunter said he was very sorry for the National Security Bank; that they had been very kind to him, and the note, which they discounted at the request of Mr. Van

Haagen, was really for the benefit of the Van Haagen Soap Manufacturing Company, and should be a claim on the fund in his hands, as assignee. "He also told me," says Mr. Connellan, "there was another note, which had been given to Mr. Van Haagen's son-in-law, Mr. William H. Lambert, and that that should also be a claim on this fund." I told him that I had been over the books of the company, and that on the face of the matter at least, the company was not liable for this loan. He said, "that Mr. Lambert, at the time he took this note, thought that he, Mr. Hunter, was stronger than the company, and that that was why the note was signed that way, instead of the company's note being given."

That the notes were taken for greater security than if signed by the company, cannot be questioned, but if the contract was with and for the company, the notes would stand as a collateral security for the company's debt. The learned Judge of the Court below, was of opinion, that the testimony was sufficient to rebut the presumption that the notes were taken as a consideration for, or in payment of the debt, and we are satisfied that he was right.

The decree of the Common Pleas is affirmed, and the appeal dismissed at the cost of the appellants.

APPEAL OF RUTSCHMAN BROS.

April 6, 1891. CLARK, J. For reasons given in our opinion filed in the appeal of the Third National Bank of Philadelphia, filed herewith, the decree of the Common Pleas is affirmed, and the appeal dismissed at the cost of the appellants.

APPEAL OF MAGUIRE & SONS.

April 6, 1891. CLARK, J. For reasons given in our opinion in the appeal of the Third National Bank of Philadelphia, filed herewith, the decree of the Common Pleas is affirmed, and the appeal dismissed, at the cost of the appellants.

APPEAL OF FOURTH ST. NATIONAL BANK.

April 6, 1891. CLARK, J. For reasons given in our opinion in the appeal of the Third National Bank of Philadelphia, filed herewith, the decree of the Common Pleas is affirmed, and the appeal dismissed at the cost of the appellants.

H. C. O.

Jan. '91, 195 and 196.

March 10, 1891.

Carr v. City of Easton.

Negligence—Contributory negligence—Imputed negligence—Roads and highways—Voluntary carrier without compensation—Contributory negligence of the latter does not debar passenger from recovering from the party who was the direct cause of the injury.

The negligence of a voluntary carrier cannot be imputed to a passenger who is guilty of no contributory negligence.

Where in such cases, the passenger voluntarily joins the driver in testing a patent danger, he is barred as a matter of law by his own contributory negligence.

Where in an action for damages upon the ground of negligence, contributory negligence upon the part of the plaintiff is clearly shown by the evidence, but only where it is clearly shown, the Court may so declare it as a matter of law, and direct a verdict for defendant.

C. was riding in a sleigh belonging to her brother-in-law, T., in Easton, on December 30, 1887, with T., and A., who was driving. A heavy snow had fallen on December 18. A railway track ran along the middle of the street, from which the snow had been removed and piled on each side, with gutters dug upon either side of the rails. The snow had also been removed from the pavements and added to the piles. The sleigh was driven between the rails a distance of upwards of 2000 feet when it became necessary to turn out for a sleigh coming in the opposite direction. The driver slackened up and turned off of the track, when the sleigh struck the snow-bank and was overturned, C. being injured. C. saw other teams using the street, was not shown to have any special knowledge of driving, or horses, or sleighs, and had trusted herself to the guidance of T. and A. C. having brought suit against the city, the Court directed a verdict for the defendant upon the ground of contributory negligence:

Held, to be error. The question whether the danger was so apparent, or so serious, that plaintiff was called upon to exercise her own judgment in opposition to that of those in charge of the sleigh, should have been left to the jury.

Whether, in this case, there was negligence on the part of defendant, not considered.

Crescent Township v. Anderson (114 Pa. 643), and Dean v. Penna. R. R. Co. (129 Id. 514), distinguished from this case, and from Borough of Carlisle v. Brisbane (113 Id. 544).

Appeals of Susan Carr and Andrew Carr, plaintiffs, from judgments of the Common Pleas of Northampton County, in actions of trespass, brought against the city of Easton, to recover for injuries received by said Susan Carr owing to the alleged negligence of defendant, and for the loss of services sustained by Andrew Carr, her husband.

Both cases were tried together before SCHUYLER, P. J., when it appeared that plaintiff received her injuries by the upsetting of a sleigh on December 30, 1887, on Walnut Street, in Easton.

Walnut Street is narrow, being about 30 feet wide, and is much travelled. A street passenger railway track runs along the centre of the street. Snow, about two feet in depth, had fallen on December 18, 1887, followed by several lighter snows before December 30. Much of the snow had been removed from the track to the side thereof, and gutters had been dug about a foot in depth on either side of the rails of the track. The snow had likewise been removed from the pavements and gutters and thrown toward the track, thus forming a high ridge on either side of the railway track. The clear part of the carriage way was not wide enough to allow teams to pass each other. The street is entirely straight throughout its entire distance of less than half a mile, and in an easterly direction has a gradually descending grade.

On December 30, between 10 and 11 A. M., Samuel Trumbore, with Samuel Adams, on a low sled came to the residence of Susan Carr to take her and her two children to his house. Trumbore and Adams sat together on the front seat and Mrs. Carr between her children on the rear seat. They went in Butler Street to Walnut, thence down Walnut, passing Washington and Ferry streets, on a slow trot, driving on the street car track, between the rails after they passed Ferry Street, a distance of 2168 feet, until they met a team coming in the opposite direction, when, turning to the right, on a walk, they crossed the right gutter, but coming in contact with the bank of ice the sled slid to the left, the runner fell into the gutter, causing the upset, throwing Mrs. Carr and her children out on the ice and breaking and dislocating her arm near the elbow.

Whilst Mrs. Carr was acquainted with Walnut Street, she did not know its condition on that day prior to this occurrence. Neither did Mr. Trumbore, or Samuel Adams, the driver. Other teams were travelling on this street. Trumbore and Adams, in driving to Mrs. Carr's house, had taken another route, where the streets were safe and clear, entirely avoiding Walnut Street.

The plaintiff proposed to prove that there were other upsets at that place about this time. Objected to. Objection sustained. Exception.

The plaintiff likewise proposed to prove that Mr. Wood, a member of the highway department, said the reason the snow and ice was not removed at the time of the accident was because they were uncertain as to whether it was the duty of the city or the street car company to remove it. Objected to. Objection sustained. Exception.

Plaintiff proved also that the supervisor, after this accident, removed the snow from this street, between Sixth and Ferry streets.

The Court charged: "It must be conceded that Walnut Street, where the accident happened,

was, on the day of the accident, in an unsafe condition, owing to high embankments of snow and ice on either side of the single track, which was the only passageway for vehicles, and if the only question before you was whether the city had been guilty of negligence in allowing the street to remain in this condition for an unreasonable length of time I would probably have to submit that question, under the evidence, to your consideration. But it does not necessarily follow, even if you should find that the city was negligent and that the accident to the plaintiff was the result, that the plaintiff would be entitled to your verdict; for the law is that if the negligence of the plaintiff contributed in any degree to the accident she cannot recover. Ordinarily and generally the question of contributory negligence is for the jury, but the rule is not universal. When the facts are undisputed and the inference of contributory negligence is a necessary one, there it becomes the duty of the Court to draw the inference and to give to the jury binding instructions to find for the defendant. This, I think, is such a case. Walnut Street is one of the narrowest and at the same time one of the busiest thoroughfares in our city, with the track of a passenger railway company running through its centre. Some ten days before the accident happened a heavy snow had fallen which was still on the ground. The track of the railway company, however, had been cleared by shovelling the snow on either side of the track, thus making embankments, which were further increased by the snow from the sidewalks. The passageway in the street was not wide enough to allow teams to pass each other without mounting these embankments. The condition of the street from the point where the plaintiff entered it was plainly visible throughout its entire length. There were other streets free from danger which the plaintiff might have taken by a very slight detour. The plaintiff was entirely familiar with the locality and its surroundings. The driver sat on the left hand side of the sleigh from no necessity. Meeting a team coming from the opposite direction the driver turned to the right and in endeavoring to get the sleigh over the embankment the sleigh overturned, causing the accident of which the plaintiff complains. These are the undisputed facts, and to my mind they lead so irresistibly to the conclusion that the plaintiff was guilty of contributory negligence that I feel constrained to say to you that she has no cause of action. You will, therefore, return a verdict in favor of the defendant."

Verdict accordingly. Plaintiffs then appealed, assigning for error that the Court erred: (1) in deciding that the plaintiff, Susan Carr, was guilty of contributory negligence; (2) in not submitting the question of negligence on the part

of the city to the jury; (3) in not allowing plaintiff to prove that other persons upset at the same place a few days before; (4) in directing the jury to return a verdict in favor of the defendant; (5) in charging as follows: "The condition of the street from the point where the plaintiff entered it was plainly visible throughout its entire length."

F. H. Lehr, for appellants.

The only negligence imputed to Mrs. Carr is, that she did not object to being driven in the sleigh through this street on that day; but she did not know the street was unsafe, and she had a right to expect that after such a lapse of time it would be in a reasonably safe condition.

This case is ruled by—

Erie v. Schwingle, 22 Pa. 384.

Macungie Twp. v. Merkhoffer, 71 Id. 276.

McLaughlin v. Corry, 77 Id. 109.

Borough of Carlisle v. Brisbane, 113 Id. 544.

This case differs from—

Dean v. Penna. R. R. Co., 129 Pa. 514.

Crescent Twp. v. Anderson, 114 Id. 643.

The question of negligence should have been left to the jury.

The plaintiff should have been allowed to show that other upsets had taken place at the same place a few days before.

North Manheim Twp. v. Arnold, 119 Pa. 389.

H. J. Steele, city solicitor, for appellee.

The excluded evidence was clearly inadmissible.

Greenleaf, Ev. § 52.

Lincoln v. Mfg. Co., 9 Allen, 181.

Hawks v. Charlemont, 110 Mass. 110.

Cutter v. Howe, 122 Id. 541.

Plaintiff could see the condition of the street, the snow banks, and the railway tracks, if she had chosen to use her eyes, and was chargeable with negligence in consenting to be driven through the street.

There can be no recovery for a mutual fault of both parties.

R. R. Co. v. Aspell, 23 Pa. 147.

Snow and ice are not *per se* defects in a street for which a city is responsible. It becomes the duty of those using the streets to exercise increased care and caution.

Beach on Cont. Neg. 282.

Plaintiff saw the danger and could have avoided it by going through another street. It would therefore have been error to submit the case to the jury.

Baker v. Fehr, 97 Pa. 70.

Erie v. Magill, 101 Id. 616.

Barnes v. Sowden, 119 Id. 60.

Twp. of Crescent v. Anderson, 114 Id. 643.

Robb v. Connellsville, 26 WEEKLY NOTES, 517.

Forks Twp. v. King, 84 Pa. 230.

Fleming v. Lock Haven, 15 WEEKLY NOTES, 216.

Railway Co. v. Taylor, 104 Pa. 306.

Durkin v. Troy, 61 Barb. 437.

Wharton on Neg. § 440.

While it is true that the negligence of the

driver of the sleigh cannot be imputed to Mrs. Carr if she did not contribute to her injury, it is equally true that if she willingly joined the driver in testing the danger she is guilty of negligence, and is responsible for the consequences of her own act.

Twp. of Crescent v. Anderson, 114 Pa. 643.

Dean v. Penna. R. R. Co., 129 Id. 514.

A municipality is not an insurer against all defects, even in its highways, and if a defect exists in them, or is the work of a wrongdoer, notice must be brought home to the corporation, or the defect must be so notorious as to be evident to all passers.

Rapho v. Moore, 68 Pa. 404.

Otto Twp. v. Wolf, 106 Id. 608.

May 4, 1891. MITCHELL, J. Mrs. Carr was a guest in the sleigh which was the property of her brother-in-law, Trumbore. The exact relation to the party of Adams, who was driving, does not appear, but he was apparently a friend of Trumbore. He certainly was not in any sense the servant of Mrs. Carr. Under these circumstances it was conceded in the Court below and at the argument that the negligence either of Trumbore or of Adams was not imputable to Mrs. Carr. (*Borough of Carlisle v. Brisbane*, 113 Pa. 544.)

We have then the sole remaining question whether there was contributory negligence on the part of Mrs. Carr herself, so clearly shown by the evidence that the Court was right in deciding it as a question of law, and directing a verdict for the defendant. It is entirely settled that this may be done in a clear case, but in a clear case only. Two recent decisions of this Court are relied upon to support the present ruling. In *Crescent Township v. Anderson* (114 Pa. 643), there was a gully or small ravine across the public road, over which travellers ordinarily crossed by a bridge. Plaintiff, driving with her father, found the bridge impassable, the flooring having been torn up for repair, and her father then drove through the ravine, at the side of the bridge, and in so doing the spring catch of the wagon seat broke and plaintiff was thrown out and injured. It was held that though the plaintiff was not affected by the negligence of the driver, yet as she had voluntarily joined him in testing a patent danger she was barred as matter of law by her own contributory negligence. A closely analogous case is *Dean v. R. R. Co.* (129 Pa. 514), where the same rule was applied to the plaintiff, who, riding with a neighbor in the latter's wagon, neither stopped, looked, nor listened, nor requested the driver to do so, at a railroad crossing with which he was familiar. The essential point in these cases was the patent character of the danger, and in the latter, in addition, the

violation of a fixed rule of law as to the duty of travellers in crossing a railroad, thus constituting clear legal negligence. This is the distinction between these cases and *Borough of Carlisle v. Brisbane* (*supra*), and also between the latter and *Erie v. Magill* (101 Pa. 616); *R. W. Co. v. Taylor* (104 Id. 306); *Dehnhardt v. Philadelphia* (15 WEEKLY NOTES, 214); *Fleming v. Lock Haven* (Id. 216), and others of the same class, where the danger was either patent or the plaintiff had knowledge or warning of it beforehand.

In the present case we are unable to say that the circumstances proved were such as to establish any fixed standard of prudent conduct from which Mrs. Carr departed. It was not shown that she was informed of the condition of this particular street. All of the streets, as she testifies, were covered with deep snow, and while the special ruts or gutters caused by the digging out of the snow and ice down to the car tracks, were visible to her, it is not clear that they did or necessarily ought to have conveyed to her mind the idea of danger. She saw other teams using the street; her own drove a considerable distance in it before the accident, and she may have thought, as her driver, Adams, says he did, that "there were other teams turned out, and we thought we could turn out just as well." She was a woman not shown to have any special knowledge of driving, or horses, or sleighs, who had trusted herself to the guidance of her brother-in-law and his friend, and we cannot say, as matter of law, that the danger was so apparent or so serious that she was called upon to exercise her own judgment in opposition to theirs. All these matters are for the jury to decide upon their view of reasonable care and prudent conduct under the circumstances shown by the evidence.

The question of the negligence of the defendant is not raised on this appeal, and of course we have not considered it.

Judgment reversed, and venire de novo awarded. H. C. O.

Jan. '91, 154.

February 25, 1891.

Moules v. Delaware and Hudson Canal Co.

Negligence—Contributory negligence—Employer's liability.

The test of the liability of an employer to an employee is negligence and not danger, and where, in an action for damages for personal injuries, the testimony fails to establish any negligence on the part of the defendant, binding instructions should be given to the jury to find for defendant.

The honest exercise of his judgment by a competent employee in the course of his employment, can never be negligence to make the employer liable to a co-employee.

Appeal of the Delaware and Hudson Canal Company, defendant, from the judgment of the Common Pleas of Wayne County, in an action of trespass, by Laura Moules, to recover damages resulting from alleged negligence of defendant in causing the death of her husband.

On the trial, before SEELY, P. J., the facts appeared substantially as follows: Abram Moules, plaintiff's husband, was employed as a conductor of a coal train on a gravity road between Waymart and Honesdale, and had been so employed at the time of his death for a period of about seventeen years. On January 7, 1889, Moules's train of forty-eight cars reached plane 17 at about noon. Henry Sohn, one of the runners, took up the incline two trains of twelve cars each, and Hoyle, another runner, followed him with twelve cars. It appeared that when the weather was good each runner proceeded at once with his trip, but if snow was falling they stopped in a snow shed until all the cars arrived, when they all went together to Waymart. On the morning of January 7 it was storming, and Sohn, the first runner, by direction of John Ryan, a foreman employed by the defendant, stopped his cars in the shed. The next runner also stopped his there. Then Moules brought up his cars, and, after unhooking them, started on his trip, and after running about 150 feet they collided with Sohn's; Moules was thrown from the car, and received injuries which resulted in his death.

Ryan, who helped Moules up when he was injured, testified that the latter had said that he did not look ahead. "I don't know when I ever missed it before, and I don't know what made me then."

It appeared that when Hoyle stopped his cars he started back to warn Moules, but was called back by Ryan to perform some other duty. Ryan, however, did not know of Hoyle's intention, and there was no proof of any custom to give such warning.

Further evidence was given to show that the cars were not running faster than four or five miles an hour, and the deceased could have jumped from the cars had he been looking ahead.

The defendant requested the Court to charge, *inter alia*, as follows: (7) Under all the evidence the verdict must be for the defendant. *Refused.* (Tenth assignment of error.)

The Court charged the jury, *inter alia*, as follows:—

"This action is brought by the plaintiff to recover compensation for the pecuniary loss which she has sustained through the death of her hus-

band, whose death she alleges was occasioned by the negligence of the Delaware and Hudson Canal Company, the defendant in this case. The law in such cases, where one person or a corporation becomes responsible by reason of negligence for damages, measures the damages strictly by the pecuniary loss sustained by the parties seeking to recover. . . . Three things are necessary to entitle a person to recover in an action of this kind. In the first place the plaintiff must show by the preponderance of evidence—that is, satisfy your minds by the weight of evidence—that the defendant has been guilty of negligence; that it has failed to discharge some duty which it owed to the plaintiff's husband. In the next place it must appear by the preponderance of evidence in the case that the injury was the result of their negligence. For although the defendant might have been negligent, yet if that negligence did not produce the injury complained of, it would furnish no ground of action. The defendant must be shown to have been negligent, and then it must be shown that that negligence was the cause of the injury complained of. And in the third place, upon all the evidence in the case, it must not appear that the plaintiff's husband was guilty of any negligence whatever which contributed in any degree to produce the injury. That is, in this case Mr. Moules must have been absolutely free from any negligence which contributed even in the slightest degree to produce the unfortunate accident, in order to entitle the plaintiff to recover. . . .

“The gravity road, upon which this accident occurred, is a road of peculiar and unusual construction, and its management cannot in all respects be held subject to the rules applying to ordinary locomotive railroads. This road, as appears from the evidence in the case, has been running for a long period of years. It seems from the evidence that it is run by the gravity of the cars on what are called the levels, and that the cars are drawn up inclined planes by means of cables run by stationary engines. The accident which gives rise to this suit occurred at the head, or summit, of one of these inclined planes. You have heard the testimony in reference to how the cars are attached to this cable, the manner in which they are detached at the head of the planes, and run out upon the level above. And you have heard the peculiar features of this particular plane described. The curves at the summit, the obstructions that exist to the view, and the freedom with which the sheds and cars and some of the plane could be seen by persons ascending the plane, after they leave the engine house, which is situated part way up the plane. When a person enters upon any particular employment which is attended with hazard, he must be taken in law to assume all ordinary risks of

that employment. The working upon this gravity road, or upon any other railroad is always attended with a certain degree of hazard, however carefully it may be managed. No man is required to enter upon this kind of employment, but if he chooses to do so the law says that he assumes all the ordinary risks that arise out of that employment, and he can hold no one responsible for an injury arising simply out of the ordinary dangers and risks of such employment. It therefore becomes necessary for this plaintiff to show affirmatively that the defendant was negligent. . . .

“You have heard the testimony as to what the custom was in running trains upon the gravity road, and particularly as to the handling of trips at the head of plane No. 17. The plaintiff's husband had been for some years working upon this railroad, running cars. In so far as he understood the methods of operating this road, and the running of trains, and the danger that arose out of those methods, he must be presumed to assume those risks. The duty of a company is to furnish such machinery, tools, and regulations as will reasonably secure the safety of their employees, they themselves exercising reasonable care and prudence. It does not require that the company shall use the highest skill, or the highest degree of care, or the most modern and improved implements, but such implements and such regulations as will reasonably secure the safety of their employees, they themselves using reasonable care and diligence. This accident occurred at the head of plane No. 17, on the 7th of January, 1889. It was a stormy day, and according to the evidence the train of which Mr. Moules was the conductor, had partly passed up the plane. Three trips had passed up the plane, two in care of Mr. Sohn, and one in care of Mr. Hoyle. Mr. Sohn stopped his trips there under the direction of Mr. Ryan. Mr. Hoyle came up and discovered those trips standing there, and stopped his, and then started back towards the head of the plane. Mr. Ryan, who was in charge of the trainmen and of the trains, sent him forward, and Mr. Moules came up the plane afterward, and the collision occurred, and he was injured so that his death occurred from those injuries. Now, what was the negligence on the part of the Delaware and Hudson Canal Company? In the first place it is said that Mr. Ryan was negligent as the representative of that company, in stopping Hoyle as he was going forward towards the head of the plane.

“In considering that question you must consider what the regulations were, and what was the customary method of operating these cars at the head of the plane, as understood by Mr. Ryan. What was the practice among the men running the trains there at that time? You

may take all these things into consideration, in connection with the facts which transpired on that occasion. Mr. Hoyle does not say that he told Mr. Ryan that he was going forward to warn Moules. Mr. Ryan says that he did not know that Hoyle was going forward to warn him, and so far as Mr. Ryan's conduct is concerned, and his order, it must be considered in connection with that testimony, and in connection with the usual and common practice at the head of that plane. And then you must inquire whether there was any negligence on the part of Ryan in sending Hoyle forward at the time he did, and under the circumstances. It is also said that it was negligence not to have a headman at the head of the plane. It appears from the evidence that sometimes they had a headman there, and sometimes they did not. We do not remember any evidence showing a custom to have a headman there. As we remember the evidence it is only that on some special occasions there was a headman there, but if I am wrong about that you will remember what the evidence is. Mr. Moules was running the cars over that railroad, and had been running them since the headman was taken off, and had been running for years with the knowledge of just how frequently and to what extent a headman was maintained there, and we think it was the duty of Mr. Moules, if he believed that the want of a headman at the head of No. 17 plane was an element of danger to runners, to go and complain to the Delaware and Hudson Canal Company, or to the officers who had charge of the matter and ask them that the danger be removed. There is no evidence that he did go and complain, and in the absence of his having made such complaint we say to you that he assumed the risk of running his train without a headman at the head of No. 17, and that the absence of a headman on the 7th of January, 1889, cannot be considered by you as an act of negligence on the part of the Delaware and Hudson Canal Company, so as to justify a recovery by the plaintiff in this case. If there is any negligence at all here it must arise out of the custom of the company not to send back flagmen to warn men who come up the plane, or out of the particular order that Ryan gave on this occasion. And we say to you further, that if it appears in the evidence that Mr. Moules knew that the custom of this defendant was not to have the trips flagged as they came up the plane, and he undertook to run his cars in view of that custom or arrangement, then he cannot complain of that custom or arrangement of the Delaware and Hudson Canal Company. In other words, we think that it is the duty of any person engaged in a hazardous business, if he sees a cause of danger existing—an unnecessary cause of danger—to go and complain of that un-

necessary cause of danger to his superior officers, and ask them to remove it, and to make his position as safe as it can reasonably be made. And if he does not call the attention of his superior officers to it and ask that it be removed after he himself has knowledge of it, he cannot afterward, if he is injured by reason of that danger, set it up as a basis of recovery against his employer. These are, so far as I now remember, the two conditions out of which the plaintiff alleges the negligence on the part of the company. That is, the failure to signal, or warn him, and the absence of a headman. As to the want of a headman, it is proper to call your attention to some testimony to the effect that Mr. Merethew said in Mr. Purdy's office that if there had been a headman there the accident would not have happened. Whether it be true or not that if there had been a headman there the accident would not have happened, Mr. Moules knew perfectly well that there was no headman there, and he had known it before, and if he felt that it was an element of risk he should have complained, and called upon the company to correct it, and if he failed to do so, he cannot complain that the injury occurred by reason of that fact. So we think that the question of negligence must be based upon the method of managing the trips at the head of the plane. Whether it was such a method as furnished reasonable protection to the trainmen, when they themselves exercised ordinary care and prudence. And in that connection you may consider all the evidence. You have a right to take into consideration the length of time that this road has been operated in this way. One of the witnesses testified that so far as he knew, there was no other accident ever occurred at this place. The defendant alleges that they were not negligent in either of these respects, and insist that Mr. Moules himself was negligent. You have the evidence as to the location of this plane, the surroundings, the visibility of the track at the top of the plane, and how easily the snow sheds can be seen after you come over the top of the plane and start out upon the grade. You have also the evidence as to the storm on this day, and its severity. You have the evidence of different persons as to how they could see in going up the plane on that day. The evidence as to the condition of the storm at the very time that Mr. Moules came up is somewhat vague. There is no evidence as to whether the storm at that time had increased or diminished, or what the character of the storm was at that time. Some of the witnesses testify that the storm was changeable, blustering, and sometimes quite severe, and at other times much lighter.

"But there is no evidence as to what the condition of the storm was at the precise time when

Mr. Moules came up the plane. After he came over the head of the plane, and unhooked his sling, and put it on the car, and performed his other duties there, we think that we should say to you without hesitation that it was his duty to be where he could look out ahead of his car. We do not think that it required any evidence to establish such a duty. He was alone upon this trip of cars, and was the only one to observe danger ahead. If he is not upon the lookout, no one is, and whatever dangers might lie in the way—and there is always danger in running cars—must be unobserved, unless they were observed by him. In addition to that, you have the evidence as to what the custom and duty of those men is, as they come up the plane and pass out on the level. Under these circumstances, what did Mr. Moules do? You have the evidence of the witnesses as to his statement made after he was injured. Without trying to repeat the language, we think the substance of the testimony of Mr. Ryan and Mr. Merethew upon this subject was that Mr. Moules said that he was not looking ahead at the time. You will remember that statement as it was given by the witnesses, and not take the memory of the Court. The credibility of the witnesses is for you. . . .

"That evidence is for you, and its credibility is for you. But we say to you, that if Mr. Moules was riding upon this occasion sitting backwards, so that he could not see what was in front of his train, and if that was the cause of this collision, or if that combined with other causes produced the collision, then he was guilty of contributory negligence and cannot recover in this action. This evidence is confined to what the witness saw before he passed the head house. This head house, as is testified to by the witnesses, was some 20 or 30 feet from the end of the snow shed. It is for you to say, under these circumstances, if you believe the evidence that he was riding backwards up to the time when he passed the head house. . . .

"If you find that the defendant was not guilty of negligence, or that Mr. Moules was guilty of negligence which contributed to this injury, then you will find for the defendant. If you find, on the other hand, that the injury to Mr. Moules arose out of the negligence of the defendant solely, with no contributory negligence on his part, then Mrs. Moules is entitled to recover damages. And those damages will be simply pecuniary compensation for the loss sustained. . . ."

Verdict for plaintiff for \$1250, and judgment thereon. Defendant appealed, and assigned for error, *inter alia*, the refusal of the Court to direct a verdict for defendant.

H. Wilson and P. P. Smith, for appellant.
George S. Purdy, for appellee.

April 20, 1891. MITCHELL, J. We fail to find in this case any evidence of defendant's negligence, nor is it easy to ascertain with precision just what negligence is charged. The learned Judge put it to the jury entirely on the method of managing the trips at the head of the plane—whether it was such as furnished reasonable protection to the trainmen; while the argument of appellee here rests mainly on the action of Ryan in stopping Hoyle when about to go back for the purpose, as he alleged, of notifying Moules. Appellee also argues negligence from the absence of a head man on that day, but as the evidence showed without contradiction that it was not usual to have a head man, and that when he was there it was not to give notice to train runners, but for entirely different duties, the learned Judge below properly excluded this question from the consideration of the jury, and we need not discuss it here.

There was no evidence on which the jury could properly find that the method of managing the trips was negligent. We have had occasion several times lately to say that the test of liability of an employer to an employee is negligence, not danger; but here there was no evidence even of danger to a man of reasonable prudence. What Moules had to do was to unhook the sling, ring the bell to notify the engineer, and get on the car again so as to control the brake if necessary. During this operation the cars were moving, as Hoyle, the plaintiff's mainstay, and certainly a friendly witness, says, "a little faster than a common man could walk," and "there was no difficulty in getting on or off." This method had been followed for years, without accident, and, as a part of the business of railroading, it certainly could not be said to be inherently dangerous. In this particular case the deceased had been employed at this work seventeen years, and was entirely familiar with it; the other cars with which he collided were in plain sight; both Sohn and Hoyle, who preceded him by a few minutes, had brought their trips up under the same circumstances without difficulty; and the uncontradicted evidence on plaintiff's own part was that even if the deceased had not seen the cars until close at hand, there was no difficulty in jumping off so as to avoid personal injury from the collision. To allow a jury, under these circumstances, to find that the method of operation was negligent, as well as dangerous, would be not only allowing them, as said in *Titus v. R. R. Co.* (136 Pa. 618), to dictate the customs and control the business of the community, but to do so without evidence.

But was Ryan negligent in stopping Hoyle on his way back to notify Moules? Hoyle says he did not inform Ryan of his intention in going back. There was, therefore, no express notice to

Ryan of Hoyle's intention. Nor could notice be implied from custom, for no custom was proved. The only evidence bearing on that point was given by Hoyle in rebuttal. It was not properly rebuttal, but the very essence of plaintiff's case; but taking it as it was given, it amounts to no more than evidence of the witness's individual habit, not adopted by other train-runners, and not known to Ryan. Nor, lastly, could any obligation upon Ryan, in regard to notice to Moules, arise from the danger of the situation. The matter of danger has already been discussed. It was usual on stormy days to stop the cars at that point and double up the trains. Moules knew the custom, for he had been engaged seventeen years in this work. Whether or not that day was one calling for doubling up was a matter to be determined by Ryan, and Moules knew this, and was bound to be on the lookout accordingly. Even if there was no actual necessity for doubling, and Ryan made an error of judgment in ordering it, of which there is no evidence whatever, it would not have been negligence. The honest exercise of his judgment by a competent employee, in the course of his employment, can never be negligence to make the employer liable to a co-employee.

This branch of the case has been discussed on the concession that the defendant would be liable for Ryan's negligence. If it were necessary, that point might at least be questioned.

On the whole case, there was no negligence proved, and defendant's seventh point should have been affirmed.

Judgment reversed.

W. M. S., JR.

Jan. '91, 42.

February 5, 1891.

Shrawder v. Snyder.

Married women — Acknowledgments — Defective acknowledgments — How validated — Acts of April 16, 1840; April 11, 1848; January 24, 1849; and April 25, 1850.

Acts of Assembly validating titles acquired under deeds defectively acknowledged are constitutional.

Tate v. Stooltzfoos (16 S. & R. 35); Mercer v. Watson (1 Watts, 330), followed.

A title conveyed by a deed in 1846 containing a certificate of acknowledgment which failed to show the separate examination of a *feme covert* grantor, is validated by the Acts of April 11, 1848 (P. L. 526); January 24, 1849 (Id. 676); and April 25, 1850 (Id. 576).

Appeal of Jesse L. Snyder, defendant, from the judgment of the Common Pleas of Montgomery County, in an action of ejectment brought by Joseph Shrawder and Catharine his wife, in

right of the wife, for the undivided half part of a tract of land in Lower Providence Township.

Both parties claimed under Levi Custer, who died seised, intestate, the land thereupon descending to his two daughters, Hannah and Catharine. The latter subsequently married Joseph Shrawder, and the three went into possession. On February 4, 1846, Hannah Custer, Joseph Shrawder, and Catharine Shrawder united in a deed of the premises to John Schrack. The certificate of acknowledgment to the deed is as follows:—

Montgomery County, ss.:

The Fourth day of February, Anno Domini one thousand eight hundred and forty-six, before me the subscriber, one of the Justices of the Peace in and for said County, personally appeared the above named Hannah Custer, Joseph Shrawder and Catharine his wife, and in due form of law acknowledged the above indenture to be their act and deed, and desired the same might be recorded as such, ~~and the said~~
being of full age, and separate and apart from her said husband; by me thereon privately examined, and the full contents of the above deed being by me first made known unto her, did thereupon declare and say, that she did voluntarily and of her own free will and accord sign, seal and as her act and deed, deliver the above written indenture, deed or conveyance, without any coercion, or compulsion of her said husband, or any undue influence whatever.

Witness my hand and seal,

WILLIAM ZIMMERMAN. [SEAL.]

[The above words in italics are the written portions; the balance was printed.]

Five days later Schrack reconveyed to Joseph Shrawder. The possession continued as before. In 1886, Shrawder mortgaged to George W. Oliver, whose executors brought suit on the mortgage, bought the premises at the sheriff's sale thereon, and having been put in possession by the sheriff, subsequently sold to Snyder, the defendant.

On the trial, the Court, WEAND, J., charged the jury as follows: "In this case you will find a verdict for the plaintiff, the Court reserving the question of law as to whether there is any evidence to be submitted to the jury upon which the plaintiff can recover."

Motions of the defendant for a new trial and for judgment *non obstante veredicto* were subsequently overruled, and judgment entered for the plaintiff on the verdict.

The defendant thereupon took this appeal, assigning for error this action of the Court.

John G. Johnson (Louis M. Childs and Montgomery Evans with him), for appellant.

By virtue of the Acts of April 11, 1848 (P. L. 526); January 24, 1849 (Id. 676); and April 25, 1850 (Id. 576), re-enacting the Act of April 16, 1840 (Id. 361), no deed of conveyance, *bona fide* made and executed by husband and wife and acknowledged by them before a justice of the peace authorized to take such ac-

knowledge, prior to January 1, 1850, shall be deemed invalid or defective because of any omission in setting forth the particulars of the acknowledgment made before such justice of the peace in the certificate thereof. All such deeds are as valid to convey the estate of the wife in the land mentioned in the same as if all the particulars of acknowledgment required by the Act of February 24, 1770, were set forth in the certificate thereof.

It is a fortunate thing that the Acts cited save a title held for forty-four years from being destroyed by a shabby technical point. There is no decision upon the Act of 1840, but there is one upon the Act of April 8, 1826 (9 Smith's Laws, 126), which, in all substantial particulars, is precisely similar.

Tate v. Stooltzfoos, 16 S. & R. 35.

Mercer v. Watson, 1 Watts, 330.

George W. Rogers (George N. Corson with him), for appellees.

The point as to the cure of the defective acknowledgment was not made at the trial or before the Court below, and therefore was not considered. It now appears for the first time, and should not be considered by this Court.

Cope v. Kidney, 19 WEEKLY NOTES, 304.

The Acts only apply to deeds *bona fide* made and executed by husband and wife. It is not even alleged that this deed or the one reconveying the premises to Joseph Shrawder was *bona fide*. No consideration is alleged to have been paid and no possession was given under it, and Mrs. Shrawder still continued in possession until evicted in 1889 by the sheriff's vendee. In the case of *Mercer v. Watson* (1 Watts, 330) it might well have been presumed that the wife had been examined as provided by the Act of 1770, for the acknowledgment says, "she, the said Margaret, being of full age, by me examined apart," and the Act of 1840 says "that no grant, bargain or sale, feoffment, deed of conveyance, lease, release, assignment, or other assurance of any lands, tenements, or hereditaments whatsoever heretofore *bona fide* made and executed by husband and wife and acknowledged by them," etc. Now this certainly means acknowledged by them as provided by law, viz., the Act of 1770, and should be shown either by proof, or, if that was not necessary, by presumption, which could fairly be done in *Mercer v. Watson*; but in the case at bar any presumption is excluded by the erasure of that part of the acknowledgment. That was in the deed before signing, and was put upon the record and was notice to the world that it was not separately acknowledged. If it does not appear that the wife was separately examined the acknowledgment is invalid, and the wife's title does not pass.

Watson v. Mercer, 6 S. & R. 49.

Steele v. Thompson, 14 Id. 84.

Barnet v. Barnet, 15 Id. 72.

April 27, 1891. *WILLIAMS, J.* The farm in controversy in this case belonged, prior to 1846, to Hannah Custer and Catharine Shrawder, *nee* Custer, who were sisters. They conveyed it in that year to John Schrack by their deed, in which Joseph Shrawder, the husband of Catharine, joined. Soon after Schrack made a deed for the same farm to Joseph Shrawder. Both deeds were properly recorded. Forty years later, in 1886, Shrawder made a mortgage, covering the same land, to George W. Oliver, for the sum of twelve thousand five hundred dollars. On default being made in the payments provided for, proceedings were had upon the mortgage, which resulted in a sale of the mortgaged premises by the sheriff in 1888. Snyder, the defendant in this action, went into possession under the purchaser at sheriff's sale.

Mrs. Shrawder, the plaintiff, claimed to recover an equal, undivided one-half of the property on the ground that the deed made by her and her sister to Schrack in 1846 did not show that she had been examined by the magistrate separate and apart from her husband or had separately acknowledged the deed, and that the deed was for this reason inoperative and void as to her.

The certificate of acknowledgment is clearly wanting in the particulars mentioned. It does not meet the requirements of the Act of Assembly that prescribes the form in which the acknowledgment of a married woman must be taken, and the learned Judge was right in so holding. If the deed had been executed since 1850, the conclusion which he drew as to its effect in binding a married woman would have been inevitable; but the form provided by law may be modified or dispensed with altogether by the law-making power, and there is a series of statutes beginning in 1770 and extending down to 1850 in which this right has been asserted and exercised. The Acts of 1848, 1849, and 1850, with which the series of curative or validating laws ends, were modeled upon that of 1826. That Act declared that no deed which had been executed in good faith prior to a date named therein by husband and wife, and acknowledged before an officer authorized by law to take acknowledgments of deeds, should be defeated or held to be defective as a conveyance because the certificate of the officer failed to set forth the particulars necessary to show a full compliance with the statute in taking the acknowledgment of the wife. The effect of this statute came under consideration in this Court in *Tate and Wife v. Stooltzfoos* (16 S. & R. 35). The constitutional power of the Legislature in the premises was affirmed, and the Act was held to cure just such defects in the certificate of acknowledgment as appeared in this case. The certificate of the acknowledgment did not show

a separate examination of or acknowledgment by Mrs. Tate, but the deed was held to be a valid and effective conveyance of her title because it was within the operations of the Act of 1826. The same question was again raised in *Mercer v. Watson* (1 Watts, 330), and Tate and Wife v. Stooltzoos was recognized as the law and followed in that case.

The deed now before us has a defective certificate of acknowledgment by the officer before whom the parties appeared to acknowledge its execution. It fails in the same particulars as the deed in *Tate v. Stooltzoos*, but it was executed in 1846. The curative Acts of 1848, 1849, and 1850 are each and all applicable to it, and they operate to relieve against the defective certificate and to give validity to the deed. Without this legislation the deed would not bind Mrs. Shrawder, but with the aid thus afforded it becomes a valid and binding conveyance. Her title passed under it because this legislation made what would otherwise have been a defective certificate of her acknowledgment a sufficient proof of her execution of this deed to vest her title in her grantee.

The learned Judge overlooked, or, what is a better statement of the fact, counsel failed to call his attention to the curative legislation applicable to this deed. The question is, however, fairly raised by the reserved point, and it is conclusive on the plaintiff's title.

The judgment on the reserved point is now reversed, and judgment is entered thereon in favor of the defendant *non obstante veredicto*.

R. H. N.

Jan. '91, 214.

April 7, 1891.

Watson v. City of Philadelphia.

Assignment of chose in action—City contract—Set-off—Unliquidated damages arising ex contractu—When they may be set off.

Unliquidated damages arising *ex contractu* from any bargain may be set off under the Defalcation Act of 1705, whenever they are capable of liquidation by any known legal standard.

A letter of attorney, authorizing the attorney to demand and receive from the city of P. "all moneys due and owing . . . on account of said contract" (to furnish clay to the city), which contract contained a prohibition of its assignment or subletting, does not operate as an assignment of the contract or the money due thereunder.

W. entered into a contract with the city of Philadelphia to supply clay for a reservoir at an agreed price. The contract contained a proviso against its subletting or assignment. He also entered into another contract to grade M. Avenue for a nominal consideration. He defaulted upon the latter contract, compelling the city to employ another contractor to

complete it. W. also delivered to E. a power of attorney authorizing him to demand and receive from the city "all moneys due and owing W. on account of said contract." Whereupon E. advanced to W. the sum of \$5560, presumably to enable him to complete his clay contract. W. having brought suit to the use of E. to recover a balance due upon this contract:

Held, that the city could set off the damages arising from his failure to comply with the grading contract.

Held further, that the letter of attorney above referred to did not operate as an assignment of the contract, or of the money due thereunder.

Clement v. City of Philadelphia, 137 Pa. 328; S. C., 27 WEEKLY NOTES, 194, followed.

Appeal of William C. Watson to the use of Peter Elder, plaintiff, from the judgment of the Common Pleas No. 2, of Philadelphia County, in an action of assumpsit brought against the city of Philadelphia to recover the sum of \$1147.60, balance alleged to be due plaintiff upon a contract for furnishing clay to defendant.

A case stated was agreed upon, and judgment entered for the defendant thereon. Whereupon plaintiff appealed, assigning the judgment of the Court for error.

The material facts are set forth in the opinion of the Supreme Court.

Howard W. Page (S. Davis Page, Edward P. Allinson, and Boies Penrose with him), for appellant, cited—

Philadelphia v. Lockhardt, 73 Pa. 211.

Philadelphia's Appeals, 86 Id. 179, 182.

Kountz v. Kirkpatrick, 72 Id. 378, 385.

McMasters v. Wilhelm, 85 Id. 218.

Charles B. McMichael, assistant city solicitor, (*Charles F. Warwick*, city solicitor, with him), for appellee, cited—

Hunt v. Gilmore, 59 Pa. 450.

Mandeville v. Welch, 5 Wheat. 277.

Clement v. Philadelphia, 27 WEEKLY NOTES, 194.

The power of attorney was not an assignment of Watson's rights under the clay contract, because the contract contains a proviso against assigning, transferring, or subletting it; and on its face does not give Elder any further authority than to collect moneys "due and owing" for the delivery of clay. There is no authority even to collect money to become due.

May 4, 1891. PAXSON, C. J. This case is free from difficulty. The plaintiff, William C. Watson, entered into a contract with the city of Philadelphia to supply clay for the East Park Reservoir at a price agreed upon. At the same time he entered upon another contract with the city to grade Montgomery Avenue. He defaulted upon the latter contract, and the city seeks to set off against his claim under the East Park Reservoir contract, the damages sustained by reason of his default on the Montgomery Avenue contract.

The right to such set-off would seem to be clear under the authorities. It was decided in *Hunt v. Gilmore* (59 Pa. 450), that unliquidated dam-

ages arising *ex contractu* from any bargain may be set off under the Defalcation Act of 1705 whenever they are capable of liquidation by any known legal standard. This is settled law.

It appears, however, by the case stated, that the plaintiff executed and delivered to Elder, the use plaintiff, a power of attorney authorizing him to demand and receive from the city of Philadelphia, "all moneys due and owing said Watson on account of said contract" (East Park Reservoir contract), and that on the faith of it Elder advanced to Watson the sum of \$5560. This sum was probably advanced by Elder to enable Watson to complete his contract to furnish the clay, although such fact does not appear in the case stated. It was contended that this paper operated as an assignment of the contract, and an equitable assignment of the fund due from the city to Watson. That it was neither is too plain for argument. Watson had no power to assign or sublet the contract. Such transfer was expressly prohibited by its terms. The power of attorney was a mere authority to receive the money due under the contract at its date. It was doubtless intended to cover all money due, and to become due under it, but it does not say so. There was nothing upon its face to convey notice to the city that Elder had any interest in it beyond the collection of the money for his principal. It was not an equitable assignment of the fund, hence the question of notice to the city, and whether it was of the whole or only of a part of it, becomes immaterial, and we need not discuss the cases which hold that a municipality is not bound to recognize an assignment of a part only of a particular fund.

The recent case of *Clement v. The City of Philadelphia* (137 Pa. 328), is directly in point. Clement, while indebted to the city, entered into a contract with it to do certain work. He immediately agreed with Josephs to advance him (Clement) the money to complete his contract, and assigned his right to receive the payments as they became due. Josephs was to deduct his advances and one-half of the net profits. He received some payments but less than his advances. In an action by Clement to the use of Josephs, it was held that the city had a right to set off the balance on account of the original indebtedness of Clement, notwithstanding the assignment. That case was even stronger than this for the reason that Josephs held an irrevocable power of attorney to collect the money, while Elder's authority could have been revoked at any time. Upon all other points the cases are similar. The fact that in the one case the set-off was for an indebtedness prior to the contract, and in the other an indebtedness for breach of a concurrent contract, is a distinction without a difference.

Judgment affirmed.

H. C. O.

Jan. '91, 139.

March 24, 1891.

Brower et al. v. City of Philadelphia.

Act of April 28, 1870, fixing the south line of Chestnut Street—Effect of the Act—Eminent domain—Statute of Limitations—Time at which statute begins to run against land owner whose property is taken by virtue of said Act—Act of June 13, 1836, § 7.

The Act of April 28, 1870 (P. L. 1291), "defining the line of Chestnut Street in the city of Philadelphia" did not constitute a present or actual appropriation of land, and the right of the land owners to sue for damages does not accrue until the city actually enters upon the land in pursuance of the power given by the Act.

Smadley v. Erwin (51 Pa. 445), distinguished.

The Act of April 28, 1870, fixed the south line of Chestnut Street, Philadelphia, at the distance of 539 feet south of Market Street, thus widening the street five feet, provided that the Act should not interfere with any buildings then erected on the south side of Chestnut Street. In 1884 the city passed an ordinance extending the width of Chestnut Street to 60 feet. The line fixed by the Act of 1870 was adopted, and the north line moved five feet to the north, and it was provided that it should not be lawful "to erect any new buildings, or rebuild or alter the front of any building now erected without making it recede so as to conform" to the new lines. G. was the owner of a marble works on the south side of Chestnut Street, in front of which was a yard separated from the street by an ornamental iron railing upon the existing line. In 1886 G. erected buildings upon the lot, receding to the new line, and in 1888 filed a petition for viewers to assess damages for the value of the land taken:

Held, that the Statute of Limitations did not begin to run from the time of the passage of the Act, but from the time of the actual appropriation for the use of the public.

Appeal of the City of Philadelphia, defendant, from the judgment of the Common Pleas No. 2, of Philadelphia County, in an issue upon an appeal from the report of a road jury, in which Bloomfield Brower, D. T. Pratt, and William J. Dreer, trustees under the will of Edwin Greble, deceased, were plaintiffs.

Upon the trial it appeared that plaintiffs, as trustees under the will of Edwin Greble, deceased, are seized in fee of real estate on the south side of Chestnut Street, in the city of Philadelphia, westward of Seventeenth Street, forty-four feet in front and one hundred and fifty feet in depth. Down to July, 1886, this property was used as a marble yard, and was inclosed upon the front line by an iron railing. The Act of April 28, 1870 (P. L. 1291), provided "that the south line of Chestnut Street between the rivers Delaware and Schuylkill shall be at the distance of 539 feet southward of the south side of Market Street." The effect of the establishment of this line was to take away five feet from the front of the property of the plaintiffs. Fol-

lowing this Act the councils of the city, by ordinance of March 31, 1884, directed the department of highways to revise the city plan so as to make Chestnut Street of the width of sixty feet, widening equally upon both sides of the former centre line of the street; and, in pursuance of the ordinance, the board of supervisors of the city, on March 21, 1885, confirmed and established the line of the street, so that the south line was 539 feet southward from the south line of Market Street. In July, 1886, the plaintiffs erected buildings upon the premises and set them back to conform to the established line of the street, thus surrendering five feet along the front to the use of the city. Up to this time the five feet had remained in the possession of the plaintiffs as above described.

On September 20, 1888, the plaintiffs filed their petition in the Court of Quarter Sessions, asking for the appointment of a jury to assess their damages for the widening of the street. An appeal was taken from the award made. The jury found a verdict for the plaintiffs for \$2200, subject to the following point reserved: "Whether the action in this case is barred by the Statute of Limitations, it being an admitted fact that at the time of the passage of the Act of April 28, 1870, there were no buildings on the plaintiffs' lot affected in anywise by the widening, and the action in this case not having been brought till September 1, 1888."

Subsequently the Court entered judgment for the plaintiffs upon the point reserved, PENNY-PACKER, J., delivering the opinion (26 WEEKLY NOTES, 270); whereupon the city appealed, assigning the action of the Court for error.

Abraham M. Beidler, assistant city solicitor (*James Alcorn*, assistant city solicitor, and *Charles F. Warwick*, city solicitor, with him), for appellant.

The Act of April 28, 1870, took and appropriated five feet of the Greble lot for a highway. This point is ruled by—

Smedley v. Erwin, 51 Pa. 445.

That decision has never been questioned, but has been quoted with approval in—

Hammett v. Philadelphia, 65 Pa. 166.

R. R. Co.'s Appeal, 79 Id. 269.

In re Ridge Avenue, 99 Id. 475.

Philadelphia v. Wright, 100 Id. 238.

Township of East Union v. Comrey, Id. 366.

In every decision upon the question of the effect of this Act the Courts have treated it as a taking of ground for a highway.

City of Philadelphia's Appeal, 78 Pa. 33.

Philadelphia v. Linnard, 97 Id. 242.

After the passage of the Act the strip was legally a part of the street, and the right to damages was then complete.

In re Chestnut Street, 118 Pa. 593.

City v. Linnard, *supra*.

The maintenance of the fence was an unauthorized use of the highway and gave no title as against the Commonwealth.

The Act of June 13, 1836, § 7 (Purd. Dig. 1497, pl. 7), in which the limitation is one year, rules this case. That Act is applicable to Philadelphia.

In re Ridge Avenue, *supra*.

City v. Wright, *supra*.

The limitation begins to run when the right of action accrues.

Mills on Eminent Domain, § 174.

Hoskins's Adm'r v. Lindsay et al., 1 Del. Co. Rep. 249.

Silas W. Pettit (John R. Read with him), for appellees.

The Act of 1870 was not a taking in law any more than it is in fact. It was a plotting and not a taking *in presenti*. The case of *Smedley v. Erwin* (*supra*) differs from this in that the Act therein construed was intended to secure the street without delay.

The Act of 1870 constituted simply an inchoate taking, and such inchoate taking by laying out and plotting public streets gives no right of action.

In re Sedgely Ave., 88 Pa. 509.

District of Pittsburgh, 2 W. & S. 320.

Stewart v. County, 2 Pa. 340.

City v. Dyer, 41 Id. 463.

City v. Dickson, 38 Id. 249.

Borough of Easton v. Walters, 18 WEEKLY NOTES, 117.

Lewistown Road, 8 Pa. 109.

Forbes Street, 70 Id. 125.

The case of Chestnut Street (118 Pa. 593) did not involve the construction of the Act of 1870, and *City v. Linnard* (*supra*) is in our favor.

Jarden v. P., W. & B. R. R., 3 Wh. 502.

The land-owner is not bound to bring his suit until the taking in fact of his land; and there is no general limitation to such a claim.

D., L. & W. R. R. v. Burson, 61 Pa. 369.

Hannum v. Borough of West Chester, 63 Id. 475.

McClinton v. Ry. Co., 66 Id. 404.

The limitation in the Act of 1836 relates to the actual physical opening of the street.

Borough of Easton v. Walters, *supra*.

In re Lewistown Road, *supra*.

Jarden v. P., W. & B. R. R., *supra*.

The one year limitation in that Act is extended to six by the Constitution of 1874.

In re Grape Street, 103 Pa. 121.

May 18, 1891. WILLIAMS, J. The lines of Chestnut Street, in Philadelphia, had been settled for many years prior to 1870, and the occupancy by the lot owners and by the public had conformed to them. In that year the Legislature increased the width of the street from fifty to fifty-five feet, by carrying the south line over five feet on the lot owners, with a proviso that the new line should not disturb existing build-

ings. Nothing was done by the city to carry this Act into effect until 1884, when an ordinance was passed extending the width of Chestnut street to sixty feet, and directing the department of surveys to revise the city plan accordingly. This involved a removal of the north line of the street five feet over on the lot holders, and the adoption of the south line fixed by the Act of 1870. The ordinance provided that after the new lines were thus established it should not be lawful for any person or builder "to erect any new buildings, or rebuild, or alter the front of any building now erected, without making it recede so as to conform" to the new lines. In obedience to this ordinance the department of surveys, in March, 1885, revised the city plan by putting upon it the new lines of Chestnut Street.

When the Act of 1870 became a law Greble owned a lot on the south side of Chestnut Street, between Seventeenth and Eighteenth streets, with a front of forty-four feet. It was then occupied as a marble yard, at which the manufacture and sale of monuments, headstones, and other marble work was carried on. The foot pavement extended up to the old line of the street, upon which there was an iron fence. On the other side of the fence the lot was occupied as a marble yard, and the work ready for sale or removal was displayed along and near to the fence. This actual inclosure and occupancy, existing when the Act of 1870 was passed, continued down to 1886, when a block was erected on the new street line covering the entire front. The city took possession of the strip of land thus surrendered, and in 1888 the owner presented the petition in this case asking for an assessment of his damages. Proceedings were had, and a judgment recovered against the city for the value of the land, from which this appeal was taken, alleging that the plaintiff's demand is barred by the Statute of Limitations. The appellant contends that the Act of 1870, *ex proprio vigore*, appropriated the plaintiff's land to the use of the public, and that the statute began to run against him at once, so that at the end of six years from the approval of the Act of 1870 his action was barred.

There is a certain limited and popular sense, in which it may be said that the Act did appropriate the plaintiff's land, but it was not a present or an actual appropriation. No means were provided for carrying the Act into operation, and no time fixed within which the owner should retire from the possession. The Legislature may be said to have designated or set apart the space between the old and new south lines for public use when the city should decide that it was necessary to take it, but the time when, and the manner in which, an actual appropriation

should be made was left to the city to determine. For fourteen years the city did not determine, and the status remained undisturbed. The ordinance of 1884 did no more than to mark the new line on the city plan, and to require that buildings thereafter erected should conform to it. The power to enter upon the land which the Act of 1870 gave, was exercised as fast and as far as building was done; for then, and not until then, it became the duty of the owner to recede from the old to the new line, and surrender the intervening space to the city. When he did this his right of action accrued, and not before.

It is urged that a contrary doctrine is held by *Smedley v. Erwin et al.* (51 Pa. 445), but we do not so understand that case. The Act that came under consideration in *Smedley v. Erwin et al.*, ordained and fixed the limits of a street in Philadelphia, and directed the commissioner of highways to proceed and open it for public use within thirty days. The Act was not permissive, but directory. It left nothing to the judgment or decision of the city councils or the Courts, but laid a legislative injunction upon the commissioner to open a street for public use upon a location absolutely fixed in the Act itself. This was an appropriation of the land covered by the street by the Legislature, and the only thing left for the city or the Courts to do was to ascertain its value and make compensation to the owners. The Act of 1870 lays no command on the city or its officers. It fixes the south line of the street, so as to settle any possible question about the legality of widening it, but it leaves everything else to the city. Whether the city shall avail itself of the new line, and, if so, when, to what extent, and in what manner, are questions over which the city has absolute control within the general limits fixed by law. These questions have been considered and determined by the city in the ordinance of 1884; and the plan adopted for widening Chestnut Street is a wise and conservative one. Existing structures are not interfered with. New ones must go upon the new line. When the owner recedes in this manner from the old line, the city advances and enters into possession of the five feet additional, and then for the first time an actual appropriation takes place and a right of action accrues. This gradual process is not oppressive to lot owners, nor burdensome to the city. As was said by the present Chief Justice *In re Chestnut Street* (118 Pa. 593), "it will probably occupy nearly a hundred years. It is done gradually and in a way to produce no great strain on the city treasury." The city can be called upon to pay only for its own act of appropriation, and not until such appropriation takes place. (*Hannum v. Borough of West Chester*, 63 Pa. 475; *In re Volkmar St.*, 124 Pa. 320.)

*

The learned Judge was right in his disposition of the reserved point, and the judgment is affirmed.

H. C. O.

Jan. '91, 139.

April 1, 1891.

City of Philadelphia v. Anderson, Owner, and Baxter, Registered Owner.

Municipality—Estoppel—Acts of municipal officer in the line of his duty—Whether they estop the municipality—Taxes—Lien of taxes—Tax search—Whether a municipality is estopped from claiming taxes by a certificate of search certifying that none were registered.

By virtue of the Act of April 16, 1845 (P. L. 489), the lien of taxes in the city of Philadelphia during the first five years after they become delinquent, is not the result of legal proceedings in a Court of record, which are notice to every one, but of the act of the city in carrying the unpaid taxes upon the book kept for that purpose.

A purchaser of real estate must, therefore, take notice of this book, and where an intending purchaser asks and obtains from the proper officer a certificate, in accordance with the above Act, of the liens upon the land which he proposes to purchase, the officer in giving the certificate represents his principal, the municipality, speaks for it, and binds it.

The city of Philadelphia is bound by a certificate of search as to registered taxes given to one who procures and acts upon it in good faith.

The city is not above the duty to deal fairly and justly with its citizens, and to speak the truth to them when the duty to speak for their information rests clearly on it.

In issuing a certificate of search as to registered taxes for an intending purchaser of real estate, the receiver of taxes of the city of Philadelphia is in no sense the agent of the said purchaser; he is discharging an official duty, and under a legal obligation to certify truly.

An intending purchaser of real estate applied through his conveyancer to the receiver of taxes to certify any taxes registered against the land in question, and received a certificate that "on examining the register of unpaid taxes . . . I find nothing . . . except as per bill of 1877;" the city subsequently filed a claim for the taxes of 1875, and issued a scire facias thereon:

Held, (1) that it was estopped by the foregoing certificate, and therefore could not recover.

Alcorn v. City (44 Pa. 348), distinguished.

(2) That the certificate was sufficient in form.

Ziegler v. Commonwealth (12 Pa. 227), followed.

Appeal of John Baxter, defendant, from the judgment of the Common Pleas No. 3, of Philadelphia County, in an action of scire facias sur tax claim, brought by the city against H. R. Anderson as owner and the said appellant as registered owner.

The claim was filed for the municipal taxes of 1875 against a lot on Indiana Street below

Eighteenth Street, and a scire facias issued and the cause put at issue.

On the trial, before FINLETTER, P. J., the defendant, Baxter, offered to show that he purchased the premises in 1878, and before completing his purchase and paying over the purchase-money, he, on the order of his conveyancer, obtained a certificate of search as to registered taxes, the order and certificate being in the following form:—

[Description of the Land.]

Please certify any taxes registered against the above, in the name of Franklin C. Paxson or that of any other person.

To Albert C. Roberts, Esq.,
Receiver.

WILLIAMSON.

5 | 15 | '78.

On examining the register of unpaid taxes for the city of Philadelphia, for the years 1873 to 1877, inclusive, I find nothing against the above-described premises, except as per bill of 1877.

CHAS. P. LYLE,
Chief Sch. Clk.

And that on the faith thereof he paid over to his grantor all the purchase-money except the taxes for 1877, which he subsequently paid to the city. Offer overruled. Exception.

The Court directed a verdict for the plaintiff. Verdict and judgment accordingly. Defendant, Baxter, thereupon appealed, assigning for error the overruling of his offer of testimony and the above direction of the Court.

The case and arguments of counsel are fully reported on the argument of the rule for a new trial, which was discharged, in an opinion by FINLETTER, P. J. (26 WEEKLY NOTES, 315.)

Thomas B. Taylor, for appellant.

Abraham M. Beitler, assistant city solicitor (*Isaac H. Shields*, assistant city solicitor, and *Charles F. Warwick*, city solicitor, with him), for appellee.

May 18, 1891. WILLIAMS, J. In the recent case of *Crouse v. Murphy* (27 WEEKLY NOTES, 444), in which an opinion was filed at the present term, we had occasion to note the evident purpose pervading the legislation of this State to protect *bona fide* purchasers of real estate against unrecorded liens and incumbrances. The same general subject is brought to our attention from a different standpoint by the facts now before us. These are that Baxter purchased in 1878 a house and lot on the south side of Indiana Street, in the Twenty-eighth Ward of the city of Philadelphia, from one F. C. Paxson. His conveyancer, in order to secure for his employer an unincumbered title to the premises he desired to buy, applied to the receiver of taxes and requested him to "certify any taxes registered against the above property in the name of Frank-

lin C. Paxson, or that of any other person." On the fifteenth of May, 1878, he received from the receiver's office a certificate, properly executed, setting forth that "on examining the registry of unpaid taxes for the city of Philadelphia, for the years 1873 to 1877, inclusive, I find nothing against the above described premises, except as per bill of 1877." The conveyancer, upon the receipt of this certificate of no lien, except for taxes of 1877, concluded the transaction, and the purchase-money was paid over. Three years afterwards, the city, in 1880, filed a claim against the same premises for the taxes of 1875. A writ of sci. fa. was issued on the claim in 1885, which was seven years after the certificate was made and ten years after the taxes are alleged to have accrued. The defendant replied to the writ with the certificate of the receiver that the city had no lien on the premises for the taxes of 1875, and with the fact that, relying on the certificate, he had paid over the purchase-money. His position was, that if the certificate was true the city had no lien, even if the taxes were unpaid. If it was untrue, he having been misled by it into paying out the money when it was in his hands, the city was estopped from alleging its untruth against him. The Court below, entertaining a different opinion upon the effect of the certificate, directed a verdict in favor of the city. The defendant appealed, and assigns the ruling of the learned Judge in the Court below as error. The effect of the certificate is therefore the only question before us.

It is well to remember at the outset that taxes upon seated property were originally a personal charge against the owner, for which his personal property and his person were liable to seizure, but which were not a lien upon land. (*Burd v. Ramsay*, 9 S. & R. 109.) In regard to unseated land a different rule prevailed, the land being treated as the debtor, and not the owner. Payment was compelled by the sale of the land, without any personal demand on the owner. In order to facilitate their collection, the Legislature has from time to time made seated taxes a lien on the lands on which they are assessed, by a series of Acts of Assembly applicable to different portions of the State. In Philadelphia they were made a lien, under certain limitations, as early as 1824, by an Act passed on the third of February in that year. It provided that taxes imposed on real estate in Philadelphia "shall be a lien on the said real estate on which they may hereafter be imposed or assessed," and that such lien should have priority over liens for debts due to individuals by recognizance, mortgage, or judgment against the same real estate. The duration of this lien was limited by the Act of 1845 to the first day of July in the year following that for which the tax was imposed, unless

before that time the tax was registered in a book to be called the register of unpaid taxes, for that purpose. If it was registered in time, then the lien was continued to the end of five years from the time the lien began. If, before the expiration of the five years, a claim was filed for the tax in the office of the prothonotary, this continued the lien for five years from the entry of the claim. The tax was thus made a lien during the year for which it was levied, and until the first day of July following, without any formal registry. The lien thereafter was lost, unless the tax was entered on the register of unpaid taxes, and at the end of five years it ceased altogether, unless proceeded for by claim filed in the Court of Common Pleas. A purchaser was therefore bound to take notice of the current taxes for six months after the end of the year. He was then bound to take notice of the registry for the balance of five years. After five years he was not bound to inquire beyond the lien dockets. To enable him to know with certainty what the registry showed, the Act of 1845 made it the duty of the receiver "to furnish certificates of all taxes and claims which are a lien on real estate," and provided a fee to be charged for such service.

The certificate held by Baxter was made under the direction of the Act of 1845. Does it protect the purchaser who procures and acts upon it? The Court below held that it did not, and gave three reasons for entertaining that opinion.

(1) The receiver is an elective officer, over whose selection and term of office the city has no control, and for whose certificates she is therefore not responsible.

(2) The law does not make it his duty to certify to the absence of liens, and when he gives such a certificate he "becomes the special agent of the purchaser" who asks for it.

(3) The certificate, by reason of its form, or want of it, imposes no liability even if it was the duty of the receiver to make certificates of search and no lien.

As authority for the first of these positions *Alcorn v. The City* (44 Pa. 348) is cited. The plaintiff in that case sought to hold the city for the negligence of the city surveyor in locating the lines of plaintiff's lot at his request. This Court held that the act of the city surveyor was in no sense that of the city, nor was the duty in which he was engaged a municipal duty. The location of lines between adjoining owners and surveying lots, was held to be "not a duty incumbent on cities in their corporate capacity . . . but a private one falling on the lot owners themselves." The city surveyor, like county surveyors and other public officers, is elected not to represent the municipality, but to serve the public

as occasion may require, at the instance and upon the employment of individuals.

But the collection of taxes is a municipal purpose. They are levied, collected, and disbursed under the authority and direction of the city by officers appointed or elected for the purpose, who represent the city. When levied the duplicates are charged to the receiver. He is the only authorized collector and receiving officer. He is required to open his books for the receipt of taxes on the first day of January of the year for which the taxes are assessed. His daily collections must be reported to the city controller, and his daily cash receipts deposited in the banks designated for that purpose. Taxes not paid during the year, or within fifteen days thereafter, he is required to enter upon the register of unpaid taxes in order to continue their lien. If this is not done the lien ceases, and the real estate may pass by sale discharged therefrom (*Smaltz v. Donohugh and Wife*, 11 WEEKLY NOTES, 219). The entries on the register, if made in time, are valid liens on the real estate affected by them, and must be taken notice of and provided for in case of sale. These liens are not the result of legal proceeding in a court of record which are notice to everybody, but of the act of the city in carrying the unpaid taxes upon the book kept for that purpose in the office of her receiving officer. This is the book of the city, made up by the officials who represent her, and remaining in their custody. It is the evidence of her demands upon real estate within her borders. A purchaser must take notice of this book, and to enable him to know with certainty what appears upon it, the law makes it the duty of the receiver of taxes to certify the liens against any particular piece of real estate. This is a specific duty imposed upon him by law as the representative of the city, the collector of its taxes, and the custodian of its records. In its discharge he represents his principal, speaks for it, and binds it. If his certificate is false and misleading, one who acts upon it in good faith has a right to insist that the city is bound by it. The city is not above the duty to deal fairly and justly with its citizens, and to speak the truth to them when the duty to speak for their information rests clearly on it.

The second reason does not seem to us tenable. When taxes were made a lien on the real estate on which they were levied in the city of Philadelphia, it was necessary to provide some record of the liens unpaid at the end of the current year. For this purpose a book was provided upon which unpaid taxes were to be entered. Taxes not appearing there were presumed to be paid, and they were not liens. Taxes appearing there were valid liens upon the real estate on which they were assessed. This book was thus made the lien docket of the city. It was the

proper and the only reliable source of information open to the interested inquirer. It was kept by, and in the custody of, the receiver whose duty it was to certify liens appearing upon it. When applied to, it was his duty as the representative of the city to state truly the liens against the real estate inquired about. Baxter's conveyancer applied for a search which made an examination for five years necessary. The receiver certified that he had examined for five years, viz., 1873 to 1877, inclusive, and that there were no taxes registered against the lot, except those of 1875. It was as important to the purchaser to know that there were no taxes registered for 1875, as to know that there were taxes unpaid for 1877. It was the amount of liens the purchaser was interested to know, and that the city was bound to tell him, for they were to be taken into consideration and adjusted in the purchase about to be closed. In giving this information he was in no sense the agent of the purchaser. He was discharging an official duty, viz., certifying the liens against the lot inquired about, and he was under a legal obligation to certify their amount truly.

Nor do we regard the form of the certificate as a matter of any consequence in this case. The purchaser applied for, and had a right to receive, a certificate in proper form, informing him of the exact amount of the demands of the city for unpaid taxes. A certificate intended to convey the needed information was furnished, and relying on the truth of its statements the title was taken and the purchase-money paid over. Having thus led the purchaser to pay the amount of the taxes of 1875 to his vendor as purchase-money, the city cannot now be permitted to set up the mistake of its officer as a reason for compelling the payment of the money a second time. If it was a mistake, as it was acted upon in good faith by the purchaser, the city cannot now assert a lien for the taxes of 1875, nor deny the facts which the certificate asserted. The subject of the want of form in a certificate, and of negative statements therein, was considered in *Ziegler v. The Commonwealth* (12 Pa. 227), in which a certificate similar to the one before us was held sufficient in form to justify a recovery.

The judgment in this case is reversed, and a venire facias de novo awarded.

[*Cf. City of Philadelphia v. Heister*, ante, p. 43; *City of Philadelphia v. Glanding*, 26 WEEKLY NOTES, 319.]

R. H. N.

Common Pleas.

C. P. No 4.

April 18, 1891.

Mallon v. Gay.

Practice—Statement for negligence—Damages—Items thereof—Plaintiff is not required to give a particular statement of the amount claimed for each item of damage, as for medicines, medical attendance, and nursing, loss of time, pain, and suffering, the amount stated in the ad damnum averment being sufficient.

Rule for a more specific statement.

The following is a copy of the plaintiff's statement:—

"Tillie Mallon, the above-named plaintiff, seeks to recover the sum of five thousand dollars from the above-named defendants, trading as John Gay's Sons, under the following averment of facts:—

"That the above-named defendants carry on the business of manufacturing carpet at their mill at the northeast corner of Howard and Norris streets, in the city of Philadelphia, and it was and became their duty to provide reasonably safe and proper protection to their employes.

"That notwithstanding their duty in this behalf, the said defendants negligently and carelessly allowed a certain trap-door on the second floor of said mill, to be and remain open without any notice or warning to this plaintiff, so that while this plaintiff was, on the 28th day of November, A. D. 1890, carefully passing across the second floor of said mill, she suddenly fell into said open way, caused by the covering to same having been left open, without any protection or notice to this plaintiff.

"And this plaintiff further avers that she never knew that there was any trap-door in the place where she fell, and that the particular place where said trap-door was located, was so situated that it could not be seen by her exercising ordinary care and diligence, as same was in a dark passageway.

"That in falling in said open way this plaintiff bruised, hurt, and injured her side and other parts of her body, and was confined to bed for a long time from said injuries and nervous prostration caused by said injuries; and this plaintiff suffered great pain, and has been under the doctor's care from that time till now; has been compelled to lay out large sums of money for medicine and medical attendance, and has been unable to follow her usual employment, and has been permanently injured.

"And by reason of said injuries received as aforesaid, this plaintiff has suffered damages in the sum of five thousand dollars."

William C. Hannis, for the rule.

The statement is defective because it does not show the amount the plaintiff has laid out for medicine and medical attendance.

Childs v. Penna. R. R. Co., 27 WEEKLY NOTES, 510.

John S. McKinlay, for the plaintiff.

May 16, 1891. *ARNOLD, J.* Under the practice prior to the Procedure Act of 1887, it was customary to demand a bill of particulars, when further information as to the nature of the injury sued upon and the damages, was desired. (See *Fisher v. Allen*, 21 WEEKLY NOTES, 509, and note.)

The rules of Court now in force require questions of that kind to be raised by demurrer or rule for a more specific statement, which is the same in effect. Under the new practice, in an action of trespass, in which the plaintiff claimed "damages for pain and suffering, loss of time, medical attendance and medicines, and for injuries to his shoulder and head in the sum of \$5000," it was held that the averment of damages was sufficiently specific. (*Schnable v. Schmidt*, 21 WEEKLY NOTES, 153, C. P. No. 1.)

While in an action for damages from assault and battery causing injury to the plaintiff, expenses for medical aid, nursing, loss of time, etc., it may be more regular to set out such elements of damage (but not itemized amounts thereof), yet a reversal will not be ordered because of the absence of such averments. (*Hawes v. O'Reilly*, 126 Pa. 440.) By the modern English practice "no denial or defence shall be necessary as to the damages claimed or their amount; but they shall be deemed to be put in issue in all cases, unless expressly admitted." A demurrer to the amount of damages claimed was overruled in *Mathews v. Penna. R. R. Co.* (20 WEEKLY NOTES, 575).

Rule discharged.

C. P. No. 4.

May 16, 1891.

Fender v. Mason Wrecking Company.

Practice—Requisites of statement in action for negligence—In a case of alleged negligence in doing work under a contract, the contract need not be set out, nor need the particulars of the alleged negligence be stated.

Rule for more specific statement.

The plaintiff's statement was as follows:—

"The plaintiff brings this suit to recover

damages from the defendant for its negligence under the following circumstances:—

"On or about December 23, 1890, the plaintiff, through his agent, the Keystone Plaster Company, hired the defendant, for a certain consideration, to pump sand out of the schooner Mary H. Ladow, then sunk in Salem Cove, and to land her on shore near by, or if she floated after being raised, to tow her to Almshouse Wharf, ice permitting, by means whereof it became the duty of the defendant, in and about the performance of the said contract, to exercise due and proper care and diligence, to employ competent servants, and to use proper, competent, and efficient means, aids, and instruments necessary to perform and complete its contract. The plaintiff avers that the defendant, disregarding its duty in the premises, failed and neglected to exercise due and proper care and diligence to employ competent servants and to use proper, competent, and efficient means in performing its contract, but so carelessly and negligently performed its contract, that the schooner of the plaintiff was damaged, injured, broken, and destroyed, to the damage of the plaintiff, four thousand dollars, wherefore he brings his suit."

Alfred Driver (J. Warren Coulston, with him), for the rule.

The statement does not inform us whether the contract to pump out the schooner is in writing; if it is, we want a copy of it.

[ARNOLD, J. The suit springs out of the alleged negligence or breach of duty, and is not on the contract.]

We are not informed of the time, place, or nature of our neglect, whether it was in pumping out the sand or towing the boat.

The particular acts of negligence should be given.

Childs v. Penna. R. R. Co., 27 WEEKLY NOTES, 510.
Dimmer Beeber, contra.

Exo die. THE COURT. The statement is sufficient. What you want is the evidence. You will get that at the trial.

Rule discharged.

[Less particularity is required where the facts lie as much as or more in the knowledge of the opposite party than in the party pleading: *Stephen on Pleading*, 370; *Heft v. Jones*, 9 WEEKLY NOTES, 541.]

Orphans' Court.

February 18, 1891.

Dickinson's Estate.

Satisfaction of existing claim—When not presumed—Agreement for forbearance—Failure of consideration.

A payment of part of a debt after the whole is due, is no consideration for a release of the balance, or for an agreement to look to another source for payment.

Testator was indebted to claimant who brought suit. The suit was discontinued by agreement, testator paid to claimant a certain sum in cash, and the parties entered into an agreement that testator should pay the balance of the claim out of the first moneys received by him or his personal representatives from the amount due him for paving and grading certain streets, whether said money was received from the city or otherwise. No money was ever paid the decedent for said work, the Supreme Court having decided against the validity of his claims:

Held, that as the agreement to restrict the liability of decedent to the particular fund was not part of the original contract between the parties, and there was no evidence of the acceptance of the new arrangement as a payment in full, claimant had the general right of a creditor to demand payment out of the estate.

Sur exceptions to adjudication.

The facts as they appeared at the audit of the account of the administrator of the estate of William W. Dickinson, the decedent, are set forth in the opinion of the Court. The Auditing Judge awarded to George W. Hancock the balance claimed to be due him by the testator, to which award accountant excepted.

Richard C. McMurtrie, for exceptant.

Lewin W. Barringer, contra.

March 28, 1891. FERGUSON, J. The decedent was indebted to the claimant, who had brought suit in the Court of Common Pleas for the recovery of the amount due him. It does not appear whether there was any defence to this suit; at any rate, while it was pending, on February 4, 1887, the parties came to an agreement that the same should be discontinued. In pursuance of the arrangement the decedent paid the claimant \$967.71 in cash, and gave him an agreement in writing to pay him the balance of his claim "out of and from the first moneys that shall be received by me, my executors, administrators, or assigns, in payment or settlement of the money due and owing to me for the grading and paving of said street (Market Street from 43d to 63d Street), whether said money is received from the city of Philadelphia or otherwise." In point of fact no money was ever received by the decedent for the said work, the

Supreme Court having decided against the validity of his claims against the property owners, none of them voluntarily paid him, and the city made no appropriation for that purpose, as it was then expected it might do; so that the whole balance of the claim remains due, and the payment thereof is demanded out of decedent's estate. It is now claimed that the payment of this balance is restricted to the fund referred to in the above agreement, and that as that fund failed, there is no further personal responsibility upon the part of the decedent. This would undoubtedly be so, if the agreement to restrict the liability of the decedent to this particular fund was a part of the original contract between the parties. (*Chambers v. Jaynes*, 4 Barr, 39; and *Mixsell's Estate*, 25 WEEKLY NOTES, 156.) But at the time this agreement was made this debt already existed, and the claimant had the general right of a creditor to demand its payment from any source whatever. Of what advantage was the new arrangement to him, which limited his means of payment to one fund, and that, as it has since transpired, a very precarious and uncertain one? In the absence of evidence of the acceptance of the new arrangement as an absolute payment and settlement in full, it can only be regarded as an agreement for forbearance, without any waiver of the right of the claimant to enforce the general liability. (*League v. Waring*, 85 Pa. 244; *Diller v. Brubaker*, 52 Id. 498; *McManus v. Bark*, L. R. 5 Ex. 65.)

In this case there is not only no evidence of an acceptance of the money and agreement as a full settlement, but that position is rebutted by the words of the subsequent part of the agreement that the claim for the balance unpaid "shall not be barred by the Statute of Limitations, and I do hereby agree not to plead the said statute to the above claim." This agreement was without any object or purpose if the old obligation was wiped out by the new arrangement, as the statute would not begin to run until the debt became due, and that would not be until the money was recovered by the decedent for the grading and paving of Market Street.

But where is the consideration for this agreement? It must have a consideration to support it or it must fail. The payment of cash on account was no consideration, because that and more was already then due and legally demandable. That a payment of a part of a debt after the whole is due is no consideration for a release of the balance or for an agreement to look to another source for payment, is well settled. (*Cumber v. Wayne*, 1 Sm. Leading Cases, 606; *Bank v. D'Olier*, 1 Chest. Co. Rep. 373; *Brandon v. Brandon*, 2 Pa. C. C. Rep. 46; *Diller v. Brubaker*, *supra*.)

The exceptions are dismissed.

W. L. S.

March, 1891.

Weaver's Estate.

Counsel and client—Privileged communications—What constitute.

Although what takes place between counsel and client in the sanctity of the former's office, cannot be disclosed by the lawyer without the consent of the client, the rule does not apply to what may take place between others in the presence of counsel although they may happen to be his clients.

Counsel may testify to facts which may as readily have occurred in the presence of any other person as in that of a lawyer.

Sur interlocutory report of Examiner.

A petition for an issue *devisavit vel non* to test the validity of the will of Dr. Martin Weaver is pending. The grounds alleged are want of testamentary capacity, and that the paper was procured by undue influence of the principal legatee, Miss Emerson. The evidence already taken disclosed most intimate relations between the testator and the proponent. At a meeting before the Examiner, the contestant called Thomas W. Barlow, Esq., who testified that at the direction of Dr. Weaver, a deed was drawn by witness and executed by the alleged testator, conveying the great bulk of his estate to Miss Emerson, who so frequently accompanied the grantor to counsel's office as to be regarded by the counsel as a client in connection with Dr. Weaver. When asked as to her influence over the doctor, the witness declined to answer because of his professional relation to Miss Emerson. He admitted that both called him as a witness as to this very deed before an inquest in lunacy and that both there waived all objections.

The Examiner thereupon filed this report to test the question.

Edward W. Magill, Carroll R. Williams, and F. Carroll Brewster, for contestants, cited—

- House v. House*, 27 N. W. Rep. 858.
- Shaffer v. Mink*, 14 Id. 726.
- Weeks on Attorneys*, 277, 305, 318, 319.
- Beidler v. Miller*, 1 Woodward, 222.
- Snow v. Gould*, 43 Am. Rep. 604.
- Coveney v. Tannahill*, 1 Hill (N. Y.), 33.
- Jeanes v. Fridenberg*, 3 Clark (Pa.), 199.
- Daniel v. Daniel*, 39 Pa. 191.
- Shore v. Bedford*, 5 Man. & Gr. 271.
- Reynell v. Sprye*, 10 Beav. 51.
- Wharton on Evidence*, § 587.
- Gulick v. Gulick*, 12 Stewart, 516.
- Goodwin Gas Stove Co.'s Appeal*, 117 Pa. 514.
- Graham v. O'Fallon*, 4 Mo. 338.
- Greenough v. Gaskell*, 1 M. & K. 98.
- Russell v. Jackson*, 15 Jurist, 1, 117.

Joseph DeF. Junkin and George Junkin, for proponent.

March 28, 1891. FERGUSON, J. This case comes before us upon the interlocutory report of the Examiner appointed to take testimony in an issue *devisavit vel non*, upon the ground of want of testamentary capacity of the testator and of undue influence exercised upon him. It appeared that Mr. Thomas W. Barlow was counsel for the decedent and also for the respondent in this suit. They were frequently at his office together to consult him professionally. His testimony was objected to upon the ground that what took place in his office, between his clients and himself, was a privileged communication which he had no right to disclose. While it is undoubtedly true, that what takes place between a lawyer and his client in the sanctity of his office must be regarded as sacred, and cannot be disclosed by the lawyer without the consent of the client, yet this rule does not apply to what may take place between others, in his presence, although they may happen to be his clients. He has a right to testify to facts which might as readily have occurred in the presence of any other person, as in that of a lawyer. What, therefore, the decedent and the respondent may have said or done to each other, that was not in the course of Mr. Barlow's employment as attorney for them, or either of them, and not in the nature of a professional communication to or from him, is, we think, competent testimony. (*House v. House*, 27 N. W. Rep. 858; *Shaffer v. Mink*, 14 Id. 726; *Coveney v. Tannahill*, 1 Hill (N. Y.), 33; *Jeanes v. Fridenberg*, 3 Clark (Pa.), 199; *Daniel v. Daniel*, 39 Pa. 191; *Reynell v. Sprye*, 10 Beavan, 51, etc.)

The Examiner is directed to take the testimony of Mr. Barlow to the extent herein indicated.

W. C. S.

February 17, 1891.

Curran's Estate.

Petition to vacate decree—When not entertained—Bill of review under Act of October 13, 1840—Requisites of—Jurisdiction.

A Court may not set aside and vacate a decree fifteen years after its entry, on the allegation that it was improvidently made.

A bill of review under the Act of October 13, 1840, will not be entertained where it does not disclose that the decree complained of was made in confirming the account of an executor, administrator, or guardian.

The Orphans' Court has no jurisdiction where a question of title is raised, the remedy being in the Common Pleas, by bill of equity or otherwise.

Sur petition and answer.

The petition of Reuben Frederick recited an

order of this Court, made November 6, 1875, ordering Frederick C. Brightly, surviving executor of Martin Curran, the decedent, to transfer to Louis and Adela, testator's children, one-half of the said executor's interest in a certain bond and mortgage of one Jacob Engard, for six hundred and sixty-six dollars. The petition also stated that the property upon which said mortgage is created is real estate, belonging to the petitioner, subject to a dower interest of forty dollars, belonging to one Ann Gilbert, now deceased, and the petitioner is entitled to the aforesaid sum of six hundred and sixty-six dollars; and that the decree, as above stated, so far as it directed the assignment of said mortgage to decedent's children, was improvidently made. The prayer of the petition was that the aforesaid decree might be set aside, the said assignment cancelled and destroyed, and the mortgage assigned to the petitioner.

An answer to the above petition was filed in behalf of William McGeorge and others, which denied the facts set out therein.

Harvey K. Newitt, Jr., and *Frank F. Brightly*, for the petitioner.

J. Warner Goheen, for the respondents.

March 28, 1891. FERGUSON, J. We are asked by this petition to say that a decree of this Court made in 1875 was improvidently made, and should now be vacated and set aside. We have no such power. No Court can change its decree after the end of the term in which it was entered. (*Ullery v. Clark*, 18 Pa. 148; *Mathers v. Patterson*, 33 Id. 485; *King v. Brooks*, 72 Id. 364; *Commonwealth v. Mayloy*, 57 Id. 291.) There is in this Court an exception to this rule made by the Act of October 13, 1840, which provides that a bill of review will lie at any time within five years after the final decree confirming the account of any executor, administrator, or guardian. It does not appear that the particular decree complained of was made in confirming such an account, and if it was, it is now too late, after the expiration of fifteen years, to invoke its provisions.

The petition alleges that the executors, by authority of the decree complained of, transferred a certain mortgage to the respondent, the title to which was not in the decedent, but in the petitioner. Thus a question of title is raised, and this Court has no jurisdiction to determine such a controversy. The petitioner's remedy is in the Court of Common Pleas by bill in equity or otherwise.

The petition is dismissed.

W. L. S.

WEEKLY NOTES OF CASES.

VOL. XXVIII.] FRIDAY, MAY 29, 1891. [No. 6.

Supreme Court.

Jan. '91, 206.

April 7, 1891.

Commonwealth, to use, etc. v. Wistar et al.

Appeals from decrees of the Orphans' Court—Recognizances upon—Conditions of—When void—Damages—Act of March 29, 1832, § 59—Interest upon money of the use of which a distributee has been deprived by an appeal, not recoverable as damages in a suit brought upon the recognizance after the dismissal of the appeal.

In a suit upon a recognizance upon an appeal from a decree of the Orphans' Court drawn in the form prescribed by the Act of March 29, 1832, § 59, interest is not recoverable by way of damages.

The amount of the security is in the discretion of the Orphans' Court, and the Judges thereof may increase the amount at any time whilst the record remains with them.

As a general rule, where a statute prescribes the condition of a bond or recognizance upon which a legal remedy is given, and terms harder than the statute requires are exacted, the obligation is void, and the surety is discharged; the rule is otherwise, however, where the stronger obligation is voluntarily assumed.

Where administrators, executors, guardians or trustees appeal from a decree of the Orphans' Court in matters affecting the trust, and when the appeal may jeopardize the estate, the Court may, by exacting additional security to that end, secure the faithful performance of official duty, and preserve the integrity of the trust during the pendency of the appeal.

A recognizance upon an appeal from a decree of the Orphans' Court, given by an appellant who has assumed no official duty, stands in no fiduciary relation, and owes no duty to the Court, which contains conditions beyond the requirements of the Act of March 29, 1832, § 59, is void.

W., one of the heirs-at-law of R., was a party to the partition of R.'s real estate in the Orphans' Court, and took an appeal from a decree therein made. He entered security in the usual form. Subsequently, upon a rule taken, the Court ordered W. to enter security in \$50,000, conditioned "to prosecute his appeal with effect, and to pay all costs that may be adjudged against him, and if the decree be affirmed or the appeal be discontinued or *non prosequi*, to pay all costs and damages that may accrue to the appellees or any of them by reason of his said appeal." The appeal was dismissed by the Supreme Court, whereupon the distributees brought suit upon the recognizance, claiming as damages the loss of interest on the money

to which they were entitled, from the date of the decree to the dismissal of the appeal:

Held, that the bond was void, and that they could not recover.

Appeal of Richard Wistar and the Commonwealth Title Insurance and Trust Company, defendants, from the judgment of the Common Pleas No. 4, of Philadelphia County, in an action of assumpsit brought by the Commonwealth of Pennsylvania to the use of William L. Elkins and Peter A. B. Widener, to the further use of Sarah W. Gillilan, also to the further use of Lillie L. Hopkinson, S. W. Reeves, John M. Scott, and J. Howard Gendell, upon a recognizance given by Wistar, with the Commonwealth Title Insurance Company as surety, upon an appeal by the former from a decree of the Orphans' Court of Philadelphia County.

Wistar having appealed on June 20, 1887, from a decree of the Orphans' Court of Philadelphia County, gave a recognizance for \$50,000 under the direction of the Court, with the Commonwealth Title Insurance and Trust Company as surety, in which the condition was "that if the said Richard Wistar, as aforesaid, shall prosecute his appeal with effect and pay all costs that may be adjudged against him, and if the decree be confirmed or the appeal be dismissed or *non prosequi*, to pay all costs and damages which may accrue to the appellees or any of them by reason of the said appeal, and shall return to the said Orphans' Court the record with the *remittitur*, then the above obligation to be void or else to remain in full force and virtue." Upon April 23, 1888, the Supreme Court dismissed the appeal.

The distributees then brought suit upon the recognizance, claiming as damages interest on the money to which they were entitled from the date of the decree of distribution to the dismissal of the appeal, the use of which they had been deprived of by the appeal.

Judgment was entered for want of a sufficient affidavit of defence; whereupon defendants appealed, assigning the entry of the judgment for error.

The facts are more fully set forth in the opinion of the Supreme Court.

Francis H. Garrett (William Gorman with him), for appellants.

The Orphans' Court not only required the appellant to enter into the recognizance required by the Act of March 29, 1832, § 59, of which the condition is to prosecute the appeal with effect, and pay all costs which may be adjudged against him, but superadded other conditions.

The appeal bond not being such as is prescribed by the Act of Assembly is void.

King v. Culbertson, 10 S. & R. 325.

Bolton v. Robinson, 13 Id. 193.

Thomas v. Stewart, 2 P. & W. 475.

Com. v. Laub, 1 W. & S. 261.

Donley v. Brownlee, 7 Pa. 109.

Hellings's Exrs. v. Directors of the Poor, 15 Id. 409.

Haines v. Levin, 51 Id. 412.

The damages claimed are not actual damages but loss of prospective profits.

J. Howard Gendell (*John M. Scott, A. B. Shearer, and Joseph B. Townsend* with him), for appellees.

Under the Act, if there is a failure either to prosecute the appeal with effect, or to pay the costs, the obligation becomes absolute.

The *quantum* of the security is a matter for the discretion of the Orphans' Court.

"The Court will take care that the interests involved will be fully secured as to costs, compensation for delays, or any other matter that may affect the claimants incidentally. and the necessary discretion, therefore, is wisely deposited where a superior knowledge of the circumstances enables the Court to graduate the security to the exigencies of the particular case."

Koch's Case, 4 Rawle, 268.

Chew's Appeal, 9 W. & S. 151.

Com. v. The Judges, 30 Pa. 37.

Same v. Same, 102 Id. 228.

The damages claimed are not prospective profits, but merely legal interest.

May 18, 1891. CLARK, J. On the 23d of February, 1886, on the petition of Lewis A. Scott, guardian, etc., proceedings in partition of certain real estate, formerly of Richard Wistar, deceased, were instituted in the Orphans' Court of Philadelphia. The partition was so proceeded in that the premises were subdivided into several allotments, all of which, under the order of the said Court, were subsequently sold for prices amounting in the aggregate to \$205,200. When the sale came up for confirmation in the Orphans' Court, Richard Wistar, the defendant in this case, presented his petition, setting forth his interest as an heir-at-law of Richard Wistar, deceased, and praying the Court that the sale might be set aside, and that he should be allowed to take the several allotments at the valuation fixed by the inquest. His petition was refused, and he thereupon, on the 20th of June, 1887, filed the usual affidavit and entered into recognizance of bail, with security in the usual form, for an appeal to the Supreme Court. The amount of the recognizance is not given, but it was conditioned according to the 59th section of the Act of March 29, 1832, "to prosecute his appeal with effect, and to pay all costs that may be adjudged against him."

On the next day, a rule was entered to show cause why the amount of the security should not be increased, and on the 23d day of June, 1887, upon hearing of the rule, it was ordered and de-

creed that the bond previously given "be vacated, and that said Richard Wistar, the appellant, on or before the 8th day of July next, perfect his said appeal, by giving bond or recognizance with sufficient surety, to be approved by the Court, or one of the Judges thereof, after due notice according to the rule of Court, in the sum of \$50,000, conditioned to prosecute his appeal with effect, and to pay all costs that may be adjudged against him, and if the decree be affirmed, or the appeal be discontinued or *non prossed*, to pay all costs and damages that may accrue to the appellees or any of them by reason of his said appeal; and that if security be not entered as aforesaid within said time, the appeal to be disallowed as incomplete and not perfected."

The defendant, Richard Wistar, in order to obtain his said appeal, was obliged to and did comply with the order, entering into recognizance in the amount and according to the conditions required, and his appeal was afterwards entered in the Supreme Court. Upon argument, however, the decree of the Orphans' Court dismissing his petition was, on the 23d of April, 1888, affirmed, and the appeal dismissed, at the cost of the said appellant.

In this suit upon the recognizance of bail, the plaintiffs claim that, by the affirmance of the decree, the condition of the recognizance was broken, and that as the final distribution of the fund realized from the sale was delayed by the appeal, they are entitled, by way of damages, to the interest which they might have made upon the money, which would have come to them in the course of distribution, for one year, with interest on the same from the date of the affirmance of the decree with the costs. The learned Judge of the Court below entered judgment upon a statement of claim to this effect for want of a sufficient affidavit of defence, and this is the error assigned.

The 59th section of the Act of March 29, 1832, relating to appeals from the Orphans' Court, provides as follows: "Any person aggrieved by a definitive sentence or decree of the Orphans' Court, may appeal from the same to the Supreme Court; provided, that the party appealing shall give security by recognizance, with sufficient surety, in the Orphans' Court, or before one of the Judges thereof, conditioned to prosecute such appeal with effect, and to pay all costs that may be adjudged against him, and shall make oath or affirmation that the appeal is not intended for delay; which appeal, thenceforth, shall stay all proceedings in the Orphans' Court, until the same be determined in the Supreme Court, and the record be remitted to the Orphans' Court."

We have held, in an opinion filed herewith, in *Commonwealth* to use *v. Richard and Wm. Lewis Wistar* (next case), that in a suit upon a recognizance in the form prescribed by the statute,

interest is not recoverable by way of damages. In that case a fund arising from the sale of real estate under the same proceedings in partition had been paid into the Orphans' Court for distribution, and, from the final order of distribution, an appeal was entered in the Supreme Court, which was on hearing dismissed at the cost of the appellant, and the decree of distribution affirmed. If in such case interest was not recoverable, it only remains to determine the effect of the superadded words contained in the recognizance in this case, inserted in accordance with the order of the Court, and to decide whether or not the Orphans' Court in its discretion may impose harder terms than are exacted by the statute.

It may be conceded that the amount of the security is in the discretion of the Orphans' Court (*Commonwealth v. Judges*, 10 Pa. 37; *Koch's Estate*, 4 R. 268); and the Judges of that Court may increase the amount at any time, whilst the record remains with them. (*Chew's Appeal*, 9 W. & S. 151.) But unless aided by the provisions of some other statute, there is no authority in the Orphans' Court to impose harder terms than are imposed by the 59th section of the Act of March 29, 1832.

The Orphans' Court undoubtedly has the power by statute, generally, to prevent mismanagement and waste by administrators, executors, guardians, and trustees (Act of March 29, 1832, secs. 22 and 23, P. L. 195); and when in certain cases this class of persons wish to avail themselves of an appeal, in matters affecting the trust, and when the appeal may jeopardize the estate, the Orphans' Court may, by exacting additional security to that end, secure the faithful performance of official duty, and preserve the integrity of the trust during pendency of an appeal. But where the appellant has assumed no official duty, stands in no fiduciary relation, and owes no duty to the Court, but desires to avail himself, in his own right, of a remedy which the law gives him, he can be held to no harder terms than the statute imposes.

As a general rule, where a statute prescribes the condition of a bond, or recognizance, upon which a legal remedy is given, and terms harder than the statute requires are exacted, the obligation is void, and the surety is discharged. (*Farmers' Bank v. Boyer*, 16 S. & R. 48; *Beacom v. Holmes*, 13 Id. 190; *McKee v. Stannard*, 14 Id. 380; *Power v. Graydon*, 53 Pa. 198; *Hutton v. Helme*, 5 Watts, 346.) To the same effect also are *King v. Culbertson* (10 S. & R. 325); *Bolton v. Robinson* (13 Id. 193); *Thomas v. Stewart* (2 P. & W. 475); *Com'th v. Laub* (1 W. & S. 261); *Donley v. Brownlee* (7 Pa. 109); *Hellings's Exrs. v. Directors of the Poor* (15 Pa. 409). If, however, the stronger obligation is voluntarily assumed, it is otherwise. (*Haines v. Levin*, 51 Pa. 417; *Slutter v. Kirkendall*, 100 Id. 307.)

Nor does the surety stand on more advantageous ground than the principal. A variance of this sort, when it is available at all, may be pleaded at law, and therefore affords no room for the extraordinary interference of a chancellor. (*Farmers' Bank v. Boyer*, *supra*.)

In *Haines v. Levin* (51 Pa. 417), it is said that when a statutory condition is expressed, limiting the terms upon which a legal remedy is given, and harder terms are exacted than the statute requires, the recognizance or bond is void, as a departure to the prejudice of the rights of the party entitled to his redress, and the surety is discharged. It is different when the statutory obligation is given to secure the performance of a duty; then, if the vicious portion of the condition is severable from the remainder, the bond is valid as to the part which is good; citing *Com'th v. Laub* (1 W. & S. 261); *Hellings v. Dirs. of Poor* (15 Pa. 409); and *Shunk v. Miller* (5 Id. 250).

This distinction is illustrated in the cases cited by the appellees. In *Commonwealth v. Judges*, etc. (10 Pa. 37), an executor, by a decree of the Orphans' Court of Philadelphia, had been dismissed from his office, for failure to give security for the faithful performance of his duties. Whereupon he tendered a recognizance, according to the statute referred to, amply sufficient to cover the costs, etc. But the Court demanded security in \$600,000, conditioned to prosecute his appeal with effect, pay all costs which might accrue, and for the faithful performance of his duties pending the appeal. He prayed a rule on the Judges to show cause why a mandamus should not issue, etc. The return set forth that the relator had been dismissed for mismanagement, that the recognizance had been fixed to prevent waste, etc. In course of the opinion Chief Justice Ginson said: "With a decree against him, which is at least presumptive evidence of malversation, did the Legislature intend that he should continue to administer the estate on no more than his original responsibility—perhaps for years—during the pendency of the appeal, though the estate might be wasted or ruined before the determination of it. Certainly not. The appeal suspended the order for permanent security; but the Legislature directed the Orphans' Court to demand as a substitute for it, security, *ad interim*; and this was intended, undoubtedly, to secure the appellees against intervening waste. It is plain, therefore, that the general form of the condition prescribed must be moulded by interpretation so as to reach the ends of justice in the particular proceeding."

Chew's Appeal (9 W. & S. 151), is to the same effect. In that case it had been adjudged that the appellant, who was an executor, was mismanaging the estate of his decedent, and it was ordered that he should give bail in the sum

of \$50,000; failing to do so, he was dismissed from his office, and from this decree he entered an appeal to this Court. Security was first entered in \$100, but afterwards the Orphans' Court increased the amount of security required to \$50,000. The appellant failing to give the security required, the appeal was dismissed.

In Koch's Estate (4 Rawle, 268), and in Commonwealth v. Judges (102 Pa. 228), nothing more was decided than that the extent or amount of the security is within the discretion of the Orphans' Court. The generality of expression in Koch's Estate is calculated to mislead perhaps, but if read in the light of what has been said, it will be found to be entirely consistent with the general rule stated.

No trustee can complain that he is called upon, by the Court having control of his accounts, pending his appeal, and when he is under a charge of mismanagement, to secure the faithful performance of his duty. But the increased obligation of this recognizance was not inserted to insure the discharge of official duty. Richard Wistar was not a trustee; he owed no duty of a fiduciary nature to the Court, or to the appellees, in respect of the estate, or of the fund afterwards for distribution. He was one of the heirs-at-law of Richard Wistar, deceased, and was a party to the partition, and as a party was entitled to avail himself of all the rights and remedies which the law afforded him, upon such terms as the law prescribed. The amount of the recognizance, under the 59th section of the Act of 1832, is subject to the discretion of the Orphans' Court, or one of the Judges thereof; whilst on appeals from decrees distributing the proceeds of sheriff's sales of real or personal property, and the proceeds of sales by an assignee for creditors, etc., the amount of the recognizance is subject to the discretion of the Common Pleas or one of the Judges thereof, and we can see no reason for supposing that any greater powers are conferred in the one case than in the other; for the words of the respective statutes are substantially the same. To hold that in either, or any of such cases, the unsuccessful appellant might be held liable in damages, in an action upon the recognizance, to each and all of the persons interested, for the interest accruing during the pending of the appeal as damages for the delay, would be a monstrous wrong, and would operate in many cases as an absolute denial of justice.

We are of opinion that the Orphans' Court had no power to impose such terms as were contained in the order of June 23, 1887, and that the recognizance, exacted from the defendant in this case, as a condition of obtaining the appeal, was void.

The judgment is reversed.

[See next case.]

H. C. O.

Jan. '91, 207.

April 7, 1891.

Commonwealth, to use, etc., v. Wistar et al.

Appeals from decrees of the Orphans' Court—Recognizances upon — Damages — Act of March 29, 1832, § 59—Interest upon money, of the use of which a distributee has been deprived by an appeal, not recoverable as damages in a suit brought upon the recognizance after the dismissal of the appeal.

In a suit upon a recognizance upon an appeal from a decree of the Orphans' Court, drawn in the form prescribed by the Act of March 29, 1832, § 59, interest is not recoverable by way of damages.

W. appealed from a decree of the Orphans' Court, making distribution of a fund arising from the sale of real estate in proceedings in partition, and gave a recognizance in the sum of \$10,000, conditioned to "prosecute his appeal with effect, and pay all costs that may be adjudged against him." The appeal was dismissed. The distributees then brought suit upon the bond, claiming as damages the loss of interest upon the money awarded to them:

Held, that they could not recover.

Appeal of Richard Wistar and William Lewis Wistar, defendants, from the judgment of the Common Pleas No. 4, of Philadelphia County, in an action of assumpsit, brought by the Commonwealth of Pennsylvania to the use of William L. Elkins and Peter A. B. Widener, also to the further use of Sarah W. Gillilan and Lillie L. Hopkinson, to recover upon bonds given by defendants upon their separate appeals from a decree of the Orphans' Court.

From the decree of distribution of the proceeds of the sale of real estate formerly of Richard Wistar, deceased, under proceedings in partition in the Orphans' Court of Philadelphia County, by which awards were made to the use plaintiffs, defendants appealed to the Supreme Court. A recognizance in the sum of \$10,000 was given in each appeal, the appellants becoming surety for each other. The condition of the bond in each case was "that if the said W. shall prosecute his appeal with effect, and pay all costs that may be adjudged against him, then the above obligation to be void," etc.

The decree of distribution was made on December 6, 1888; the appeals were taken December 19, 1888, and the Supreme Court dismissed the appeals on April 15, 1889, at the costs of the appellants. (Wistar's Appeals, 23 WEEKLY NOTES, 532.)

Suit was then brought upon the bonds by the Commonwealth to the use of the appellees, upon the ground that the latter had lost the use of the money awarded to them. They claimed four per cent. interest upon the amount of their awards, being the difference between the legal rate of

interest and the amount allowed by the depository of the Court. An affidavit of defence having been filed setting forth that the statement was not one upon which judgment could be had for want of an affidavit of defence; that the damages claimed were not the result of any breach of the condition of the bond; and that defendants had paid large sums for taxes, repairs, and improvements upon the property, for which they were entitled to a set-off, the Court entered judgment for want of a sufficient affidavit of defence. Whereupon defendants appealed, assigning the judgment of the Court for error.

Francis H. Garrett (William Gorman with him), for appellants.

The conditions of the bond have been complied with. There is no mention in the bond of anything but costs, and the suit is brought to recover damages for loss of prospective profits.

The amount of the bond seems exorbitant if it is only given to secure the payment of costs, but the amount of security is entirely within the jurisdiction of the Orphans' Court, and not the subject of an appeal.

Chew's Appeal, 9 W. & S. 151.

J. Howard Gendell (John M. Scott, A. B. Shearer, and Joseph B. Townsend with him), for appellees.

The bond is not satisfied by the payment of costs alone; the appellant must succeed in his appeal. Otherwise the appellee would be at the mercy of any one who might take a frivolous appeal, and stay proceedings for months or years until its determination. Additional words added to the obligation simply serve to explain the obligation contained in the general words specified in the statute.

Koch's Case, 4 Rawle, 268.

Chew's Appeal, 9 W. & S. 151.

Com. v. The Judges, 10 Pa. 37.

Same v. Same, 102 Id. 226.

May 18, 1891. CLARK, J. The real estate formerly of Richard Wistar, deceased, under proceedings in partition in the Orphans' Court of Philadelphia, was sold upon the order of that Court; the sales were confirmed and the proceeds, \$203,450, were paid into Court for distribution by S. W. Reeves, the trustee. In the distribution which followed, certain sums were, on December 6, 1888, awarded by the Orphans' Court to the persons to whose use this suit is brought, to be paid out of the fund, viz: to William L. Elkins, and Peter A. B. Widener the sum of \$93,580.98; to Sarah W. Gillilan \$15,596.83, and to Lillie L. Hopkinson the interest upon \$15,596.83 for life, etc. On the 19th of December, 1888, Richard Wistar and William Lewis Wistar, who were parties interested, entered into recognizances in due form, and took appeals from the final order of distribution to the Supreme

Court, filing the usual affidavits that the same were not intended for delay.

These separate appeals were subsequently so proceeded in, that on the 15th of April, 1889, the decree of distribution was in each case affirmed, and the appeals dismissed at the cost of the appellants, respectively. This suit is brought upon the two several recognizances, given at the time the appeals were taken, each in the sum of \$10,000, and in which the appellants each became the surety of the other.

The recognizances are conditioned in the exact words of the 59th section of the Act of March 29, 1832 (P. L. 213), that the appellant "shall prosecute his appeal with effect, and pay all costs that may be adjudged against him." In the statement of claim, the plaintiffs aver that by reason of said appeals having been entered, the order for distribution, and payments of the money thereunder, were stayed; that the fund in Court was deposited, pending the appeals, with the bankers of the Court, and bore interest at the rate of two per cent. only; that by this means, the persons to whom the money was awarded lost the use of their money; that the condition of the recognizance was broken, and an action hath accrued to the use of plaintiffs to demand and have the interest at the rate of four per cent. on the respective sums awarded to them in the distribution from the date of the appeals to the date of the affirmance of the decree.

It is contended, that the appellants did not prosecute their respective appeals with effect, and that they are therefore liable for all loss or damage sustained by the appellees therein, in consequence of the appeals. The condition of the recognizance is that the appellant "shall prosecute his appeal with effect, and pay all costs that may be adjudged against him." The appellees' contention is that two distinct things must be done to comply with the condition—the appeal must be prosecuted with effect, and in addition to this, the costs, if any, adjudged against the appellant, must be paid. But it is plain, if he does prosecute his appeal with effect, no costs would ordinarily be adjudged against him; costs would be adjudged against him only if he failed to prosecute the appeal with effect. The condition therefore in effect creates an alternate obligation, viz: that the appellant will prosecute his appeal with effect, and failing to do so, will pay all costs which shall be adjudged against him.

Precisely the same form of recognizance is provided for in the 91st section of the Act of June 16, 1836 (Purd. Dig. 765, pl. 123), relating to appeals from distributions of the proceeds of sheriff's sales; also in the 36th section of the Act of June 14, 1836 (Purd. Dig. 1653, pl. 36), relating to appeals from the distribution of as-

signed estates in the hands of trustees; also in the 43d section of the Act of June 13, 1836 (Purd. Dig. 626, pl. 16), relating to distribution in cases of domestic attachment; and the same form of recognizance is also, by the 1st section of the Act of March 17, 1845 (Purd. Dig. 699, pl. 58), directed to be taken in certain appeals from interlocutory and final decrees in equity.

No authority has been cited to show that in any of the very numerous cases arising under these various sections, has it ever been contended, much less decided, that a recognizance in this form is to have the construction contended for in this case. On the contrary, *Johnson v. Hessel* (134 Pa. 315) was an action upon a recognizance of bail in error, taken under the 7th section of the Act of 1836, in such form as to be a super-seedeas. The condition was, "that the above-named plaintiff in error prosecute his writ of error *with effect*; and if judgment be affirmed, or the writ of error be discontinued, or *non prossed*, that he pay the debt, damages, and costs adjudged or accrued upon such judgment, and all other damages or costs that may be awarded upon such writ of error," etc. The action in the Court below was an ejectment, and the plaintiff's claim in the suit on the recognizance was that, as the judgment in the Common Pleas had been affirmed by the Supreme Court, he was entitled by way of damages to the rental value of the premises during the pendency of the writ of error. The plaintiff there, as here, contended that such damages were the natural, proximate, and orderly result of the writ of error. "Otherwise," he argued, "an owner of property is helpless against an irresponsible person in the wrongful use and occupation of his premises, as by merely purchasing a writ of error and discontinuing it, when reached for argument in the Supreme Court, he may occupy the premises for the intervening time without payment of rent." But this Court held that the recognizance, although the plaintiff in error did not prosecute his writ of error with effect, did not bind the obligors to pay the rental value of the premises, during the pendency of the writ of error; that such damages, not being included in the judgment, nor awarded upon the writ of error, were within neither the letter nor spirit of the condition stated in the recognizance.

The fund for distribution in the case now under consideration was \$203,450. It was not in the hands of Richard and William Lewis Wistar; it was paid into Court; the defendants had no control over or use of the money. They were by these appeals denied the use of the amount awarded to themselves, and suffered the same proportionate loss as the other distributees. The law secured to them the right of appeal, and they

were entitled to exercise that right. If, in the distribution of a fund in the Orphans' Court, or in the hands of an assignee for creditors, or of a fund arising from a sheriff's sale of either real or personal estate, an appellant, upon failure to sustain his appeal, is to be held liable for the interest accruing upon the whole fund for distribution, there would, in many cases, be a practical denial of justice. For, whilst the creditors' claim may be less than \$500, the fund for distribution may be \$500,000, and in such case the risks incurred would be too great to justify the creditor in asserting his claim. The adoption of such a measure of liability as is here contended for, would result in the most monstrous injustice.

The affidavit of defence does not set forth the matters of defence in as direct and specific form and manner as might have been done, but it contains enough to show at least a partial defence. If the costs have not been paid, they may be recovered at the trial.

The judgment is reversed, and a procedendo awarded.

[See preceding case.]

H. C. O.

Jan. '91, 184.

April 2, 1891.

Hessel v. Johnson.

Landlord and tenant—Distress for rent—Lease—Sub-tenant—Assignment of lease—Surrender of lease.

When a tenant for a term certain sublets for the same term and then assigns his tenancy, and thereafter, without notice to the sub-tenant, whose rights are known both to said assignee and to the landlord, the assignee surrenders his lease prior to its expiration, and such surrender is accepted by the landlord, who immediately makes to said assignee a new lease for a longer term during the time covered by the original term, the landlord sustains no relation to the sub-tenant out of which any right to distrain can arise.

In the above case, if the landlord's right to distrain upon the goods of the sub-tenant in the right of the original lessee subsisted after the surrender of the original lease, it passed out of the landlord by virtue of the new lease, which clothed the new lessee with all the rights and remedies which his landlord had at the time the new lease was made, for the recovery of both the rent and the possession from the sub-tenant.

Appeal of Henry Hessel, plaintiff, from the judgment of the Common Pleas No. 4, of Philadelphia County, entered upon a case stated, wherein M. T. Johnson and R. D. Thompson, a bailiff, were the defendants.

This was originally an action of replevin. After a reversal of the judgment of the Court below and a venire facias de novo (see *Hessel v.*

Johnson, 25 WEEKLY NOTES, 101) the pleadings were amended by both plaintiff and defendants, who eventually, to avoid complications in the pleadings, agreed to the following case stated:—

"In the early part of October, 1887, one James P. Rossiter was the tenant of the premises at the northwest corner of Tenth and Race streets, under a demise under seal made to him by the avowant in the above case, Moses T. Johnson, as agent for Horatio M. and Mary Bell Allen, the term under the lease extending to April 1, 1888, and the rent thereby reserved being at the rate of \$58.33 per month, payable on the first day of each month, in advance.

"Henry Hessel, the plaintiff, was sub-tenant, under Rossiter, of a portion of the premises, viz., the first floor and basement, at a rent of \$25 per month. It is admitted, for the purpose of this suit only, that Hessel's term extended to the end of Rossiter's term, at least. On October 16, 1887, Rossiter sold and assigned to Clinton S. Fritz his unexpired term for valuable consideration then paid by Fritz to Rossiter; Fritz was aware that Hessel was in possession of the said portion of the premises as sub-tenant.

"To this transfer avowant (the landlord) assented. It was then agreed between Fritz, who was the assignee of Rossiter's lease, and Johnson, the avowant, that the Rossiter lease should be given up on November 1, 1887, and a new lease to Fritz substituted therefor from that date, and accordingly on October 19, 1887, Fritz procured from the avowant, as agent aforesaid, a new lease of the entire premises for the term of two years, to begin on the first day of November, 1887, reserving precisely the same rental and containing precisely the same provisions as were contained in the Rossiter lease; the rent reserved being payable in monthly portions of \$58.33, in advance, on the first day of each month, it being the understanding that the new lease should be substituted for the Rossiter lease from the date the new lease went into effect.

"Henry Hessel, the plaintiff, was not a party to these transactions. His consent was never asked for nor obtained to the transfer by Rossiter to Fritz, nor to the substitution of the new lease to Fritz in place of the old one to Rossiter.

"Immediately on his purchase of Rossiter's unexpired term, Fritz went into occupation of that part of the premises not occupied by Hessel. He called on Hessel and announced himself as Hessel's new landlord. Some time in November, Fritz called on Hessel and demanded the rent due for that month, and on Hessel's refusal to pay, distrained therefor. Hessel remained in possession until April 1, 1888, and paid no rent to any one, nor did Fritz or Rossiter or any one

else pay any rent to avowant for that period from November 1, 1887, to April 1, 1888.

"In March, 1888, avowant distrained under avowant's lease to said Clinton S. Fritz for four months' rent as then due and unpaid and in arrear from Clinton S. Fritz, for the entire premises at the rate of \$58.33 per month, amounting to \$233.32—that is to say, for months of December, 1887, January, February, and March, 1888. Under this distraint a levy was made generally, both on the household goods of Fritz in the upper part of the building, and on the goods and stock of the plaintiff on the first floor. The plaintiff replevied his goods by the writ in this case. The avowant did not further pursue his distraint against Fritz.

"The value of the plaintiff's goods replevied was \$300.

"If the Court shall be of opinion that the avowant had any right of distraint for rent on the plaintiff's goods, then judgment to be entered for defendant for such amount of rent in arrear as the Court shall fine that the plaintiff's goods were liable to be taken for; otherwise judgment to be entered for the plaintiff."

Upon this case stated the Court below entered judgment in favor of Johnson in the sum of \$100; whereupon Hessel took this appeal, assigning as error the judgment of the Court.

William C. Mayne, for appellant, relied upon—
Hessel v. Johnson, 129 Pa. 173.

Rowland Evans (Richard L. Ashhurst with him), for appellee.

In replevin, it is well settled that if it appear that the avowant had any right of distraint on the plaintiff's goods, for any amount of rent, he is entitled to a return of the goods.

Forty v. Imber, 6 East. 435.

Johnson v. Lawson, 2 Bing. 343.

Page v. Chuck, 10 Moore, 264.

Grenville v. The College, 12 Mod. 386.

It was expressly decided in *Hessel v. Johnson supra*, that: "The effect of Rossiter's surrender as upon a transfer or assignment, was therefore to attorn the sub-tenant to the original landlord, to whom he was bound to fulfil the conditions of his contract in the payment of the rent; and failing to pay the rent, his goods upon the demised premises were liable to distress, according to the terms of the lease from Rossiter."

It is well settled that a man may distrain for one cause and avow for another.

Morris on Replevin, p. 174.

So the avowant may show, by several separate avowries, the various rights justifying his distraint.

Morris on Replevin, 151.

In *Johnson v. Lawson* (2 Bing. 343), there were twelve avowries.

In *Phillips v. Whitted* (105 E. C. L. R. 804),

it was held that it is immaterial what reason may have been assigned for taking a distress if any right to take it existed.

The law as laid down in these cases has been repeatedly recognized and followed in the decisions of this Court.

Barr v. Hughes, 44 Pa. 516.

Phipps v. Boyd, 54 Id. 342.

The right of the landlord to distrain and have a return of the goods replevied, is not affected by any question of the amount of the rent in arrears.

Barr v. Hughes, 44 Pa. 516.

Karns v. McKinney, 74 Id. 387.

Reed v. Ward, 22 Id. 144.

April 27, 1891. WILLIAMS, J. This case presents an interesting question that lies outside the beaten track of landlord and tenant cases. It was before us two years ago, and is reported in 129 Pa. 173. The material facts are not in controversy, and are as follows: In 1886, Johnson leased the building at the corner of Tenth and Race streets, Philadelphia, to Rossiter, at an annual rent of seven hundred dollars, with leave to sublet. Rossiter did soon after sublet the first floor to Hessel, who went into possession with the knowledge of Johnson, at a rental of twenty-five dollars per month. On the sixteenth of October, 1887, Rossiter sold his lease to Fritz, and assigned his entire interest therein to him. The term had until April 1, 1888, to run. By his purchase Fritz became, and well understood the fact, the landlord of Hessel, entitled to collect the rent falling due from him. Three days later Fritz surrendered his lease to Johnson, who thereupon gave him a new one for the same premises at the same rental but for a longer term. This arrangement was made without notice to Hessel, and in disregard of his rights, of which both parties had the fullest notice. For some reason Fritz did not pay his rent, and in March, 1888, while Hessel's term was yet unexpired, Johnson issued a landlord's warrant on his lease to Fritz for four months' arrears. Upon this warrant a quantity of Hessel's goods in his own store was seized as a distress for rent due from Fritz. An action of replevin was brought for the goods, in which Johnson avowed the taking for rent due from Fritz under the lease made October 19, 1887. On the trial in the Court below judgment was rendered in favor of Johnson, the avowant, and the rent due from Fritz found to be two hundred and thirty-three dollars. We held that Fritz could not surrender the term of Hessel, and Johnson by accepting the surrender and making a new lease could not extinguish it under the circumstances of this case; that Hessel did not hold under or in subordination to the new lease, but in hostility to it, and that the seizure of his goods could not be justified under an avowry for rent due from Fritz on the new

lease. The case went back for another trial, which has now been had. The judgment entered is again in favor of the defendant, but the rent in arrear is fixed at one hundred dollars, being the amount of four months' rent due from Hessel to his landlord under the Rossiter lease. This was probably intended as a compliance with the rule laid down in Hessel v. Johnson (*supra*), and as holding Hessel simply for his own rent.

It may be that Hessel owes and ought to pay this sum to his landlord, but our question is whether Johnson has the right to seize his goods because he does not pay it. What right has he? Hessel went into possession under Rossiter. Johnson was the landlord, Rossiter the tenant, Hessel the sub-tenant, and liable to be distrained upon either by his lessor for his own rent, or by his lessor's landlord for the rent to him on the original lease. When Fritz bought from Rossiter he assumed his obligation to pay Johnson and acquired his right to collect from Hessel, the sub-tenant. The surrender of the lease may have passed the right of Fritz to collect the rent from Hessel over to Johnson if the transaction had ended with the surrender. If the rent had not been paid then, it is probable that Johnson could have distrained not for rent due from Rossiter or Fritz, for as to them the lease was at an end, but for the rent due from Hessel whose sub-tenancy survived. Neither the avowry on which the first trial proceeded, nor the case stated which was substituted for the pleadings at the second trial, suggests that the seizure complained of was made by Johnson as the landlord of Rossiter or of Hessel. On the contrary, the only demise alleged in either is that of November 1, 1887, to Fritz. Our brother CLARK in Hessel v. Johnson (*supra*), pointed out very clearly that as Hessel was not in under the demise so set up, but in hostility to it, the seizure of his goods could not be justified under it. But the transaction between Fritz and Johnson did not end with the surrender of the Rossiter lease, but immediately upon the surrender, Johnson made a new lease for the entire building at an entire rent to Fritz, who accepted it. Both parties knew, as we have seen, of Hessel's lease and occupancy of the first floor. It was clear, therefore, that Fritz took the risk of his possession and the collection of the rent from him, and engaged without any reservation or exception on that account to pay Johnson the rent due for the whole building. If then the surrender vested in Johnson the right residing in Fritz as the landlord of Hessel to collect the rent from him, the new lease executed at the same time operated as a conduit to return the right so acquired to Fritz, who, as between himself and Johnson, acquired an absolute and unqualified leasehold estate in the premises. If, therefore, the right to amend the avowry or to

treat it as amended, notwithstanding the case stated, be conceded as broadly as it is claimed on Johnson's behalf, the question remains what right of distraint on the goods of Hessel has Johnson shown himself to have of which we can give him the benefit? He could not distraint for rent due from Rossiter, for that lease, with its undertaking to pay rent, has been surrendered to him, he has accepted the surrender, and has made a new demise of the premises to Fritz. He could not distraint in the right of Rossiter for the rent due from the sub-tenant, for, as we have seen, he does not hold that right since the execution and delivery of the new lease to Fritz.

The mere fact that Hessel owes rent to somebody is not enough to justify the seizure of his goods by anybody except the person who occupies towards him the relation of landlord. This is apparent if we consider on what the right to distraint rests. From the earliest days of the common law it has been regarded as a remedy for the non-payment of rent, to be made use of by the landlord, or his bailiff, because of a demise at a rent certain of the premises entered for the purpose of making the seizure. If a restatement of this elementary principle was desirable, it was made in *Oil and Mining Company v. Barnes* (62 Pa. 445). The avowry of the seizure must, therefore, on all the authorities, English or American, set out a demise, the rent reserved, that rent was in arrears under the demise, and that the seizure was made to compel payment of such arrears. It was formerly held that the amount of the arrears must be stated with certainty and proved as stated. (*Waltman v. Allison*, 10 Pa. 464.) This rule has been relaxed, and it is now enough to state the demise and the rent reserved with certainty, and a variance between the avowry and the proofs as to the rent in arrear is immaterial. (*Barr v. Hughes*, 44 Pa. 516; *Phipps v. Boyd*, 54 Id. 342.) If the plaintiff in replevin desires to deny the right of seizure set up, he may deny the demise under which it is asserted; or, admitting the demise, he may allege that the title had passed out of the avowant before the seizure was made. In either case the force of the reply rests in the denial of the existence of the relation of landlord and tenant when the goods were seized. On the facts of this case that relation did not exist between Johnson and Hessel in March, 1888, and no amendment of the avowry could, therefore, avail as a justification for the seizure of Hessel's goods in his own store.

It was distinctly held when this case was here before, that Johnson having made the new lease with knowledge of Hessel's position as a sub-tenant, could not seize his goods in his own possession for the rent due from Fritz under the new lease. That was the only question then presented. We now hold that he sustained no

relation to Hessel out of which the right to distraint could arise. His right to distraint against Rossiter was extinguished by his own act in accepting, and acting upon, the surrender of the lease to him. His right to distraint upon Hessel in the right of Rossiter, if that right subsisted in him after the surrender by Fritz, passed out of him by virtue of the new lease, which clothed Fritz with all the rights and remedies which his landlord had at the time the new lease was made for the recovery of both the rent and the possession from Hessel.

If any other right to distraint than those we have now considered could have been alleged by Johnson, it has not been suggested to us by counsel, nor by an examination of the facts presented. Hessel ought to pay his rent if he has not; but whether he does so or not, he has a right to object to the seizure of his goods by any person not authorized to make such seizure. If his position is a somewhat anomalous one, there is this to be said in his favor, he did not put himself in it. The acts of Johnson and Fritz done in disregard of his right, and apparently in hostility to him, are responsible for whatever uncertainty has arisen in consequence of them.

The judgment is now reversed, and judgment is entered in this Court upon the case stated in favor of the plaintiff.

MITCHELL, J., dissented.

GREEN and CLARK, JJ., absent.

Counsel for appellee subsequently moved for a reargument, filing a printed brief, in which they contended:—

During the Rossiter lease Hessel's goods could certainly have been distrained on for rent due under that lease.

The transaction between Johnson and Fritz, after the latter had become assignee of the Rossiter lease, whereby a new lease was to be substituted therefor from a future date (November 1, 1887), at most was but an agreement for surrender and not a surrender *per se*. It required to be followed by a surrender of possession to make it effectual. In *Huddleston v. Johnston* (1 McClell. & Younge, 143), it was expressly decided that an agreement for surrender, not followed by delivery of possession, does not amount to a surrender. To constitute a surrender there must be both an agreement by the proper parties to manifest such an intent, and also a yielding up of the possession to him who hath the greater estate.

The surrender could not be made to the prejudice of the rights of Hessel as sub-tenant, and he had the option of either affirming or disaffirming it.

By holding on to possession he clearly disaffirmed the surrender and prevented it from

becoming effectual, and having thus elected to retain his possession under the Rossiter lease he is clearly estopped to say the same had been surrendered. Thus the agreement for surrender, if such it was, came to naught, because the surrenderer or his sub-tenant failed to surrender possession of the premises at the time agreed on. It surely cannot be held that a landlord loses his rights under a lease by reason of an agreement on the part of his tenant to surrender, which agreement the tenant, or one claiming under him, fails to perform by insisting on retaining possession.

If *qua* Hessel the Rossiter lease still existed, Hessel's goods were certainly liable to be distrained thereunder.

This, moreover, is *res adjudicata*.

Hessel v. Johnson, 124 Pa. 233.

On the other hand, if Hessel did assent to the surrender he thereby became attorned to Johnson, the paramount landlord, and his goods became liable to distraint by the latter directly for his own rent.

When the new lease was made to Fritz, either Hessel came under it or he did not.

If he did, his goods of course became liable to be taken for Fritz's rent.

If he did not, and if it can be held that it was possible for him to retain his tenancy under his own lease in hostility to the lease to Fritz, then clearly his goods remained liable to be distrained on by Johnson for his own proper rent.

May 18, 1891. PER CURIAM. Reargument refused.
C. K. Z.

Jan. '91, 96.

March 26, 1891.

City of Philadelphia v. Ridge Ave. Pass. Ry. Co.

Legislation—Acts of Assembly—Title—Supplemental Acts—Act of March 8, 1872—Ridge Avenue Passenger Railway Co.—Dividends of—Taxation of—Estoppel—Res adjudicata.

Although it is not necessary that the title to an Act of Assembly should be a complete index to its provisions, the subject of the proposed legislation must be expressed therein, so as to give notice of its purpose to the members of the Legislature and to others specially interested.

When however an Act of Assembly is a supplement to a former Act, if the subject of the original Act is sufficiently expressed in its title, and the provisions of the supplement are germane to the subject of the original Act, the general rule is that the subject of the supplement is covered by a title which contains a specific reference to the original Act by its title, giving the date of its approval, and declaring it to be a supplement thereto.

The provisions of the Act of March 8, 1872 (P. L.

264), relating to the tax upon the dividends declared by the Ridge Avenue Passenger Railway Company, which Act is entitled "An Act relating to the Ridge Avenue Passenger Railway Company," are unconstitutional and void, being in contravention of § 8, Art. XI. of the Constitution of 1790, as amended in 1864, which requires that "no bill shall be passed by the Legislature containing more than one subject, which shall be clearly expressed in the title, except appropriation bills."

Ridge Avenue Passenger Railway Co. v. City of Philadelphia, 124 Pa. 219; S. C. 23 WEEKLY NOTES, 324, approved and followed.

While a judgment, rendered upon the merits, is an absolute bar to a subsequent action upon the same claim or demand, and concludes the parties and privies thereto, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but also as to any other admissible matter which might have been offered for that purpose, yet in a second action between the same parties or their privies upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered.

The city of Philadelphia having brought suit against the Ridge Avenue Passenger Railway Company for taxes on the dividends declared by that company for the years 1872-1879, under the Act of March 8, 1872 (P. L. 264), and having obtained judgment therefor, is now estopped from bringing any subsequent action founded on the same demands, but in another proceeding to recover the tax on the dividends declared subsequent to 1879, the city is not estopped from setting up the unconstitutionality of said Act of March 8, 1872, and of claiming to collect taxes on said dividends under the previous Acts of April 15, 1858 (P. L. 301) and March 28, 1859 (P. L. 264).

When however the city of Philadelphia had demanded and accepted payment of taxes from said railway company under the provisions of the Act of March 8, 1872 (P. L. 264), and said taxes were paid and receipted for as in full for all the taxes then due, the city cannot thereafter allege the unconstitutionality of said Act, and claim to collect the additional amount which would have been paid had the tax been levied under the provisions of said prior Acts of Assembly.

Appeal of the Ridge Avenue Passenger Railway Company, defendant, from the judgment of the Common Pleas No. 2, of Philadelphia County, entered upon a case stated, wherein the city of Philadelphia was plaintiff.

The case stated recited the incorporation of the Girard College Passenger Railway Company by the Act of April 15, 1858 (P. L. 301), with an authorized capital of \$500,000, and of the Ridge Avenue and Manayunk Passenger Railroad Company by the Act of March 28, 1859 (P. L. 264), with an authorized capital of \$250,000, and that each Act required the company thereby incorporated to "annually pay into the treasury of the city of Philadelphia, for the use of said city, whenever the dividends shall exceed six per centum per annum on the capital stock, the sum of six per centum on the said dividends thus declared."

The case stated further set forth that these two roads subsequently merged and consolidated and were thereafter known as the Ridge Avenue Passenger Railway Company.

An Act of Assembly, entitled "An Act relating to the Ridge Avenue Passenger Railway Company," was approved March 8, 1872 (P. L. 264). The third and eighth sections of that Act are as follows:—

SECTION 3. That dividends of so much of the profits of the said company, as shall appear advisable to the directors, shall be declared by the said directors, at such time or times as they may deem expedient, and be paid at the office of the said company at such times as the said directors may designate; but the sum divided shall in no case exceed the amount of the net profits of the said company, so that the capital stock shall not be impaired thereby; *Provided, always, that the said company shall annually pay into the treasury of the city of Philadelphia, for the use of the said city, a tax of six per centum upon so much of any dividend declared which may exceed six per centum upon their said capital stock; and if the said directors shall make any dividend impairing the capital stock of the said company, the directors consenting thereto shall be liable, in their individual capacities, to the said company for the amount so divided, and each director present, when such dividend shall be declared, shall be considered as consenting thereto, etc.*

SEC. 8. All provisions in the charters of the two companies so consolidated as above recited, not included in this Act, are hereby repealed, etc.

The case stated then recited the proceedings taken by the city against the present defendant to collect a tax on dividends in excess of six per cent. of the capital stock in and prior to the year 1879, and made the record and report of the case and decision in 102 Pa. 190, a part of the case stated. It also set forth the proceedings taken by the city to recover money expended in repairing a street occupied by defendant's tracks, and the judgment in favor of the city in which the above Act of 1872 was held unconstitutional, and made the record and report of that case and the decision in 124 Pa. 219, a part of the case stated. It then averred that the capital stock paid in, of the two companies merged in the defendant company, is and has been \$120,000; then set out the dividends declared by the defendant company and the taxes paid thereon, and then concluded as follows:—

"The difference between the amounts paid the city and the amount due, if the tax should have been six per centum on the dividends declared, is as follows:—

	Dividend.	Declared.	Tax paid.	Six per cent. on dividend.	Difference.
1880 . . .	\$90,000	March 21, 1883	\$3888	\$5400	\$1512
1881 . . .	90,000	March 21, 1883	3888	5400	1512
1882 . . .	90,000	March 21, 1883	3888	5400	1512
1883 . . .	90,000	March 19, 1884	3888	5400	1512
1884 . . .	120,000	April 8, 1885	4788	7200	2412
1885 . . .	135,000	April 10, 1886	6588	8100	1512
1886 . . .	135,000	April 13, 1887	6588	8100	1512
1887 . . .	135,000	May 7, 1888	6588	8100	1512
1888 . . .	135,000	May 7, 1889	6588	8100	1512

"These payments were made upon and in accordance with bill rendered by the city, and prior to 1889 they were accepted without any claim that the city was entitled to a larger amount; but the tax for 1888 has been accepted with the mutual understanding that the acceptance was not in any sense a waiver of the city's claim to six per centum upon the entire dividends declared.

"Upon the foregoing facts the Court shall enter such judgment as is in accordance with law, it being understood and agreed that the cause is to be decided without regard to pleadings, and as if in addition to the general issue all defences which ought to be specially pleaded had been so pleaded."

The following amendment to the case stated was subsequently agreed to: "Instead of the statement that taxes for prior years were paid on bills rendered by the city, substitute the following: These payments were made upon and in accordance with bills rendered by the city solicitor and made out by a clerk in his office. They were duly entered in his accounts, which have been from time to time properly audited by the controller."

Judgment having been entered upon the case stated for the plaintiff for \$9972, the defendant took this appeal, assigning as error the judgment of the Court.

J. Howard Gendell and John G. Johnson, for appellant.

Too great minuteness should not be exacted in the titles to Acts of Assembly.

Allegheny County Home's Case, 77 Pa. 77.

There are a long line of cases in which Acts have been sustained whose titles disclose nothing more than does the title to the above Act of 1872.

Allegheny County Home's Case, supra.

State Line & Juniata Co.'s Appeal, 77 Pa. 429.

Craig v. First Presbyterian Church, 88 Id. 47.

In re Pottstown Borough, 117 Id. 547.

Sewickley Borough v. Sholes, 118 Id. 169.

Bittenger's Estate, 129 Id. 344.

Millvale Borough v. Evergreen Ry. Co., 131 Id. 19.

The appellee is estopped by the decision in 102 Pa. 190. Although the point may not have been made, the decision that the company was liable on the excess, necessarily involved the decision that it was liable *only* on the excess over six per centum. A decision that it was thus liable under the statute of 1872 likewise involved a decision that the statute imposing the liability was to that extent valid.

A judgment is conclusive respecting all questions involved, whether the points were actually made or not. All grounds of recovery which might have been presented, but were not, are concluded, whether the failure arose from design or from negligence, inadvertence or even accident.

Henderson v. Henderson, 3 Hare, 115.

Freeman on Judgments, 3 ed. § 178.

Smith's Ld. Cas., 8 ed., p. 921.

Beloit v. Morgan, 7 Wallace, 619.

Harman v. Auditor, 13 N. E. Rep. 161.

It will not be claimed that the city can relitigate for the taxes of the years included in the former suit; but the doctrine of estoppel by judgment applies wherever the same question is raised, and is not restricted to cases in which the cause of action is the same.

Beloit v. Morgan, 7 Wallace, 619.

Aurora City v. West, Id. 85.

Durant v. Essex, Id. 107.

Corcoran v. Canal Co., 94 U. S. 741.

2 Smith's Ld. Cas., p. 941.

Wilson v. Deen, 121 U. S. 525.

Gardner v. Buckbee, 3 Cowen, 120.

Bouchaud v. Dias, 3 Denio, 243.

Harman v. Auditor, 13 N. E. Rep. 161.

One who treats a statute or law, or decision, as valid, cannot afterwards allege that it is unconstitutional.

Bidwell v. City, 85 Pa. 418.

McKnight v. City, 91 Id. 273.

Baily v. Baily, 44 Id. 274.

Manufacturing Co. v. McKee, 77 Id. 170.

Ry. Co. v. Phila., 83 Id. 429.

The city of Philadelphia may be bound by such estoppel.

City of Philadelphia v. Matchett, 116 Pa. 103.

Abraham M. Beittler, assistant city solicitor (Charles F. Warwick, city solicitor, with him), for the appellee.

The title of an Act should fairly give notice of the subject, so as reasonably to lead to an inquiry into its body.

Allegheny County Home's Case, 77 Pa. 77.

Mauch Chunk v. McGee, 81 Id. 433.

The following cases would seem to determine that the Act of 1872 is unconstitutional:—

Union Passenger R'y Co.'s Appeal, *81 Pa. 91.

Beckert v. City of Allegheny, 85 Id. 191.

Ruth's Appeal, 10 WEEKLY NOTES, 498.

In re Road in Phoenixville, 109 Pa. 44.

In re Borough of Pottstown, 117 Pa. 546.

Sewickley Borough v. Shoes, 118 Id. 169.

Rogers v. Manfr's Improvement Co., 109 Id. 109.

Hatfield v. Comm., 120 Id. 395.

Little Equipmunk & Union Woods T. Co., 2 Pa. C. C. R. 632.

Carbondale and Providence T. & P. R. Co., 3 Id. 460.

The whole question is, however, set at rest by the decision in—

Ridge Avenue P. Ry. Co. v. Phila., 124 Pa. 219.

The city is not estopped by the decision in 102 Pa. 190, because the doctrine of *res adjudicata* has no application to this case. This Court decided that in an action founded on the Act of 1872, wherein the Act is declared on, in which the Act is treated as valid and its provisions invoked, the appellant should pay taxes on the dividend declared by it in excess of six per centum on its capital stock. In the present case the city seeks to recover on the Acts of 1858 and 1859. It cannot recover on the Act of 1872,

for that Act is no longer in existence. It has been decided that the Legislature in its attempt to pass that Act failed to draft it in accordance with the Constitution. It is no longer a basis of claim for the city, nor of defence for the company. It is as completely out of existence as though it had never been enacted.

Neither has the doctrine of estoppel any application here. Estoppel is the application of a principle which closes the defendant's mouth. It is founded on good faith and fair dealing. It requires that a man cannot have the benefit of a defence when it serves his turn, and repudiate it afterwards when it makes against him. It prevents a man in a court of justice from blowing hot and cold with the same breath.

The act of 1872 is gone. In place of it stand the Acts of 1858 and 1859, and upon these Acts the city's claim is founded, and by them the company's liability is to be measured.

May 25, 1891. CLARK, J. It appears from the case stated, that the Ridge Avenue Passenger Railway Company resulted from the merger and consolidation, under the statute, of the Girard College, and the Ridge Avenue and Manayunk Passenger Railway companies; the former incorporated under the Act of April 15, 1858 (P. L. 301), and the latter under the Act of March 28, 1859 (P. L. 264). By the terms of their respective charters the original companies were required, annually, to "pay into the treasury of the city of Philadelphia, for the use of the said city, whenever the dividends shall exceed six per centum per annum on the capital stock, the sum of six per centum on the said dividend thus declared." After the consolidation, however, an Act of Assembly was approved March 8, 1872 (P. L. 264), entitled "An Act relating to the Ridge Avenue Passenger Railway Company," which provided that the said company should pay, annually, into the treasury of the city of Philadelphia, for the use of the said city, "a tax of six per centum upon so much of any dividend declared, which may exceed six per centum upon their said capital stock," etc. It is now contended on the part of the city, that this Act of 1872 was in conflict with section 8, Article XI. (Amendment of 1864) of the Constitution of this State, in force at the time of its passage, and that the company therefore remains liable for the greater tax imposed in the original charters. The company having paid, and the city having received the taxes, according to the provisions of the Act of 1872, for the years 1880 and 1888 inclusive, this suit is brought to recover the balance which would remain unpaid for these years, according to the rate fixed in the original charters.

The provision of the Constitution was as follows: "No bill shall be passed by the Legisla-

ture containing more than one subject, which shall be clearly expressed in the title, except appropriation bills." Article III., section 3, of the present Constitution is precisely to the same effect; it differs from the Amendment of 1864 in phraseology only. Although it is not necessary that the title to an Act of Assembly should be a complete index to its provisions, all the cases agree that the subject of the proposed legislation must be so expressed therein as to give notice of its purpose to the members of the Legislature and to others specially interested. (*Commonwealth v. Green*, 58 Pa. 233; *Dorsey's Appeal*, 72 Id. 192; *Beckert v. City of Allegheny*, 85 Id. 191; *Road in Phoenixville*, 109 Id. 44; *Sewickley Boro. v. Sholes*, 118 Id. 165.)

A distinction exists, however, between the title to an original Act and that of a supplement. When an Act of Assembly is a supplement to a former Act, if the subject of the original Act is sufficiently expressed in its title, and the provisions of the supplement are germane to the subject of the original, the general rule is that the subject of the supplement is covered by a title which contains a specific reference to the original by its title, giving the date of its approval, and declaring it to be a supplement thereto. (*State Line R. R. Co.'s Appeal*, 77 Pa. 429; *Craig v. First Presby. Ch.*, 88 Id. 42; *In re Pottstown Borough*, 117 Id. 538; *Millvale Boro. v. Evergreen Ry. Co.*, 131 Id. 19.) Although the cases at the outset, after the adoption of this Amendment, were a little loose in its construction, yet if the distinction just referred to is kept in view, they will be found to have established a reasonably consistent rule, which may now be recognized as the settled law of the State.

The question of the constitutionality of the Act of March 8, 1872, upon the ground of its defective title, was on a previous occasion argued in this Court before a full bench; and in a *per curiam* opinion it was held that the subject of the bill, as it was passed by the General Assembly, was not clearly expressed in the title (*Ridge Ave. P. Ry. Co. v. Philada.*, 124 Pa. 219), and upon that ground the Act was held to be in conflict with the constitutional provision referred to. In the case cited, the company sought to have the advantage of a provision of the Act of 1872, relieving it from the burden of repairing the streets, a burden imposed by the original charters, and releasing the company from control by the city councils; whilst in this case, the company seek to have advantage of a provision of the same Act, which would in part relieve it from the payment of city taxes. If the title of the bill was not so expressed as to warn the city as to the former feature or effect of the bill, it was clearly defective as to the latter, for there is no reference in the title to either; indeed there

was nothing expressed in the title to call the attention of the city to the fact that her rights were in any way affected by it. We are not inclined to change the conclusions to which we came in the case referred to, nor to recede from the rule so well settled in our cases. It follows that the Act of 1872 must be treated as unconstitutional and therefore void, in so far, at least, as it affects the rights of the city, and changes the rate of taxation for city purposes.

But assuming that upon this ground the Act of 1872 is unconstitutional and void, in so far as it affects the rights of the city of Philadelphia, and that the company was and is liable according to the provisions of the original charters of 1858 and 1859, is the city now in condition to insist upon that measure of liability for the years 1880 to 1888 inclusive? It appears that some time after the year 1879 the city brought suit against the company for the taxes of 1872 to 1879 inclusive; the claim was for taxes according to the provisions of the Act of 1872. The company, admitting its liability under that Act, contended that upon a proper construction of the Act it was not liable for tax, excepting when any single or separate dividend declared exceeded six per cent. of the authorized capital of the company. The city's contention was, however, that as upon this construction of the statute the company could declare dividends as often as the directors desired, they might so manipulate their dividends as to defeat the manifest design of the Legislature to provide revenue for the city. Suit having been brought, as we have said, defence was taken and such proceedings were afterwards had that the cause came into this Court upon a writ of error, where it was held that the extent of the company's liability under that Act was to be ascertained by applying the aggregate annual dividends to the capital actually paid in, and judgment was entered against the company accordingly. The constitutionality of the Act of 1872 was not drawn in question, and the company was compelled to pay according to the demands of the city, under the provisions of that Act. (*City of Philad. v. Ridge Ave. Ry. Co.*, 102 Pa. 190.) The argument of the company's counsel now is, that, although in the case referred to, the point does not appear to have been made or decided, yet the constitutionality of the Act of 1872 must be taken to have passed *in rem judicatum*; that the judgment in that case necessarily involved a decision that the statute imposing the tax was to that extent valid, and although the cause of action is not the same, the city is estopped of record from re-litigating that question. In support of this doctrine they cite *Beloit v. Morgan* (7 Wallace, 619); *Aurora City v. West* (Id. 85); *Durant v. Essex* (Id. 107); *Corcoran v. Canal Co.* (94 U. S. 741); *Wilson v. Deen* (121

Id. 525); and *Duchess of Kingston's Case* (2 Smith Leading Cases, 8th ed. 941).

Whilst the general rule declared in these authorities is undoubtedly correct, it does not extend to estop a person from setting up the constitutionality of a statute when the cause of action is not the same. The former judgment is absolutely conclusive upon the parties as to the cause of action involved in it, although the statute upon which the proceedings were taken was not constitutional; that judgment can only be impeached collaterally for fraud or want of jurisdiction. It is a matter of no consequence now that the Act of 1872, upon which judgment was entered for the amount of the tax, was unconstitutional and void; judgment having been entered and no appeal taken, the subject-matter at issue in that suit is *res adjudicata*. The former judgment, therefore, operates as a bar to any subsequent action founded on the same demands. (Bigelow on Estop. 80-88.) In the case at bar, however, whilst the point in issue may perhaps be the same, the cause of action is different, and although the verdict, with the judgment thereon, would furnish conclusive evidence of the matters in controversy upon which the verdict was rendered, and operate as a bar to the further litigation thereof, it would not preclude the plaintiff in this suit from asserting the unconstitutionality of the Act upon which the previous action proceeded. (Bigelow on Estop. 90-103.)

The distinction is thus stated by Mr. Justice FIELD in *Cromwell v. County of Sac* (94 U. S. 352, 353): "It should be borne in mind, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. . . . But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus

litigated and determined. Only upon such matters is the judgment conclusive in another action." This same distinction is illustrated in *Outram v. Morewood* (3 East, 346), which is a leading case of high authority upon this subject; in *Gardner v. Buckbee* (3 Cow. 120); in *Betta v. Starr* (5 Conn. 550); and in the *Duchess of Kingston's Case*; see also *The Washington, etc., Packet Co., v. Sickles* (24 Howard, 342); *Davis v. Brown* (94 U. S. 423). The doctrine, as we have stated it, is consistent with our own cases. (*Long v. Long*, 5 Watts, 102; *Killeffer v. Herr*, 17 S. & R. 319; *Smith v. Elliott*, 9 Pa. 345.)

But from the year 1880 to 1887 inclusive the city has from year to year formally rendered their claims and demanded payment of taxes from the company under the provisions of the Act of 1872, which demands as they were made were met by prompt and full payment. These demands were for the whole and not for any portion of the taxes supposed to be due and owing for these years respectively, and were paid and receipted for in full. Whether the Act of 1872 was in conformity with the Constitution or not, was matter of law, not of fact. The city chose to treat it as a valid enactment, and to collect the tax it imposed, and having done so we are of opinion she must be taken to have waived or relinquished her right to receive more. She cannot in this manner repudiate the authority under which she assumed to act to the prejudice of the company's rights. The company accepted the results of the litigation, which the city originated, and paid the taxes annually at the rate demanded, and in accordance with the judgment of this Court. Relying upon the annual adjustment of these taxes, the company, from time to time, declared dividends, and distributed their surplus earnings among the stockholders; and upon these dividends, presumably larger by reason of the reduced burden of taxation, the city has from year to year received the tax at the rate demanded. *Non constat*, that the stockholders then are the stockholders now, or were stockholders when this suit was brought. The city could not split up her claim in this way to the prejudice of the company, and we are of opinion that in so doing she must be held to have waived and relinquished her right to receive beyond the amounts from year to year demanded.

It is plain that if the parties had treated the Act of 1872 as unconstitutional, and the taxes had been paid and received pursuant to the original charters, a subsequent adjudication that it was a valid enactment would not entitle the company to receive back the excess, and this is but the converse of the proposition now advanced by the city. It is said to be a poor rule that will not work both ways. The city cannot occupy inconsistent positions. Having chosen to treat the Act of 1872 as constitutional, and proceeded against and

treated with the company accordingly, she will not now be permitted to rip up the annual settlements, made under it, to the prejudice of others' rights.

As to the taxes for the year 1888, and for the years subsequent to that, the city is entitled, under the provisions of the Acts of 1858 and 1859.

The judgment is, therefore, reversed, and judgment is now entered on the case stated in favor of the plaintiff and against the defendant for \$1512 (fifteen hundred and twelve dollars) and costs.

C. K. Z.

July '91, 51, 52, 57, 58.

May 18, 1891.

Twelfth Street Market Company v. Philadelphia and Reading Terminal Railroad Company.

Farmers' Market Company v. The Same.

Eminent domain—Public and private corporations—Franchises of—Market house—"Public use"—Bonds to secure damages—Penalty therein—Sufficiency of—Appeals from interlocutory decrees—Practice.

Under the right of eminent domain, not only the lands, but also the franchises of a corporation may be taken for such a public use as a railroad; but there can be no such taking of lands held by corporations for public uses without a clear and express authority from the Legislature to that effect or an authority necessarily implied from the grant.

The test whether a use is public or not, is whether a public trust is imposed upon the property, whether the public may enjoy it by right or only by possession.

A particular enterprise, palpably for private advantage, does not become a public use because of the theoretical right of the public to use it.

A franchise is a privilege vested in certain persons by grant from the sovereign authority in the State, to exercise, possess or to perform acts, which, without such grant, they could not do or perform.

A corporation is private if the foundation be private, although the uses may, in a certain sense, be called public. The mere act of being incorporated, cannot change a corporation from a private to a public one.

A corporation empowered to acquire such real or personal estate as it may deem necessary for the maintenance of a market house, and to sell, mortgage or convey the same at its pleasure, and having the further power to erect and maintain a building and stalls to be used as a public market house, the same to be leased, rented or disposed of on such terms and conditions as the managers shall determine, is not a public corporation, and its property or franchises may be taken by virtue of the vested right of eminent domain, without other express or necessarily implied legislative authority.

No appeal lies from the decision of the Common Pleas that bonds offered to secure damages for the taking of private property by virtue of the right of

eminent domain, are adequate in amount, and the sureties satisfactory.

In such bonds under the Act of April 9, 1856, § 2 (P. L. 288, Purd. Dig. 1425, pl. 49), the universal practice is to designate a fixed sum as a penalty.

In a case of an appeal from an interlocutory order, where the facts are before the Supreme Court as fully as they would be upon final hearing, and it is to the manifest interest of the parties that their rights shall be settled, the case may be disposed of upon its merits if the parties agree that a final decree shall be entered.

Appeals of the Twelfth Street Market Company, and the Farmers' Market Company, plaintiffs, from the decrees of the Common Pleas No. 4, of Philadelphia County, refusing injunctions against the Philadelphia and Reading Terminal Railroad Company, to restrain the latter from entering upon or taking the market houses or franchises of plaintiffs; and also from the decrees approving certain bonds offered by defendant to plaintiffs to secure damages caused by the proposed occupation of plaintiffs' property.

The bills set forth substantially that the plaintiffs are, respectively, owners in fee-simple of two pieces of real estate on the north side of Market Street, Philadelphia, one of them at the northeast corner of Twelfth Street, containing in front on Market Street eighty-five feet, and in depth northward along Twelfth Street, three hundred and six feet, to Filbert Street, with a public market house thereon, erected and maintained under the provisions of the Act of April 6, 1864 (P. L. 282), and known as the Twelfth Street Market; the other on the north side of Market Street adjoining the above on the eastward, containing in front one hundred and fifty-five feet two inches, and in depth northward of that width three hundred and six feet to Filbert Street, upon which is erected and maintained, under the provisions of the Act of March 19, 1859 (P. L. 250), a public market house, known as the Farmers' Market. Both of these market houses were built and established and appropriated to the public purpose described in the Acts of incorporation above mentioned, within three years from the approval thereof, and have been appropriated, maintained, and used as public market houses ever since. Any persons desirous of renting and occupying the stalls therein have been permitted to do so to the full capacity of the respective market houses, and the public have been admitted to deal therein unrestrictedly, save by the general regulations of the markets for the preservation of order therein. The stall-holders have been permitted by custom existing uninterruptedly, as to the Farmers' Market for more than thirty years, and as to the Twelfth Street Market for more than twenty-six years, to hold their stalls so long as they conform to the rules of the market and paid their stallage, and to sell and transfer to others

their stalls; and in case of death, to dispose thereof by will or transmit by descent. These markets were erected to supply the place of the public city markets previously maintained on Market Street, and have afforded to the citizens of Philadelphia, without restriction, the necessary facilities of public markets to which producers and dealers in fresh perishable food products may resort on equal terms for the open sale of their commodities to the public at large. There are in said markets together about eight hundred stalls, occupied by about four hundred and forty producers and dealers in victuals of various sorts.

The defendant corporation was organized on April 13, 1888, under the provisions of the general railroad law of April 4, 1868 (P. L. 62), the subscribers to the stock being principally officers and employés of the Philadelphia and Reading Railroad. One of the principal stockholders, Wharton Barker, was President of the Finance Company of Philadelphia, which had undertaken as agent of and attorney for the Philadelphia and Reading Railroad Company to acquire title to the real estate needed for its proposed branch railroad, which it was then seeking to construct under its branching powers; the question of the right of the Philadelphia and Reading Railroad Company to construct its proposed branch under its charter is now pending and undetermined in the Supreme Court.

Shortly after the organization of the Philadelphia and Reading Terminal Railroad Company, its directors and engineers located the route of its proposed road from a point in the line of the Philadelphia, Germantown, and Norristown Railroad, leased and operated by the Philadelphia and Reading Railroad Company, at or near Ninth Street and Fairmount Avenue, to a point on the north side of Market Street, between Eleventh and Twelfth streets, wholly within the limits of the city of Philadelphia, with a branch from a point in the line of Pearl Street, between Eleventh and Twelfth streets, to the line of the Philadelphia and Reading Railroad on Noble Street, between Thirteenth and Broad streets. The route thus located was substantially the same as the route of the proposed branch railroad of the Philadelphia and Reading Railroad.

The defendant applied to the municipal authorities of the city of Philadelphia for permission to construct its proposed elevated railroad over the route described, in accordance with the provisions of the Act of May 31, 1887 (P. L. 275), and an ordinance of councils of said city purporting to grant such permission was approved on December 26, 1890.

The object and purpose of the construction of defendant's road is to furnish to the Philadelphia and Reading Railroad Company the terminal and depot facilities needed in the centre of the

city for its entire railroad system, which it is unable to ask for and obtain on its own behalf under the provisions of the Act of May 31, 1887, without subjecting itself to the provisions of the Constitution of this Commonwealth of 1874, which it has not yet done and is unwilling to do, and to avoid subjecting itself to the Constitution, proposes to obtain its needed facilities by promoting and procuring the construction of defendant's road, and then leasing and operating the same as a branch of its present line of railroad.

Defendant is now engaged in constructing an elevated railroad over its said route, and has extended its operations to the north side of Filbert Street, opposite to the rear of plaintiffs' market-houses, and at the time of the filing of the bills in these cases, had presented to the Court below for approval, bonds for the damages to be caused the plaintiffs by the taking of their said public markets, and threatened to enter upon, tear down, and remove the same for the purpose of erecting a terminal depot with sidings, switches, offices, etc.

The prayers were for an injunction, etc.

The defendant tendered to the Farmers' Market Company a bond in the sum of \$800,000, and to the Twelfth Street Market Company a bond in the sum of \$600,000 to secure the damages to be caused by the occupation of the public market-houses and premises of said companies respectively, which bonds plaintiffs claimed were inadequate and insufficient, both by reason of the penal sums fixed, and in the amount of justification of the sureties to secure the damages.

Defendant having demurred to the bills, the Court refused the injunction, and approved the bonds which were offered, THAYER, P. J., saying:—

“The right of eminent domain is the right of a sovereign State to take private property for public use, in order to promote the general welfare. It is called eminent domain, because it is superior to all private rights, and is an exercise of the sovereign authority which of necessity resides in all governments for the common benefit and welfare of their citizens. It was assumed by the framers of the Constitution to be a right necessarily inherent in every sovereign State. Accordingly they did not put into the Constitution any express grant of such power to the Legislature, while they took care to prohibit by express words any limitation to its exercise which should exempt corporations from its application to their property, in common with that of individual persons. Article 16, section 3, declares ‘the exercise of the right of eminent domain shall never be abridged or so construed as to prevent the General Assembly from taking the property and franchises of incorporated companies and sub-

jecting them to public use, the same as the property of individuals.' If this power, which resides in the State, is a great power, it cannot be denied that it is also a necessary power. If it may seem in one aspect of it to be a despotic power, it cannot be denied that it is at the same time a beneficent power and absolutely essential to the public welfare. Without it a road could not be opened, a railroad or telegraph line constructed, a canal dug, a bridge built, a new street laid out or an old one altered, and all public improvements would come to a stand-still. It oppresses no one, for its exercise is always accompanied by adequate and full compensation. It is guarded by just restrictions, and its abuse is prevented by adequate limitations.

"This power the State, as it had the right to do, has delegated to the defendants in these cases, who were incorporated under the general law of April 4, 1868 (2 Purdon, 1414). By sect. 5 of that Act they are empowered to exercise all the rights, powers, and privileges of the Act regulating railroad companies, approved February 19, 1849, by section 10 of which (Purdon, 1423, pl. 47) they are authorized to locate such route for their railroad 'as they may deem expedient, not, however, passing through any burying-ground, or place of public worship, or any dwelling-house in the occupancy of the owner thereof, without his consent, . . . and to enter upon and occupy all land on which said railroad or their depots, warehouses, offices, toll-houses, engine and water stations, or other buildings before mentioned, may be located, or which may be necessary or convenient for the erection of the same: *Provided*, that before such company shall enter upon or take possession of such lands they shall make ample compensation to the owner thereof, or tender adequate security therefor.'

"This, then, is the warrant from the State by virtue of which the defendants propose to take the land belonging to the several plaintiffs in these cases, for the purpose of making the same the terminus of their line and erecting thereon their depot; the city of Philadelphia, so far as its consent may have been necessary, having, by its appointed authorities, also given its consent thereto.

"The plaintiffs allege that their property cannot be lawfully taken without their consent, because they are corporations with charters which empower them to build, hold, and maintain market houses for the public accommodation; that this use of their property is a public use, and that in accordance with the established law upon this subject one corporation cannot take, by the right of eminent domain, the property and franchise of another corporation held for public uses, without an express authority from the Legislature so to do, or an authority necessarily to be implied

from the grant to them of their powers, and arising out of the absolute necessity inherent in the grant, and not created by themselves.

"So far as relates to that portion of the objection made by the plaintiffs to the proceedings of the defendants which rests upon the corporate character of the plaintiffs, and the privileges secured to them by their charters, it is unnecessary for me to enter into any discussion, for the reason that it is too well settled to admit of debate that under the right of eminent domain not only the lands of a corporation may be taken for such a public use as a railroad company, but their franchise also. It would be a mere affectation of industry for me to parade the many cases decided in Pennsylvania and the other States of the Union which affirm this proposition, especially in view of the express words of the Constitution already quoted, which subject all franchises, as well as other property of corporations, to the exercise of this right. It must, however, be conceded that the plaintiffs are right in declaring that neither the franchise of a corporation existing for a public use, in the legal and proper sense of those words, or the lands which are necessary for the enjoyment of such public use, can be taken under the delegated power of eminent domain, without a clear and express authority from the Legislature to that effect, or an authority necessarily implied from the grant. The cases upon this subject are numerous and full to the point. Those cited by the plaintiffs are conclusive. (Penna. R. R. Appeal, 93 Pa. 150; Packer v. R. R., 19 Id. 211; Commonwealth v. Erie R. R., 27 Id. 339; *Cake v. Phila.* and *Erie R. R.*, 87 Id. 307; Appeal of Pittsburgh Junc. R. R., 122 Id. 511; Sharon Co.'s Appeal, Id. 533; Groff's Appeal, 128 Id. 621.)

"It must further be conceded that there is not in the Act of February 19, 1849, any express grant of authority to take lands held by other corporations for public uses, nor have I been convinced, notwithstanding the ingenious argument made by the defendants' counsel, that the facts in the present case show any such absolute necessity of taking the plaintiffs' land as would give rise to an implied authority,—such a necessity as arises out of the nature of the case, and is not of the defendants' own creation. On the other hand, nothing can be plainer than that it is not necessary for the defendants to show any such absolute necessity for the taking, unless the plaintiffs have made good their claims to be corporations existing for public uses, within the true legal meaning of those words.

"Now the meaning of these words, 'for public use,' has been frequently determined in the cases in which the question of the validity of the grant of the right of eminent domain has arisen, where it was necessary to decide whether the purpose

for which the property was to be taken was for 'public use.' Clearly the words do not mean that every use is a public use, from which the public may incidentally and temporarily derive an advantage or benefit or convenience, during the pleasure of the owner of the property, and from which they may be excluded at the mere caprice of the owner. If this definition were accepted, any man's property might be taken upon the shallowest pretence of a public use. The test whether a use is public or not is whether a public trust is imposed upon the property, whether the public has a legal right to the use, which cannot be gainsaid or denied, or withdrawn at the pleasure of the owner. (*Mills on Eminent Domain*, § 11; *In re New York Railway Company*, 99 N. Y. 12.) A particular enterprise, palpably for private advantage, will not become a public use because of the theoretical right of the public to use it. (*De Camp v. Hibernia R. R.*, 47 N. J. L. 43.) The question is, whether the public have a right to the use. (*Concord Railroad v. Greeley*, 17 N. H. 47; *Bloodgood v. Mohawk R. R.*, 18 Wend. 9; *Brown v. Beatty*, 34 Miss. 227.) The general public must have a definite and fixed use of the property, a use independent of the will of the private person or corporation in whom the title is vested, a public use which cannot be defeated by the private owner, but which is guarded and controlled by the law. (*Varner v. Martin*, 21 W. Va. 534.) The true criterion by which to judge of the character of the use is whether the public may enjoy it by right, or only by permission. (*Mills on Eminent Domain*, § 14.) The test is not what the corporation owning the land may choose to do, but what, under the law, it must do, and whether a public trust is impressed on the land. (*In re N. Y., Lackawanna, and Western R. R. Co.*, 99 N. Y. 12.) A franchise for such a public use cannot be granted away. (*Canal Co. v. Bonham*, 9 W. & S. 27; *Wood v. Bedford R. R.*, 8 Phila. R. 94; *Thomas v. Railroad Co.*, 101 U. S. R. 71.) The question of a public use is not affected by the agency employed. It is no more of a public use for being held by a corporation. (*Lewis on Eminent Domain*, § 160.) To constitute a public use the property must be under the control of the public or of public agencies, or the public must have a right to the use. (See the large number of cases cited in *Lewis on Eminent Domain*, § 164, note 6.)

"Let us turn now to a brief examination of the nature of the rights possessed by the market companies who are plaintiffs in these cases. The Farmers' Market Company was incorporated by an Act passed March 19, 1859. By the first section they were empowered to acquire such real or personal estate as they might deem necessary for the maintenance of a market house in the city

of Philadelphia, with full power to sell, mortgage, or convey the same at their pleasure. Section 2 declares the purpose of the corporation to be to erect and maintain a building and stalls to be used as a public market house, the same to be leased, rented, or disposed of on such terms and conditions as the managers should determine. By section 3 the capital stock was not to exceed \$250,000 in shares of \$50 each, and the affairs of the company, by section 4, were to be managed by a board of nine managers elected by the stockholders.

"The Twelfth Street Market Company, by an Act passed April 6, 1864, was incorporated 'with all the powers, privileges, and immunities contained in the Act incorporating the Farmers' Market Company.' Its capital stock was not to exceed \$300,000 in shares of \$50. The charters of the two companies were therefore in all essential respects identical.

"They are both private corporations, authorized to build houses and stalls to be used as public market houses, for the sale of meats, vegetables, victuals, and provisions, with the right to rent the stalls for whatever prices they may choose, or to sell out and quit the business whenever they please. We may ask then, as the Supreme Court pertinently asked in the *Girard Storage Co. v. Southwark Foundry Co.* (105 Pa. 251), 'What rights have the public in and upon these properties other than what it would have did that property belong to a private individual?' 'We understand very clearly,' the Court goes on to say, 'the relation of a turnpike road, a canal, or railroad, to the public. The people of the Commonwealth have the right of way over them, which right, when occasion requires, may be exercised regardless of the will of the corporation owning them. They are highways, and the companies operating them have the right of eminent domain conferred upon them only because of this direct interest which the public has in them. But in the works of this corporation the community at large has no other or further interest than it has in the storehouses of private individuals. It may receive the grain of one person and refuse that of another; or it may, at its own will, suspend operations and shut out the public altogether. Its organization is all that it has received from the public. Beyond this the public has no special interest in it, and when the organization disappears there is nothing left of a public character, or anything over which the Commonwealth has control.' Every word of this is as applicable to the corporations plaintiff in these cases as it was to the *Girard Storage Company*. 'Corporations are divided,' said *Thompson, C. J.*, in *Foster v. Fowler* (60 Pa. 30), 'into public and private corporations; that is, into those which are agencies of the public directly affecting

it, and those which only affect it *indirectly*. The public is directly interested in the results to be produced by the former, and the use of them cannot be disturbed by the seizure of the property essential to their operations by creditors. They must recover their debts by sequestering their earnings, allowing them to progress with their undertaking, to accommodate the public. This direct benefit to, and accommodation of the public very clearly distinguishes this class of corporations from private corporations, in which the public is but indirectly interested. Whether they progress or cease the public is not directly affected.

"To apply this reasoning to the cases now in hand. In a market established, managed, and controlled by the municipal authorities, and governed by municipal laws, there may be, no doubt, a public use. Such were the markets formerly maintained by the city in Market Street, and other streets. But what legal interest has the public in the plaintiffs' market houses? Is not their property entirely under their own control? May they not rent their stalls to whom they please, and refuse them to whom they please? And may they not, by the express words of their charter, rent, or sell the whole building when and to whom they please? The 2d section of their charter declares that they may. Where is any trace of a public trust impressed upon their property, or where are there any rights of the public which can be enforced against them? May they not be sold out by the sheriff at any time upon a creditor's execution like any private individual? The answers which must be given to these questions show, it appears to me, conclusively, that the plaintiffs are but private corporations owning property impressed with no public trust, that they are engaged in a purely private business which is wholly under their own control, in which the community has no public rights, and with which the public has no right to interfere. It is impossible that corporations which exist solely for their own purposes and profit, and which are governed only by their own interests and their own will, and over which the public can by no possibility exercise any control, can be regarded as corporations existing for public uses within the legal meaning of those words.

"But it is said the plaintiffs have a franchise. Well, if they have, the franchise as I have already shown, may be taken by virtue of the right of eminent domain, unless it is a franchise existing for public uses. If it is a franchise of that character it cannot be taken without an express legislative grant, or in virtue of an implied power arising out of an absolute necessity. But what is their franchise? A franchise in England is a branch of the King's prerogative subsisting in the hands of a subject. It is derived from the

crown, and must arise from the king's grant, or by prescription, which pre-supposes a royal grant. In this country, it may be defined as a privilege vested in certain persons by grant from the sovereign authority in the State to exercise powers, or to perform acts, which without such grant they could not do or perform. A franchise is *ius publicum*, and necessarily exclusive in its nature. (3 Kent's Com. 573.) What are the franchises possessed by the plaintiffs? They have the franchise of being a corporation. As such they have a right in their corporate capacity to have and maintain a market house. There is plainly nothing exclusive in that. Any person or association of persons have a right to do the same thing without any grant from the State. Every green grocer and provision dealer in the city is engaged in the same business; that is, he keeps a market house. Unlike the plaintiffs, however, he not only keeps the market house, but he himself sells the provisions which are sold there. The plaintiffs are engaged in maintaining a market house in their collective capacity, under the cover of a charter. Any persons may do the same thing without a charter. There is nothing in the nature of a franchise in the business which they carry on, for any one who chooses may carry on the same business. Their franchise consists solely in being a corporation and carrying on their business in a corporate capacity. When the defendants take their market house under the delegated power of eminent domain, they do not take their charter, or touch their franchise of being a corporation, which is really the sum total of the franchises which they possess. Even if the taking of their property involved the loss of their charters, as their counsel argued—a proposition to which I by no means assent—they could obtain a new one as any other person may under the provisions of the Act of 1874, for the mere asking (Purdon, 336). What is the commercial value of a franchise which any one who chooses to ask for it may obtain for nothing?

"On the argument much was said by the plaintiffs of the importance of public markets, and the case was argued as if the right to maintain a market house, or hold a market in Pennsylvania, was a prerogative vested exclusively in the State, and one which no one can exercise without a grant from the Commonwealth. At common law in England the establishment of public markets was no doubt a part of the king's prerogative, and no one could set up a market without a grant from him. Such grants were doubtless at one time fruitful sources of revenue to the royal exchequer. Their establishment was, as Blackstone says, 'a part of the economies or domestic polity which, considering the kingdom as a large family, and the king as a

master of it, he had the right to dispose of as he pleased.' (1 Com. 274.) These English markets, with their stewards, their tolls, their Courts of *piepoudre*, in which all disputes originating in them must be decided before the setting of the sun, their special privileges, and peculiar customs, constituted an important feature in the domestic economy of every English neighborhood. They were a part of the royal prerogative, undoubtedly, but they never crossed the seas to this country in that capacity, any more than did the right to all royal fish, such as the whale and the sturgeon, the right to corodies, to wrecks, to treasure trove, or to *bona vacantia*. Our ancestors, when they transplanted on these shores the principles of English freedom, left behind them all royal prerogatives, except such as were to be, in the hands of the people, the necessary instruments of the free governments which they here established. I am not aware that it has ever been supposed or maintained in Pennsylvania that no man or association of men could set up a market house or establish a market without a grant from the Legislature.

"The right to be a corporation, and to carry on any business in a corporate capacity, is a right derived from the Commonwealth. The right to maintain a market house, or to carry on the business of a market is not a right so derived, but is a right belonging to all citizens of the Commonwealth alike, and which any citizen or any association of citizens may exercise without any grant or any warrant whatever from the Commonwealth. A private company incorporated for that business is a private corporation, as much so as a private company engaged in the manufacture of goods, in insurance, in the keeping of a hotel, or the prosecution of any other business. They are not the less private corporations because they incidentally afford a convenience to the public. In *Turnpike Co. v. Wallace* (8 Watts, 316), it was held that a company in which the State held a hundred and seventy-one thousand dollars of the stock, and individuals sixty-two thousand dollars only, was a private, not a public corporation. If the foundation be private the corporation is private, although the uses in a certain sense may be called public. (*Bailey v. The Mayor of New York*, 3 Hill, 531.) The mere act of being incorporated cannot change a corporation from a private to a public one. 'To hold a corporation to be public because the charity is public, would,' says Chancellor KENT, 'be to confound the popular with the strictly legal sense of terms, and to jar with the whole current of decisions since the time of Lord COKE. (2 Com. *276.)

"Tried by any tests which can properly be applied to them the plaintiffs are private corporations. They have not a single feature belonging

to a public corporation. They maintain the market houses they own or not, at their option. They can sell them or rent them. Their property may be taken in execution and sold like that of any individual. They are not armed with any portion of the right of eminent domain. They owe no duty to the public which they are bound to fulfil or which can be enforced by the public. The public has no legal rights of any nature in their property, nor any use therein which is recognized by law. They are not under any public authority or subject to any public control, nor have the public any use in their property or any franchise which is secured by any law or which can be enforced by any remedy. They are not liable to any public supervision, nor can they be made to respond to any public demands.

"Being therefore in every legal sense mere private business corporations, with no public functions which they can be compelled to perform, and subject to no public use which can be enforced against them, there is nothing in their constitution, their nature, or their relations to the State, or to the public, which exempts their property from the exercise of the sovereign right of eminent domain. They stand in that respect upon the same level with every citizen in the Commonwealth, and have no greater rights in this regard than any private individual whose property is needed by the State for public purposes.

"With regard to the numerous amendments which have been made to the plaintiffs' bill, and to the injunction affidavits, and the other affidavits which have been filed in aid thereof since this cause was argued before us, they appear to us to have been intended to alter the whole character of the present proceeding, and to convert it into a quo warranto proceeding against the defendants, or to make it subserve the office of a *scire facias* to repeal the defendants' charter. It is only necessary to say that this cannot be done, either under the Act of 1871, or under any other law known to this State, and this has been so often determined that it is quite unnecessary to refer to the cases upon the subject. The charter of incorporation of a regularly incorporated company cannot be called in question or assailed in any merely collateral suit affecting the rights of the corporation. The machinery for that purpose can only be set in motion by the State or its authorized public officers.

"The motion for an injunction is refused.

"After a careful consideration of the affidavits as to the value of the property, and the bonds which have been offered by the Philadelphia and Reading Terminal Company for our approval, we are of opinion that they are entirely sufficient. They are adequate in amount and the sureties are satisfactory."

Both plaintiffs appealed from the decree refusing the injunction; and also from the decree approving the bonds.

Benjamin P. Wilson and George Junkin (with them *Francis L. Wayland*), for appellants.

John G. Johnson and Thomas Hart, Jr., for appellee.

APPEALS FROM DECREE REFUSING SPECIAL INJUNCTION.

May 25, 1891. *PER CURIAM*. These were appeals from the refusal of the Court below to issue a preliminary injunction restraining the Philadelphia and Reading Terminal Railroad Company from proceeding to condemn under its right of eminent domain the market house of the respective appellants for depot purposes.

The order below was interlocutory, and in appeals from such orders it is not our practice to dispose of cases upon their merits. In these instances, however, the facts are before us as fully as they would be upon final hearing, and as it is to the manifest interest of the parties to the controversy that their rights shall be settled, an agreement has been filed that we shall enter a final decree.

It would be difficult to add anything profitably to the opinion of the learned president of the Court below, and we adopt it as the opinion of this Court.

The decree is affirmed in each case, and the bill dismissed at the cost of the appellant.

APPEALS FROM DECREE APPROVING BONDS FOR DAMAGES.

May 25, 1891. *PER CURIAM*. The learned Court below has decided in each of the above cases that the bonds are adequate in amount and the sureties satisfactory. From that decision there is no appeal to this Court. (*Slocum's Appeals*, 12 WEEKLY NOTES, 84; *Getz v. Philada. & Reading R. R. Co.*, 40 Legal Intelligencer, 336.) Objection was made at bar that the bonds designate a fixed sum as a penalty. This has been the universal practice under the Act of 1856, and the affidavits submitted to the Court below show that the bonds are amply sufficient to cover the damages.

The writ of certiorari is quashed in each case.

H. C. O.

Common Pleas.

C. P. No. 1.

In re Application of the Philadelphia and Reading Terminal R. R. Co., for approval of bonds for land damages.

Eminent domain—Railroads—Land damages—Security for bonds—Act of May 9, 1889—Surety companies—Under the Act of 1889, companies that are authorized to become security for the payment of land damages may be the sole surety on the bond—Quære, Whether such companies may be sureties without some proof of their responsibility.

This was a petition by the Philadelphia and Reading Terminal Railroad Company, for the approval of bonds in the cases of Sarah M. L. Firth, John Firth, and Sophia Klages.

The petition set forth that petitioner was a corporation organized under the Act of April 4, 1868; that the route of its railroad had been located through the lands of the above-named parties, and that it had been unable to agree with them for a release of damages. That it had tendered to them bonds with the City Trust, Safe Deposit, and Surety Company as surety, but the same had been refused and were now presented to the Court for approval and filing according to the Act of Assembly.

The property owners filed the following exceptions:—

(1) Because the City Trust, etc., Company is now surety in other cases far in excess of its assets.

(2) Because the bond tendered contained but one surety, and therefore is not in accordance with the Act of Assembly in such case made and provided.

Hood Gilpin and W. Horace Hepburn, for property owners.

The Act of April 9, 1856, § 2 (*Purd. Dig.* 1425, pl. 49), requires a bond with at least two sufficient sureties, and this Act has never been repealed or superseded by any Act incorporating or applying to the City Trust Company.

The Act of May 9, 1889 (*P. L.* 159), simply enabled such a company to become one of two sureties in land damage bonds and not to become sole surety.

John G. Lamb and Thomas Hart, Jr., for petitioner.

The City Trust, Safe Deposit, and Surety Company was incorporated under the general Act of April 29, 1874 (*P. L.* 73, *Purdon*, 335), and supplements thereto. The supplement to

this Act, approved May 4, 1881 (P. L. 22, Purdon, 1465), empowered it among other things to become sole surety in any case where by law one or more sureties may be required for the faithful performance of any trust or office.

On June 25, 1885, an Act was approved empowering corporations authorized by the Insurance Department of the State to do business in the State, to become sole surety in certain cases. (P. L. 181, Purdon, 2397.) This Act was considered to apply to foreign companies only, and as the Act of 1881, did not enable a company formed under the Act of 1874, to enter into a land damage bond, the effect of the legislation was that foreign companies had a power which was denied to the home companies.

The Act of May 9, 1889 (P. L. 159), was then passed. It contained a long recital of additional powers and made absolutely certain the power of title insurance companies to enter into land damage bonds. The intent of this Act was to put the home companies on the same footing as foreign companies. It clearly empowered the former to become sole surety as bail in error, and in land damage bonds. The whole purpose of the Act would have been negated if either two companies were required in these cases or a company and an individual. (See § 29, cl. 1, ¶¶ 6, 12, and 13.)

The practice since the Act of 1889 was passed, has been to take such companies as sole sureties, both in land damage and bail in error bonds.

The additional words in § 1, § 29, cl. 1, of the Act of 1889, were intended to empower such a company to become sole surety in any case where the law required one or more sureties for the faithful performance of any "action or engagement."

The liability of a railroad company in a bond for land damages is an action or engagement within this section.

Section 4 of the Act of May 24, 1881, and clause 4, section 29, of the Act of May 9, 1889, provide for an investigation by the Courts of the affairs of such surety companies. The Court may, if deemed necessary, examine the officers under oath or affirmation.

Lincoln L. Eyre, for the City Trust, Safe Deposit, and Surety Company.

April 30, 1891. *ALLISON, P. J.* This is an application to approve the bonds of The City Trust, Safe Deposit and Surety Company of Philadelphia, as security for certain properties which the petitioners have decided to take and appropriate to the use of their road.

On behalf of the owners of properties a demand is made, that the company offered as security, shall either in open Court, or otherwise, make a full exhibit of their affairs, so that the

objectors and the Court may be able to pass upon the question of the sufficiency of the security offered.

The exercise of the power of eminent domain, which is given to the company which proposes to construct the Philadelphia and Reading Terminal Road, requires that in the execution of this power of sovereignty, the just and legal rights of the citizen whose property is taken and appropriated to that which the law regards as a public use, should be to the fullest extent protected. The security, when entered, is substituted for the land, and to this security the owner must resort, if the company should fail to pay the damages which may be awarded to him. It is therefore no more than reasonable, that the company which is offered as security, should furnish satisfactory proof of their ability to pay to the owners of property taken the just value of the same, when such value shall be legally ascertained.

The determination of this question in any case in which it may be raised, is not free from embarrassment, because it is not possible to fully investigate at the bar of the Court the actual condition of each of the several companies upon each separate offer to become security.

If we should enter upon the examination which we have been requested to do in this case, we would establish a precedent which it would be impossible to follow, where on precisely similar grounds applications would be sure to be made. The magnitude of such investigations in open Court and the frequency of their recurrence, would most seriously hinder and obstruct the regular business of the Court and require the postponement of other matters, to the prejudice and interests of suitors whose claims cannot be put aside, to make way for business of the character of that now before us. It will probably become necessary to make an order providing for an examination of the affairs of all companies offering to become security, and upon the report which shall be made to us, supplemented from time to time, as the exigencies may require, accept or refuse applications like the one before us. We are not under the law required to accept the offer of corporations to become security; it is only to be approved when the offer is satisfactory to the Court. An order of this character was at one time made by the Court of Common Pleas with satisfactory results, but as we are not prepared to make a like order at this time, we suggest, that the parties in this case should try to come to a satisfactory agreement among themselves, and for the present we pass this portion of the application over to them, to be disposed of among themselves if that can be done.

The other and more material question which

this application has given rise to, is the ability of a trust company to become *sole* security for the payment of damages for land taken in the building of any railway, or where land or other property is authorized by law to be taken for a public use.

It was assumed upon the argument, that before the passage of the Act of the 9th of May, 1889 (P. L. 159), a power of this character had been conferred on foreign corporations, authorized to carry on business in Pennsylvania, and at the same time a corporation of like character, incorporated under the laws of our own State, could only be one of two sureties, to secure the payment of land damages. This was a condition of affairs that ought never to have been allowed; either the law in regard to foreign corporations should have been repealed or modified, or our own corporations should at least be given an equal privilege with those who come to us from a foreign jurisdiction. It was doubtless intended among other things to remedy this unequal administration of the law, that the Act of May 9th, 1889, was passed, which was supplementary to the Act of April 29th, 1874.

The Act of 1889 provides, that companies which have been heretofore or which may thereafter be incorporated under the provisions of the original Act and its supplements, among other things, are empowered to become sole security in any case where by law one or more securities may be required for the performance of any trust, office, duty, action or engagement; to act as security for the performance of any contract entered into with any person or corporation; to become sole security for performance of duties of public officers, and in the following section, the eleventh, to become security for any clerk or employé of a corporation, company, firm or individual. In the twelfth section, the language is "to become security" for land damages, and in the following section, the same language is used, "to become security" upon any writ of error or appeal or in any proceeding in any Court in which security may be required. In the sixth and tenth sections, the wording is to become "sole security," and in the ninth, eleventh, twelfth, and thirteenth sections, the power is to "become security."

Upon the difference of phraseology, the construction is sought to be supported that the Act of 1889 does not change the law as it stood prior to the passage of that Act, and that another surety must join in the bond given to secure the payment of land damages. But if this construction must be given to the twelfth section, it follows, that the same interpretation must be placed on the other sections, which relate to security for performance of contracts for clerks or employés of corporations and individuals, upon writs of

error or appeals, and in proceedings in Courts in which security may be required.

It would be giving we think a forced and unauthorized meaning to each of these several portions of the Act to so hold. When the authority is given to become security without any qualification, the law is to be understood as giving power to become security, not in part only or to be joined with another as a joint obligor, but to become the security for which the law makes provision.

If this application related to the other matters recited in the ninth, eleventh, and thirteenth sections of the Act, it would not we think be seriously argued that the companies referred to in the law of 1889 could not be accepted as sole security for all matters for which the said sections provide. Assuming this to be so, we are unable to understand, upon what principle of construction of statutes, the language of the twelfth section, which is the same as that employed in the other sections mentioned, should be interpreted differently from the others. They all relate to the same general subject, becoming security, and the power is given in exactly the same words.

It may well be asked, if the company now offered as security must be joined with another obligor, for what purpose was the twelfth section incorporated in the Act of 1889? If the law on this subject was not intended to be changed, why insert the section relating to land damages at all? One object intended to be reached was doubtless to place our own companies on an equal footing with foreign corporations, and it may reasonably be held, in view of the mischief intended to be remedied, that there is no substantial difference between an authority to become the sole security and an authority to become security. Authority to become the sole security neither includes nor implies more or less than does the authority to become security for the act intended to be performed; no other or qualified security being mentioned, none is to be implied.

It is not without a significance, as bearing on the intent of the law, that the thirteenth section of the Act authorizes the company to become security in any proceeding instituted in any Court of this Commonwealth, in which security may be required. The application to enter security in the case in hand, is a proceeding instituted in Court to enable the Terminal Company to enter upon and take possession of the property in question.

For these reasons we think, and so hold, that this contention of the objectors is not well founded.

W. W. W., Jr.

C. P. No. 1.

May 16, 1891.

Potter & Hubbard v. Hartnett.

Assumpsit—Foreign judgment—Action on—Affidavit of defence—An affidavit of defence to a foreign judgment that does not allege payment is insufficient.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit sur judgment of the State of New York, duly certified in accordance with the Acts of Congress.

The statement had a copy of the record of the action in New York duly attached.

The affidavit of defence set up that after suit had been brought in 1875, and the defendant had had a copy of the summons served upon him, the latter went to the plaintiffs and inquired what the suit meant. That the plaintiffs then agreed that if the defendant would travel for them they would "accept such services in full payment of any claim they had against him." That in pursuance of the agreement he entered the employment of the plaintiffs and received his wages from them regularly after the judgment sued upon had been obtained.

John F. Keator, for the rule.

The affidavit does not allege payment which is the only admissible defence.

As a matter of fact a rule was taken to open this judgment in New York which was discharged by Judge BARRETT.

Isaac D. Yocum, contra.

Eo die. Rule absolute.

H. J. H.

Orphans' Court.

Mellon's Estate.

February 18, 1891.

Bequest—Will—Construction of.

A bequest after the death of testator's daughter of the income of a certain sum to T. W. for life in which the beneficiary was named as "T. W. the husband of my said daughter:"

Held, to be a subsisting trust, although T. W. had been divorced from his wife.

Sur exceptions to adjudication.

At the audit of the account of the Pennsylvania Company for Insurances on Lives and Granting Annuities, trustee for Amanda M. Waller, under the will of Thomas Mellon, the decedent, it appeared that the testator gave the sum of \$50,000 in trust to pay the income to Amanda M. Waller, wife of Thomas Waller, of London, England, during her life; after her death to be held in trust for the use and benefit of her children if any, until the youngest child should attain the age of twenty-two years, when it was to be

equally divided among her children then living, etc. If his said daughter Amanda M. Waller, should survive her husband and die without issue, the said sum to be distributed among the testator's heirs according to the intestate laws of Pennsylvania—

Provided, that if the said Thomas Waller, the husband of my said daughter, shall survive her, twenty-five thousand dollars of the said sum last mentioned or securities representing that amount shall be held in trust during his life, and the income, dividends, and interest thereof shall be paid to him semi-annually during his life, and after his death to go to testator's heirs according to intestate laws as aforesaid.

Mrs. Waller died in 1889, leaving no issue, and her husband, who had been decreed a lunatic, survived her. They were divorced in 1871.

Before the Auditing Judge it was urged that the bequest to Thomas Waller was conditional that he should be the surviving husband of the testator's daughter. On the other hand it was claimed that the word "husband" was simply a matter of description of the person who was to take.

The Auditing Judge awarded the interest of the fund in the accountant's hands as trustee, to the authorized committee of Thomas Waller during his life as directed by the will, holding that the word "husband," as used by the testator, must be understood as a description of the person and not of the character in which he was to take, citing *Babcock v. Smith* (22 Pick. 61); *Bullock v. Zille* (Saxton's Reports, 489); *Sharpe's Estate* (15 WEEKLY NOTES, 419).

To this finding exceptions were filed in behalf of the heirs-at-law of Thomas Mellon.

John G. Johnson, for the accountants.

H. W. Grindel, for Mrs. Waller's executors.

J. Edward Weld, for the committee.

March 28, 1891. **PENROSE, J.** We may conjecture, but we cannot be certain, that the inducing cause of the provision for Thomas Waller, was that he was the husband of the testator's daughter. The relationship, however, could not have been the sole motive, since the gift is to the individual by name, and not to him simply as husband; nor is there, as in *Bell v. Smalley* (18 Atlantic Rep.), cited by the exceptant, the evidence of intention afforded by a restriction of the bounty to the time during which the beneficiary remains unmarried.

We have no right to say, therefore, that the gift was subject to the condition that the donee should, at the time it took effect, be the husband of the daughter. Possibly the testator may have observed symptoms of the mental derangement which has since culminated in placing the legatee in an insane asylum, and for that reason wished to provide for his protection. But all of this is guessing, and our functions are confined to interpretation.

The exceptions are dismissed.

W. L. S

WEEKLY NOTES OF CASES.

VOL. XXVIII.] FRIDAY, JUNE 5, 1891. [No. 7.

Supreme Court.

Jan. '90, 358.

February 2, 1891.

Shaffer v. Corson.

*Practice—Statement of claim—Certainty as to—
Procedure Act of May 25, 1887—Negligence
—Agency—Lender of money—Charge of the
Court.*

When the plaintiff sets forth in his statement the employment of the defendant by the plaintiff, to do a specific act, there is a sufficient averment of agency, although the word agent is not used.

A statement averred employment as above, then proceeded to state the fact that defendant had in his hands sufficient funds for the agreed purpose, and his negligent failure to pay them over, and averred further the consequent damage to plaintiff. The jury found for the plaintiff, and a motion in arrest of judgment was dismissed:

Held, that the statement contained all the essential elements of a declaration for negligence and left the defendant in no doubt as to just what was claimed of him, and why.

By MITCHELL, J. It is in fact a rather favorable specimen of pleading under an Act which enjoins disregard of form and invites looseness.

In a suit by S. against C., it was claimed that C. was the agent of S. and had negligently paid money on behalf of S., to one B., which ought to have been paid D., whereby S. had to pay the money a second time. The defence was first that C. was not the agent of S., and that he had paid the money to B. by the express direction of S. On both these questions there was conflicting evidence. The Court charged the jury that if they found either one in favor of the defendant he was not liable, and that if they found that there was an agency, but no express direction to pay to B., the question then would be as to the degree of negligence, whether as a paid or voluntary agent, committed by C., which the Court carefully explained:

Held, that the defendant had no just ground of complaint as to the instructions on the subject of negligence.

There was evidence in the case of proceedings to recover the loss, begun by S. against the estate of B., and C. claimed that the jury should consider these proceedings as showing that this money had been paid to B. with the full knowledge and consent of S. The Court charged the jury that these proceedings had no bearing on the case:

Held, that the evidence being undisputed the Judge was right in instructing the jury definitely as to their weight in the cause.

Appeal of John J. Corson, defendant, from the judgment of the Common Pleas of Montgomery

County, in an action of trespass, brought by William A. Shaffer and Levi R. Shaffer, to recover the sum of \$1866.31, which the plaintiffs were wrongfully compelled to pay by the negligent and tortious act of the defendant.

On the trial, before WEAND, J., the following facts appeared: Plaintiffs were brick manufacturers in Norristown and owned real estate there. In the early part of July, 1886, wishing to consolidate certain incumbrances upon the property, consisting of a mortgage of \$1600, held by Enoch Shoemaker, and two judgments for \$500 and \$570, held by Jacob M. Cowden, they negotiated a loan of \$3000 with John J. Corson, the defendant, a real estate and loan broker of Norristown, who had money of a client, one Jeans, in his hands for investment. The Shaffers executed a mortgage therefor on July 20, 1886, and it was put upon record on the same day. Two days later, July 22, the Shaffers came to Corson's office for settlement, when a check was drawn to Cowden for \$2766.36, being the aggregate of the mortgage and judgment liens; a check to the Shaffers for \$212.64, and \$21 deducted for drawing and recording the deeds and mortgages and taking searches, making the full amount of the \$3000 mortgage. Shoemaker was not present at this settlement, and Corson claimed that he paid the money due to Shoemaker to Cowden at the request of the Shaffers. Cowden died insolvent in April, 1887, without having paid the money over to Shoemaker; and when about a year afterwards Shoemaker died, the bond accompanying his mortgage was entered up and execution issued. The Shaffers presented a petition to the Court, averring payment to Cowden as Shoemaker's agent, and asking a rule to open the judgment, which was refused. In October, 1888, they brought this suit against Corson, filing the following statement:—

“William A. Shaffer and Levi R. Shaffer, the above-named plaintiffs, come here into Court, and by Larzelere & Gibson, their attorneys, file this their statement of their demand against John J. Corson, the above-named defendant: They claim to recover the sum of one thousand eight hundred and sixty-six and 31-100 dollars (\$1866.31-100) which by the negligent and tortious act of said defendant said plaintiffs were wrongfully compelled to pay, being damages suffered by said plaintiffs by the wrongful act of defendant under the following circumstances: The said defendant was employed by the said plaintiffs to pay to one Enoch Shoemaker a mortgage debt owed by plaintiffs to said Shoemaker, and to have the same satisfied of record, lawful money for that purpose in sufficient amount being placed in the defendant's hands for their account; said mortgage being recorded in the office of the recorder of deeds for Montgomery County, in mortgage book No. 146, page 53, se-

curing the sum of \$1600 with interest, etc., according to the terms thereof. But said defendant tortiously and wrongfully neglected to pay the same to the said Enoch Shoemaker, and to have the record thereof marked satisfied, whereby the real estate of plaintiffs remained charged with said mortgage, and they have since, by adversary process, been compelled to pay the same with interest and costs to a large amount; and notwithstanding his said neglect, said defendant has also neglected and refused to pay over said sum of money to plaintiffs and to account to them therefor. By which wrongful and tortious trespass of the defendant, plaintiffs have suffered damage to the amount of claim."

The Shaffers subsequently filed a bill in equity against Cowden's legal representatives, averring themselves creditors of the Cowden estate, but expressly reserving that it was to be without prejudice to rights against other parties for mis-payments to Cowden, the claim being here made in relief of whoever shall ultimately be determined in the audit of his estate to be entitled to the amounts recovered.

In the present suit the papers connected with the rule to open the judgment were offered in evidence by the defence, and admitted.

Upon these facts the Court charged the jury, *inter alia*, as follows:—

"The first question, therefore, that arises in this case is, Was the defendant the agent of the plaintiffs? Because if he was not their agent, he is not liable in this action. In order to ascertain that fact we must refer to the testimony bearing upon that point. [It is claimed and testified to by the plaintiffs that they employed Mr. Corson as their agent, and that when doing so they told him that he was to see that the new mortgage was to be the first lien, and that the other liens then standing were to be paid off to the proper parties. If this is true, and if Mr. Corson accepted this employment, he was their agent.] But he denies this, and says that, having money of Mr. Jeans, he merely offered to loan that to the Messrs. Shaffer, and that at no time was he their agent as contended for here. Is there any corroborating circumstance which throws light upon this question either way? [It is contended by the plaintiffs that they paid Mr. Corson for his services, and that this fact would constitute him their agent. It is not denied that he received money for his services, but it is claimed by him that this is the usual compensation paid to persons who secure a loan, and that even although he was the agent of Mr. Jeans, that it was the duty of the Messrs. Shaffer, the borrowers, to pay him the usual amount for securing the loan.] The Messrs. Shaffer have contended that this was not so, and there is nothing before the jury in the shape of positive testimony to explain

whether the twenty-one dollars that Mr. Corson retained was the usual commission for securing a loan and recording the papers and the writing of them, or whether it contained something additional for his services to them; [and the jury, from the facts before them, must, in the best way they can, determine whether or not there was anything paid to Mr. Corson as an agent, so called, for the plaintiffs.] . . .

"Secondly, if he was an agent, was he a paid agent or an unpaid agent? It is important to determine this point, because the degree of care required of an unpaid agent is not so great as that of a paid agent. [If he was an agent at all, it must be manifest from the testimony of the plaintiffs that it was because of the pay he received, and if you find, therefore, that in this \$21 there was anything included for his services over and above that which the borrower usually pays, then, of course, he was a paid agent.] . . .

"[If, however, you shall find that, even although not paid, he assumed to do this business for the plaintiffs, and undertook that this new mortgage should be a first lien, then we must inquire as to what degree of care is required of him as an unpaid agent, and this is defined as follows.] . . .

"[If, therefore, you shall find that he was an agent, either paid or unpaid, was he guilty of negligence? If he, as their agent, undertook to pay off these claims, and having a knowledge that the Shoemaker mortgage had been assigned from Cowden, it was his duty, having undertaken that employment, to see that the money was paid to the proper person. He had examined the records and he knew of this assignment, and therefore, unless there were some facts or circumstances which would excuse him, the payment to Mr. Cowden, unless he had the securities there, would be a mis-payment.] . . .

"Then again, as bearing upon the question of negligence, it has been testified to here that Mr. Cowden at that time was regarded in the community as a man well to do; that he was accustomed to loaning money of his own and for other people, and that he was reputed to be wealthy. [With that knowledge in the minds of both parties, was it negligence on the part of Mr. Corson to have assumed that Mr. Cowden would properly appropriate this money? This is only important as bearing upon the question whether he was guilty of that degree of gross negligence in an unpaid agent which would render him liable in this case, because if he was a paid agent it does not make any difference what Mr. Cowden's reputation in the community was, because then it was Mr. Corson's duty to see that the money went to the proper persons,] unless Mr. Shaffer directed or consented that it should go otherwise.

["There have been offered in evidence here certain papers that the Court thinks have no bearing upon this case. It appears that Mr. Shoemaker sued out this mortgage, and that in order to test their liability, the Messrs. Shaffer interposed an affidavit of defence, in which they swore that they had paid this claim by paying it to Mr. Cowden, who was entitled to receive it. I charge you that that affidavit cannot affect the merits of this case, because these parties had a perfect right to make that affidavit under the circumstances in order to test their liability, in order to see whether they were liable or not, and it may be that it was their duty to do so in order to protect Mr. Corson. It may be important to show in one respect that they had paid it to Mr. Cowden, but the affidavit does not state whether they paid it directly or through Mr. Corson, and, as I said before, I fail to see how it can have any bearing in this case. There has also been offered in evidence a bill in equity filed by the Messrs. Shaffer with others in reference to this very money. That was another legal proceeding which these parties had a perfect right to resort to, because if this was a mispayment, no matter whose fault it was, they had a right to ask Mr. Cowden or his estate to return the money if he had misappropriated it, and whether they resorted to one or half a dozen remedies would not prevent their recovery in this case if you shall find that Mr. Corson was liable."]

Verdict for plaintiffs for \$1551, and judgment thereon. The defendant then moved in arrest of judgment, which motion was refused. Whereupon the defendant took this appeal, assigning for error the portions of the charge given above in brackets, and the refusal of the motion in arrest of judgment.

B. E. Chain, for appellant.

The defendant was the agent of Mr. Jeans. He was not the agent of the plaintiffs, and no averment that he was anywhere appears in the plaintiffs' statement. The Court therefore erred in commenting on this point as it did.

The documents, commented on by the Court at the end of the charge, were admitted in evidence, and were before the jury as a corroboration of the testimony of the defendant that he had paid the money to Cowden at the instance and request of the plaintiffs, and as a ratification of his act in so doing. For the Court to say, "The Court thinks they have no bearing on this case," was to prevent this evidence from having its proper effect before the jury.

Story on Agency, 239, 250, 255 a.

Wright v. Burbank, 64 Pa. 251.

Farmers' Trust Co. v. Walworth, 1 N. Y. 434.

Drakely v. Gregg, 8 Wallace, 267.

Hawley v. Keeler, 53 N. Y. 120.

Keeler v. Salisbury, 33 N. Y. 653.

Sanger v. Wood, 3 John. Ch. 418.

Ewell on Agency, 80.

The Court should have arrested the judgment in this case. The statement filed alleges no consideration on the part of the defendant. Not even an action of assumpsit, much less case, is sustainable, unless a consideration to do the act be averred and proved.

1 *Chitty on Pleading*, p. 136.

Fritz v. Hathaway, 26 WEEKLY NOTES, 273.

To raise a tort something more is required than the simple receipt of money and the neglect to pay on account. If there be nothing more than this, it is no more than a breach of contract, and the action is assumpsit.

Reeside v. Reeside, 49 Pa. 332.

Zell v. Arnold, 2 P. & W. 295.

McCahan v. Hirst, 7 Watts, 179.

Cook v. Haggerty, 2 Grant, 257.

McCaill v. Forsyth, 4 W. & S. 180.

N. H. Lazerele (*M. M. Gibson* with him), for appellees.

Under the present law as to pleading, the plaintiff is not obliged to disclose his case in a statement with the same nicety and precision of averment as was required in a declaration, the object being merely to inform the defendant with reasonable accuracy of the nature and extent of the plaintiff's claim.

Act of March 21, 1806.

Act of May 25, 1887 (P. L. 271).

Murdoek v. Martin, 25 WEEKLY NOTES, 288.

The law implies a promise from brokers, bankers, agents, and attorneys, that they will severally, in their respective callings, exercise competent skill and proper care in the service they undertake to perform.

Wingate v. Mech. Bank, 10 Pa. 108.

Wilson v. Wilson, 26 Id. 394.

McFarland v. McClees, 17 WEEKLY NOTES, 547.

April 6, 1891. MITCHELL, J. The motion in arrest of judgment seems to have been founded mainly on the claim that while the action was in trespass, the statement set forth merely a breach of contract, and did not aver that defendant was the plaintiffs' agent. But this view cannot be sustained. The statement does not use the word agent, but does aver an agency when it sets forth the employment of defendant by the plaintiffs. It then proceeds to state the facts that defendant had in his hands sufficient funds for the agreed purpose, and his negligent failure to pay them over. Then follows the averment of the consequent damage to plaintiffs by having to pay the Shoemaker mortgage over again. The statement contains all the essential elements of a declaration for negligence, and leaves the defendant in no doubt as to just what is claimed of him, and why. It is in fact a rather favorable specimen of pleading under an Act which enjoins disregard of form and invites looseness.

Apart from this there is nothing in the case but a question of fact. It was the unfortunate case of defendant's confidence in a man of good reputation, assuming to be the agent of another, and payment to him when in fact he had no authority to receive the money. There were two grounds of defence, the absence of any employment or duty on the part of the defendant to the plaintiffs, and express direction by them to pay the money to Cowden. On both these questions there was conflicting evidence, and the learned Judge left them to the jury, with clear and emphatic instruction that if they found either one in favor of defendant, he was not liable. The Judge then discussed the case on the alternative view that the jury might find the agency and not find any express direction to pay to Cowden, and explained the negligence which would make the defendant liable, either as a paid or a voluntary agent, under the circumstances, including in the latter the general reputation of Cowden, in the community at that time, as a man of honesty and business credit. Of the instructions on the subject of negligence the defendant at least has no just ground of complaint.

Nor was there any error in the treatment of the documents referred to in the eighth assignment. The affidavit to open the Shoemaker judgment was based on the information and averment that Cowden had paid the money over to Shoemaker. If that was true, it was a good defence, whether Cowden had been authorized to receive the money or not. As the learned Judge said in his charge, the affidavit does not state whether the plaintiffs paid to Cowden in person or through defendant as their agent, and certainly contains no admission of either authorization or ratification of defendant's action as between him and them. So, with the bill in equity against Cowden's representatives. It was filed after this suit was commenced, and with the express reservation that it was to be without prejudice to rights against other parties, meaning the defendant, for mispayments to Cowden. In fact both the effort to open the Shoemaker judgment and the bill against the Cowdens were efforts in relief of the loss and, therefore, of defendant's responsibility, and as the evidence in regard to them was undisputed, the Judge was right in instructing the jury definitely as to their weight in the cause.

It is no doubt, as the learned Court below said, a hard case for either party to have to bear the loss, but the jury have put it upon the defendant, and there was no error in the way the question was submitted to them.

Judgment affirmed.

S. H. T.

July '90, 20.

March 9, 1891

Bach v. Burke.

Actions at law—Agreements of parties concerning—Agreements to discontinue—Authority of the Court over—How exercised.

An agreement between the parties to an action at law, upon a good consideration, to discontinue the suit, known to and acquiesced in by the counsel, is within the summary jurisdiction of the Court to enforce by rule.

Wilkins v. Burr, 6 Binney, 389, confirmed.

It is, however, within the discretion of the Court whether they will do so or not. A refusal to enforce the agreement is not reviewable by the Supreme Court, for there is no judgment to which a common-law writ of error would lie, and the case is not within any of the special appeals allowed by statute.

Appeal of John A. Burke, defendant, from the order of the Common Pleas of Northampton County, discharging a rule upon Amandus Bach, the plaintiff, in an action of foreign attachment in case, to show cause why the said action should not be discontinued, in accordance with an agreement of the parties.

The facts of the case, as set forth in the petition filed by John A. Burke, the defendant, at the time the rule to show cause was obtained, were as follows: The petition avers, in the first person, that "on or about the 23d day of October, 1886, A. Bach, plaintiff in this suit against me, came to me and solicited me to make an agreement to assist him in his defence in a certain suit of John Brown to foreclose a mortgage against him, said A. Bach, Dr. John Buzzard, and Joseph Bach, assignees for the benefit of creditors of said A. Bach, at No. 2, April Term, 1886, as he knew that I was in possession of facts and documents which would make successful this defence in the mortgage suit of Brown. He first said he would cancel his suit against me in the event of his success in defending against Brown, but I utterly refused to give the preparation and aid he desired unless he would discontinue his suit against me and discharge me forever from all further liability in the same, which he finally agreed fully to do, and said he would instruct his counsel, Judge Kirkpatrick, to discontinue the suit, and that he would see that his father, the assignee, concurred in and authorized it. Thereupon in due time I proceeded to prepare a statement of facts, and gather together and compile documentary evidence with reference to the transactions of the New Bangor Slate Company, to show that a sale of all its property had been caused by said Brown on an illegal judgment, which sale had made valueless the capital stock of said company, a quantity of

which was held by said Bach, and a much larger quantity by me; and at the request of said Bach came to Easton three or four different times in the year 1887 for the purpose of joint consultations with my counsel and the counsel of Bach, all of whom were also counsel for the defendants in the suit of *Brown v. Bach*, prepared with my books, documents, statement of facts for such consultations, and prepared to testify in Court in said suit of *Brown v. Bach*. At one of these times one of my counsel, Mr. Chase, in open Court, introduced me to Judge Kirkpatrick, and in reply to Mr. Chase's statement that I had come to testify in suit of *Brown v. Bach* (which suit had been continued by plaintiff) in pursuance of the agreement with Bach, to discontinue his suit against me (which was also on list for trial) Judge Kirkpatrick said he fully understood the nature of the agreement, that it was all right, but the discontinuance of Bach's suit against me had better not be entered on the record before the suit of *Brown v. Bach* was disposed of, as it might affect the latter suit, but that the matter could rest just as safely in the hands of the counsel for both parties. That as at another time my counsel, Mr. Mackey, gave me a like version of the matter, I rested the same with my counsel, supposing it was all right, and that Bach's suit against me was in fact discontinued, until in September, 1888, I learned that it was being pressed for trial. I have always held myself ready to go to Easton whenever desired to testify and assist in gathering up evidence in the suit of *Brown v. Bach*, and was greatly surprised to learn that such suit had been compromised without advising with or notifying me, and as I have been subjected to great expense in preparing the testimony and attending Court, as well as damaged by the non-prosecution of the suit of *Brown v. Bach*, I pray the Honorable Court to order a discontinuance of the suit of Bach against me, in accordance with the agreement between us, and the express understanding of the counsel for both parties."

Appended to the foregoing petition was the following communication:—

To the Honorable the Judge of the Court of Common Pleas of Northampton County:

Upon the foregoing affidavit, as well as our personal knowledge of the facts therein stated, so far as they refer to us and Judge Kirkpatrick, attorney for plaintiff, we pray the Court in behalf of the defendant, for a rule on plaintiff to show cause why discontinuance of this cause should not be entered.

CHASE & MACKAY,
Attorneys for Defendant.

Dec. 8, 1888.

The Court, SCHUYLER, P. J., discharged the rule without filing an opinion; whereupon the defendant took this appeal, assigning for error this action of the Court.

S. B. Chase (George W. Mackey with him), for appellant, cited—

Weeks on Attorneys, § 78.

Wilkins v. Burr, 6 Binney, 389.

There was no oral or printed argument for appellee.

April 20, 1891. MITCHELL, J. On the facts presented in the petition, there was an agreement between the parties, upon a good consideration, to discontinue this suit, and the agreement was known to, and so far acquiesced in by the counsel, as to bring it within the summary jurisdiction of the Court to enforce by rule. This is entirely clear upon the authority of *Wilkins v. Burr* (6 Binn. 389), an almost exactly analogous case, which Chief Justice TILGHMAN held to fall "within the reason of that principle by which Courts compel the specific execution of agreements concerning suits depending before them."

But that case, though commenced by *capias* in the Common Pleas, was immediately transferred, as I have ascertained by examination of the original record, to this Court by habeas corpus, and all the proceedings subsequent to the writ were here as in a Court of original jurisdiction. The decision is authority therefore for the Court below to make absolute the rule to discontinue, but its refusal to do so is not a matter that we can review. There is no judgment to which a common law writ of error would lie, and the case is not within any of the special appeals allowed by statute.

We are not informed of the grounds on which the Court below discharged the rule. If it was from doubt of its authority, as the case is very much out of the usual course of proceeding, the decision in *Wilkins v. Burr* solves that doubt in favor of the jurisdiction. If for other reasons, we may say that on the facts, as they seem to be conceded, the petitioner appears to us to be entitled to the relief asked, but the consideration of the case on the merits is for the Court below, not for us. If that Court does not think the facts sufficiently established to be safe ground of summary decision on a rule, we perceive no reason why it may not permit them to be pleaded in abatement or given in evidence as an equitable release under the hotchpot pleading of the Procedure Act. But at present there is nothing before us for review.

Writ quashed.

S. H. T.

July '90, 148.

January 22, 1891.

Perry v. Jensen.*Contract—Evidence.*

Where a party covenants to furnish another with "sufficient samples" for the purpose of introducing a new article, "as the same may be called for," if the parties cannot agree as to what is a reasonable quantity, that question must be left to the jury to determine from the evidence.

Where a witness has been called for the purpose of testifying as to the reasonableness of the quantity of samples furnished, the fact that his experience has not been in distributing precisely the same style of article or that he has not distributed throughout the entire United States, as this contract called for, would not affect his competency as a witness.

Where plaintiff in a suit for damages for breach of covenant has contracted "to use his best endeavors to introduce and sell" a certain article, and has employed an outside agency to make distribution of samples, it is competent for defendant to show by a witness in same line of business, who swears to a knowledge of the methods of said agency, that such method is not the "best reasonable endeavor to introduce the article in question."

The Court will sustain an assignment of error to an incorrect statement of evidence in the charge, when it appears that such statement might be material with the jury.

Appeal of Anna M. Jensen, administratrix of Carl L. Jensen, deceased, defendant, from the judgment of the Common Pleas No. 3, of Philadelphia County, in an action of covenant by John C. Perry.

On the trial, the following facts appeared: On November 20, 1885, Carl L. Jensen entered into a contract under seal with Perry, wherein, after setting forth that he was sole proprietor of "Crystal Pepsin," and was desirous of introducing said article, it was provided as follows:—

1. Said Jensen hereby appoints said Perry his sole and exclusive agent for the sale of said article, on the continuing condition that he, said Perry, shall use his best reasonable endeavors to introduce and sell the same throughout the United States, and shall devote his entire time and attention to that purpose.

2. Said Jensen agrees to pay said Perry in consideration of his services, and of the payment of said Perry of the costs and introducing and selling said article, a commission of one-third of the gross receipts, by said Jensen from sales in North America only of said Crystal Pepsin Tablets, from any and all sources whatsoever, less five per centum of such gross receipts.

3. It is understood and agreed that if the sales of said Crystal Pepsin Tablets during the first year, and after the date hereof, shall not amount to more than five hundred gross of bottles or packages of said tablets (each containing about seventy-five two-and-a-half grain tablets), and if such sales shall not amount to more than one thousand gross of like bottles or packages during any year after the said first year, the said Jensen may, at his option, terminate this contract.

4. Said Jensen agrees to supply said Perry with sufficient samples of his said article, and printed matter in the nature of advertisements relating thereto, as the same may be called for by him, said Perry, but said Jensen is to be at no other expense or cost.

5. Said Perry shall be entitled to receive the amount of his commission from time to time, as the same shall be earned.

6. This contract shall continue for a period of forty-nine years from and after the date hereof.

The contract began February 1, 1886. Perry was furnished during February, March, April, and May with 431,621 samples for distribution. Of these, 113,040 came to Philadelphia, 131,042 to New York, 62,598 to Brooklyn, 25,000 to Baltimore, 36,000 to St. Louis, and 48,666 to Chicago. Each sample averaged nine tablets, and the amount furnished, if sold at regular price, would have realized \$31,794. On July 26, 1886, Perry wrote Jensen asking for 100,000 sample vials of pepsin tablets, with printed matter relating thereto. Jensen declined to do this, and Perry thereupon, on August 3, 1886, wrote him again as follows:—

It is necessary for us to sell over 300 gross in the next six months, and to do it will require very hard, energetic pushing of the goods directly among the people. Extensive sampling is the only method by which I can get such immediate results as to insure our selling the required quantity. The benefit to yourself from the large volume of business which would ensue from a well-directed sampling should be sufficiently apparent to you, without any urging on my part. I want 100,000 samples immediately, and will want several hundred thousand more by October 15. The distribution will be immediate. Please send at once to office.

Jensen still refused to comply with the request; Perry thereupon treated Jensen's conduct as a violation of the agreement, and ceased the work of introducing the tablets. On November, 23, 1886, Jensen contracted with other parties to sell the article, whereupon Perry brought suit to recover damages for breach of covenant.

On the first trial Jensen offered to prove that the quantity of samples furnished prior to August 3 was more than sufficient for a year. This offer was rejected, and the judgment for plaintiff which resulted from that trial was reversed on that account. (See Jensen v. Perry, 24 WEEKLY NOTES, 90.) Jensen died in June, 1888, and his administratrix was substituted as defendant.

On the second trial, Goodman, a witness for defendant, who first testified that he had been in the advertising business for twelve years; that he had distributed a great amount of printed matter, and that he was acquainted with the method of distribution employed by the American District Telegraph Company, was asked the following question: Do you regard the distribution of an article like Dr. Jensen's Pepsin Tablets through the medium of the American District Telegraph Company, or any other mode

over which this individual has no control, as the best reasonable endeavor of the individual to get that article to the public? Objected to. Objection sustained. Exception. (First assignment of error.)

Defendant further offered to prove by the same witness that at the time when this distribution in the city of Philadelphia was alleged to have been made he made an investigation, but could find none, and that he went to Dr. Jensen and complained to him that the work was not being done. Objected to. Objection sustained. Exception. (Second assignment of error.)

Lovey, another witness for defendant, testified that he had been in the advertising business since 1865; that he had experience in distributing pamphlets and medical articles, and that he had distributed articles and pamphlets in Chicago, Baltimore, and Ohio. He was then asked the following question: Is or is not 431,000 samples of medicine like this for the cure of dyspepsia a reasonable or unreasonable number for distribution in any one year? Objected to. Objection sustained. Exception. (Third assignment of error.)

Herbert L. Ford was also called for defendant and testified that he had been a general manager of the New York and Chicago Chemical Company; that this company did a large amount of sampling in the trade; that in the food business they worked from house to house, but the pepsin samples were sent to druggists; that he personally distributed samples throughout the United States, but had done so in localities. The Court declined to permit said witness to testify as an expert. Exception. (Fourth assignment of error.)

John Sunde, a witness on behalf of defendant, was asked the following question: State whether he (John Brill, who had been in Jensen's employ) is a competent and reliable pepsin maker. Objected to. Objection sustained. Exception. (Fifth assignment of error.)

The defendant requested the Court to charge, *inter alia*, as follows:—

(4) If the jury should find from the testimony that the plaintiff, when he made this contract, was ignorant or unskilled in the business about to be entered into, and thereafter refused to take advice from others having a knowledge of the business and things necessary to be done, it was a breach of contract on his part, as it was his duty to his principal to use every accepted method of introducing the article. Upon such finding your verdict should be for the defendant. *Answer.* Upon that I instruct you, gentlemen of the jury, he was to use his best endeavors. As I have already said, he did not agree in this contract that he possessed the highest, the best skill, or any superior degree of skill in connection with this business. Dr. Jensen sought his own agent.

He selected Perry, and Perry was to give all his time and attention and his best endeavors to the business; and you will say whether or not what he did do or did not do constituted a compliance with this contract. So far as this point is concerned, the reasonableness of the means employed by Perry, of employment, is a question of fact, and therefore I decline the proposition. (Tenth assignment of error.)

(5) If the jury should find from the testimony that the plaintiff stated to Dr. Jensen that he had a friend worth about a million dollars, who would go in with him, and that that fact induced the contract, and that thereafter no such person did enter into the business with him, and the plaintiff himself had not sufficient money to carry out his part of the contract, and by reason thereof the enterprise failed, then he cannot recover. *Answer.* I decline to charge you as requested in that proposition, as there is no evidence in the case upon which you can come to any such a conclusion. (Eleventh assignment of error.)

(6) The burden of proof rests on the plaintiff to show that Dr. Jensen failed to furnish sufficient samples, etc.; that by reason of such failure the plaintiff was prevented from effecting sales of 500 gross, as required by the agreement. Wherefore, if the jury should find from the testimony that failure to furnish more samples as called for was not the reason that the plaintiff failed to sell 500 gross, and that there was other reason why he failed, then the plaintiff cannot recover, and the verdict should be for the defendant. *Answer.* I do not understand that proposition. It is not clear, and is uncertain as to some other unexpressed reason for failure, and therefore I decline to charge you upon it all. (Twelfth assignment of error.)

The Court charged the jury, *inter alia*, as follows: "Jensen's part, so far as this contract is concerned, was to divide the profit, supply a sufficient number of tablets, and not break the contract so far as the sole agency was concerned. This was a new business which was to be introduced. It was to be introduced throughout the United States—all over. That was the contract that Perry undertook. He demanded 1,200,000 tablets altogether for the year. It was either argued to you, or possibly alluded to in the testimony, that that demand was intended to force a breach of the contract by Jensen, because Perry was tired of it, and was an after-thought, when three months had developed that 500 gross could not be sold. You will say whether that is true or not, gentlemen; but it is only right to say to you that the evidence in this case is undoubted; that the first, or among the very first contract, that Perry made, in connection with his duties, was with an envelope company, for 1,200,000 envelopes,

which would seem to indicate that at the inception of business he conceived that such would be the number needed. . . .

"I simply say all this, because [what you must determine is this, whether 1,200,000 tablets for distribution as samples throughout the United States, in one year, was unreasonable and oppressive upon Dr. Jensen.] If it was unreasonable or was oppressive that is an end of the plaintiff's case. No man may exact an unreasonable compliance with a contract. If, on the other hand, it was not unreasonable or oppressive then the plaintiff committed no breach so far as that was concerned, and Dr. Jensen had no right to refuse the tablets.

"[Unquestionably, the distribution of the tablets was an important element to both parties. Sales would result from publicity. Publicity was to be obtained by distribution. It was mutually beneficial that the tablets should be distributed, and so far as the expense is concerned, that was the only expense which Dr. Jensen undertook. Therefore, you will say whether such a distribution was unreasonable. If it was, then Jensen could refuse to comply, and such a demand would be a breach and a wrong upon Perry's part.]

"I do not recollect that it appears in evidence that Dr. Jensen said how many he would furnish. I think it is argued to you, and it is fairly inferable from the testimony that the amount already given by Jensen was claimed to be sufficient for the year—400,000.

"[Upon Perry's part it is contended that there was an absolute agreement outside of the written one, to furnish 25,000 a week; and his contracts with his distributors, the American District Telegraph Company, etc., were made upon that basis. Dr. Jensen's testimony, which was read to you, is to this effect: that he said to Perry that he had machinery which could make 25,000 a week, and that he went no further. There was also a letter read to you in which that number was again alluded to by Dr. Jensen.] . . .

"[There was not a shadow of evidence anywhere that this business failed because Perry had not the money to pay the expense of distributing. On the contrary, he distributed everything that was sent to him, so far as this case goes. The sums of money which he has not paid you have heard stated in the evidence. Dr. Jensen never complained of that. He was sworn once and had a chance to tell the story. He never complained that Perry was unable to distribute the samples. As a matter of fact, Perry had distributed all that he received."]

Verdict for plaintiff for \$8545.81 and judgment thereon. Defendant appealed, specifying for error the rulings on the evidence, the answers

to the points, and portions of the charge quoted in brackets as above.

William F. Johnson, for appellant.

William S. Stenger, for appellee.

May 4, 1891. GREEN, J. When this case was here before (126 Pa. 495), we held that it was error to reject proof that the quantity of samples furnished by Jensen, prior to the demand in August, 1886, was more than reasonably sufficient for the whole year's operations. We further said that "the agent may demand what is fairly and reasonably sufficient for the purposes of his undertaking and no more. . . . What is a reasonable quantity of samples for the purposes of the contract is, if the parties cannot agree about it, a question of fact to be settled by a jury." Of course such a question would have to be determined by testimony, and the testimony of persons acquainted with the business of distributing samples of goods of this class would be essential to the proper information of the jury. In point of fact such testimony was delivered on the trial, but some of that which was offered by the defendant was rejected, and of this complaint is made more especially in the third and fourth assignments of error. To the witness Lovey the defendant put the following question: Q. Is or is not 431,000 samples of medicine like this for the cure of dyspepsia a reasonable or unreasonable number for distribution in any one year? This was objected to, but no ground of objection stated, and objection sustained, but for what reason is not stated. If the witness was incompetent because he had not shown sufficient experience to be able to testify, his rejection was proper, but if that does not appear the question should have been admitted. Upon turning to his preliminary testimony on the subject of his competency, we find that he testified he had been in the advertising business since 1865, that he had experience in the distribution of pamphlets and medical articles for general consumption, that he had distributed pamphlets for Dr. Palen, Starkey & Palen, for the Real Estate Investment Co., and all of Mr. Goodman's publications, that his experience as a distributor had extended beyond Philadelphia, and that he had distributed samples and pamphlets in Chicago, Baltimore, and in Ohio. We cannot say of such a witness that he was entirely incompetent to testify in answer to the question propounded. Possibly his experience was not as great, or his judgment as good as that of other witnesses having a larger experience, but that would be a matter to be determined by the jury after his testimony was heard. He would not be incompetent because he did have experience in the matter of advertising medical articles, and in the distribution of

samples and pamphlets relating to them. We think it was error, therefore, to reject the question altogether.

And so, also, as to the fourth assignment. The witness, Herbert L. Ford, testified that he had had experience in putting out articles for general and special consumption by sample, advertising, and otherwise. He said, further, "About January 1, 1886, I was retained as general manager of the New York and Chicago Chemical Company. During the succeeding year the article of Infants' Food was brought to my attention and a co-partnership formed to place it on the market. In the pepsin business we did a large amount of sampling in the trade among the druggists. In the food business we made distribution of sample packages from house to house, worked through the mail and by other methods. . . . We sent circulars and have distributed samples, attended public exhibitions and made displays of preparations, and had contests to show their efficiency. . . . We have distributed, I should suppose, at least a half million circulars throughout the United States from first to last." In reply to questions by the Court, the witness said he had not distributed from house to house all over the United States, but he had distributed throughout the United States, not by universal sampling but in localities, that he was interested both in the food and pepsin preparations, and that the pepsin was delivered to the druggists, and the food to the trade and in localities. The learned Court below thought the witness had not sufficient knowledge to testify as an expert, in reply to the question as to the sufficiency of 431,000 samples of an article like Jensen's Pepsin Tablets, as a reasonable quantity for distribution in any one year, and rejected him as a witness. We think the witness was competent, and that the objection of want of sufficient experience or knowledge would go to the effect of his testimony and not its competency. We sustain the third and fourth assignments.

The plaintiff has proved that he did a large part of his distribution through the American District Telegraph Company. The defendant disputed the efficiency of that mode of distribution, and offered to sustain his contention by the testimony of a witness, Goodman, who had testified to his experience as an advertiser and distributor, and to his acquaintance with the methods pursued by the company in question. His testimony was rejected. It could hardly have been for lack of knowledge and experience, and as the offer was to prove that that method of distribution was not the best reasonable endeavor of the plaintiff to make distribution, it could not be said that the offer was irrelevant. By the terms of the contract, Perry was to use his "best reasonable endeavors to introduce and sell" the pepsin

throughout the United States, and to devote his entire time and attention to that purpose. His methods of distribution, therefore, were directly in issue and were liable to be impeached by the defendant, if that could be done. We think the witness had sufficient knowledge and experience from which to testify on this subject, and that it was error to reject the question propounded under the first assignment.

We think the offer covered by the second assignment should have been received, as its tendency was to show that whatever methods of distribution were adopted by the plaintiff, they were not efficient so far as the city of Philadelphia was concerned. The complaint of the witness to Dr. Jensen, however, would not be competent, and that part of the offer should be rejected.

The second assignment is sustained, except as to the communication of Dr. Jensen.

The fifth assignment is not sustained. The question of Brill's competency and reliability as a pepsin-maker is not involved in this controversy, and it is therefore irrelevant.

The sixth assignment is not sustained, because the learned Court below, in other parts of the charge, correctly said to the jury that if the plaintiff's demand for more samples was unreasonable and oppressive upon the defendant, he could not recover merely because the defendant refused compliance with such a demand; and the number already furnished, 400,000 and upwards, was stated in the charge. Whatever was demanded beyond that was left to the jury, as being within their province to determine, in support of the allegation that the number demanded was unreasonable.

There was some evidence in the case as to the reasonableness of a demand for 1,200,000, and the Court simply said in this part of the charge that the jury must determine whether such a number would be unreasonable. It is true it does not appear that such a number was specifically demanded by the plaintiff, but he did call for several hundred thousand more than the 431,000 already delivered, in his letter of August 3, 1886.

We are obliged to sustain the seventh assignment, because literally the contract did require that, in addition to the samples, Dr. Jensen should furnish "printed matter in the nature of advertisements relating thereto," and that was an additional expense to which he was subject.

A similar reason requires us to sustain the eighth assignment. The learned Court was slightly in error in stating Jensen's testimony to the jury. His testimony as actually delivered does not show that "he said to Perry that he had machinery which could make 25,000 a week," but only that he "could construct machinery to make 25,000 samples per week."

As this discrepancy might be material with the jury in considering the quantity which the defendant was reasonably bound to furnish, we cannot say it was harmless to the defendant for the Court to state Jensen's testimony on the subject incorrectly in the charge.

The ninth assignment is not sustained. We are not referred by the appellant to any testimony tending to show that the statement of the Court in this part of the charge was incorrect, and we have not discovered any.

We see no error in the answer of the Court to the defendant's fourth point, and therefore dismiss the tenth assignment. It would not follow that the verdict should be for the defendant, if the plaintiff was ignorant or unskilled in the business, and refused to take advice from others having a knowledge of the business. The practical question for the jury was whether Perry performed his part of the contract, and whether he did or not was to be determined by the jury, and so the Court charged in answer to this point.

The same consideration is applicable to the defendant's fifth point. It was not a question whether the plaintiff told the defendant that he had a friend worth a million who would go in with him, and that no such person did go in with him, but whether or not he performed his part of the contract. The considerations which pertain to that subject were fully and correctly expressed in the answers of the Court to the ninth and tenth points of the defendant and in the general charge. The eleventh assignment is not sustained.

There was no error in the answer of the Court to the defendant's sixth point, and the twelfth assignment is not sustained.

Judgment reversed, and new venire awarded.

W. M. S., JR.

July '90, 220.

March 16, 1891.

Maneval v. Township of Jackson.

Township orders—Supervisors—Power of to bind the township—Confession of judgment by the supervisors—When proper.

A judgment which is regular on its face cannot be stricken off except for fraud.

The supervisors of a township have no general power to borrow money; but they have an implied power to do so, when its exercise is necessary to enable them to perform their duties.

When the supervisors have issued a township order for money properly borrowed, and suit is brought thereon, the supervisors are justified, knowing the claim to be just, in confessing judgment in favor of the plaintiff, so as to save the township from costs in a case in which they have no defence.

That a suit cannot be brought upon a township order is a technical defence, which cannot be raised by a tax-payer, upon a motion to strike the judgment off.

Semble, that such a defence might be made by the township itself.

A destructive flood having destroyed certain township roads and bridges, the supervisors being without money to make repairs, borrowed \$600 from one M., and gave him a township order therefor. Suit was begun by M. against the township upon this order; and the writ having been served upon the supervisors, they confessed judgment for the amount of the claim. Subsequently A., a tax-payer of the township, presented his petition to the Court asking to have the judgment stricken from the record, alleging that the supervisors had no authority to give said order, or to borrow the money which it was alleged to represent. The Court below having discharged the rule to strike off the judgment, on appeal:

Held, that the duties of the supervisors which required them to promptly place the road and bridges in safe condition for travel, implied an authority to borrow money for that purpose.

Held, also, that the defence that a suit cannot be sustained upon a township order is a technicality which cannot be taken advantage of by any one except borrow the township.

Appeal of the Township of Jackson, defendant, from the judgment of the Common Pleas of Lycoming County, in an action of assumpsit brought by Charles Maneval, to recover the amount of an order on the treasurer of said township, payable to Charles Maneval or bearer, and signed by the supervisors of the township.

The action was commenced on May 6, 1890. Upon the same day, before the summons reached the sheriff's hands, the supervisors of defendant township, by paper filed, appeared for the township and confessed judgment against it in favor of plaintiff for \$600, the amount of the order, which was given for money borrowed. On May 23, 1890, Henry Antis, a citizen and tax-payer of defendant township, having, by virtue of an order of Court, made under the provisions of the Act of March 23, 1877, § 1 (P. L. 20, Pur. Dig. 365, pl. 24), been permitted to come in and defend in behalf of the township, presented a petition to the Court, setting forth the facts and averring that the supervisors had no power to bind the township for the alleged borrowed money; that the township order upon which the action was founded was of no binding validity against the township, and that the supervisors had no power to confess the judgment against the township, and praying that said judgment be stricken off.

The Court then granted a rule upon the plaintiff to show cause why the judgment should not be opened and the petitioner be permitted to defend against the same.

To this rule the plaintiff filed an answer, consisting of the affidavits of himself and the two

supervisors, to the effect that said township order was given for money borrowed from him for use of the township, when the township was laboring under great necessity for it, in consequence of great floods and the destruction of the bridges and highways, and that the whole of the money for which the order was given had been applied to the repair of the roads and bridges of the township.

After argument, the Court, METZGER, P. J., discharged the rule; whereupon the defendant took this appeal, assigning for error this action of the Court.

T. M. B. Hicks, for appellant.

The plaintiff's statement avers that the action is founded upon a township order, and therefore fails to disclose a valid claim against the township.

Port Royal v. Graham, 84 Pa. 426.

Bank v. Rush School District, *81 Id. 307.

Allison v. Juniata County, 50 Id. 351.

East Union Township v. Ryan, 86 Id. 459.

Snyder Township v. Bovaird, 22 WEEKLY NOTES, 563.

The statement avers no demand upon the township treasurer for the payment of the order, without which no action lies against the township.

East Union Township v. Ryan, 86 Pa. 463.

Such a judgment as this, like that against a married woman, must be self-supporting.

Baker v. Singer Mfg. Co., 22 WEEKLY NOTES, 366.

Brown v. McKinney, 25 Id. 76.

Real Estate Co. v. Roop, Id. 380.

The supervisors have no power to borrow money, either by statute or by implication.

Act of April 20, 1874, P. L. 65.

Union Township v. Gibboney, 94 Pa. 537.

Gibson v. Plumcreek, 22 WEEKLY NOTES, 512.

1 Dillon's Mun. Corp., 4 ed., § 125.

J. F. Strieby (*William W. Hart* with him), for appellee, cited—

Port Royal v. Graham, 84 Pa. 429.

Hopewell v. Putt, 2 WEEKLY NOTES, 46.

Somerset Township v. Parson, 105 Pa. 360.

Gibson v. Plumcreek, 22 WEEKLY NOTES, 512.

Union Township v. Gibboney, 94 Pa. 537.

Cooper & Grove v. Lampeter Twp., 8 Watts, 125.

Freeman on Judgments, § 545.

April 13, 1891. PAXSON, C. J. If we treat this case as a rule in the Court below to open the judgment, we would be compelled to quash the appeal. It was confessed in an adverse proceeding, and the opening of such a judgment is in the discretion of the Court below. It is only where the judgment is entered upon a warrant of attorney or judgment note, that the Act of Assembly gives the right to an appeal from a refusal to open it. The case was argued at Bar, however, as though the rule was to strike off the judgment, and as that was the prayer of the petition upon which the rule was granted, we will treat it as such.

The suit was brought against the township

of Jackson, appellant, upon a warrant or order drawn by the supervisors, in favor of the plaintiff, upon the treasurer of the township, for the sum of six hundred dollars, and is expressed upon its face to be "on account of borrowed money." The writ having been served upon the supervisors, they appeared and confessed judgment for the amount of the claim. Subsequently one Henry Antis, a tax-payer of the township, presented his petition to the Court below, asking to have the judgment stricken from the record, for the reason that the supervisors had no authority to give said order, or to borrow the money which it is alleged to represent. The prayer of the petition is that "said judgment be stricken off, so that the said township of Jackson, through your petitioner, may come in to defend against the said claim," etc.

A judgment which is regular upon its face cannot be stricken off except for fraud. It was contended for the petitioner that the judgment was void upon its face; that a supervisor has no authority to borrow money, and that a suit will not lie upon an order of this description. It may be conceded, that if it appears upon the face of the record that the judgment was unlawfully entered, it may be stricken off.

If the plaintiff were seeking to recover upon the order, and the township were resisting it, we would have an entirely different question before us. The township is not resisting the claim; it confessed judgment therefor by its recognized officers. We do not assent to the proposition that the supervisors, knowing a claim to be just, may not confess judgment. They are not bound to subject the township to costs in a case in which they have no defence. Under such circumstances we would not strike off a judgment for a mere technicality, even upon the petition of a tax-payer.

The allegation that a suit cannot be sustained upon a township order is a technicality. The township is as much protected by the judgment as though the plaintiff had brought suit upon the original indebtedness, and had offered the order merely as evidence of the debt. It has been said in some cases that an action does not lie on such paper; that it is neither a bill, note, check, nor contract, nor is it a satisfaction of the original indebtedness. (*Dyer v. Covington*, 19 Pa. 200; *Allison v. Juniata County*, 50 Id. 351.) In each of those cases, however, the point decided was that interest could not be recovered upon such warrants. It has been expressly held that they are not negotiable, and that suit cannot be brought in the name of a subsequent holder thereof. (*Bank v. Rush School District*, *81 Pa. 307; *Township of Snyder v. Bovaird*, 122 Id. 442.) I do not propose to discuss this question, however; it might have been a trouble-

some one had it been raised by the township, but this petitioner has no standing to raise technicalities, which do not go to the merits.

That supervisors have no general power to borrow money is conceded. Nor have they any implied power to do so, except when its exercise is necessary to enable them to perform their duties. They have no authority to borrow money for the ordinary repair of roads, but they may do so upon an extraordinary emergency, as where bridges are destroyed, and roads rendered impassable by a flood. In such cases their duty requires them to place both bridges and roads in a safe condition for travel. They must do it promptly, and are liable to indictment for neglect or refusal to do so. And if they have no money for such purpose they may borrow it. We think this principle is sufficiently recognized in *Union Township v. Gibboney* (94 Pa. 534); *Gibson v. Poor District of Plumcreek* (122 Id. 557). And if a precedent was necessary for so obvious a proposition, we would make one.

This money appears to have been borrowed by the supervisors in good faith to repair the roads and bridges injured or destroyed by the flood of 1889. This was a lawful purpose, and as there is no specific act of fraud charged, we are of opinion the township is bound to repay the holder of this order of money he advanced. The right being established, the form of the transaction does not concern the petitioner.

Judgment affirmed.

April 27, 1891. *PER CURIAM*. Reargument refused.
S. H. T.

Jan. '91, 60.

February 18, 1891.

Borough of Mahanoy City v. Wadlinger.

Errors and appeals—Acts of March 20, 1810, and April 15, 1835—Suits before Justice of the Peace—How reviewed.

Under the provisions of the Act of March 20, 1810, § 22 (5 Sm. 171), the judgment of the Common Pleas upon a certiorari to remove the proceedings before a Justice of the Peace is final.

A suit brought under the Act of April 15, 1835, to enforce the penalty for an alleged violation of a borough ordinance, prohibiting an act which is neither an indictable nor public offence, is within the provisions of sections 22 and 24 of the Act of March 20, 1810.

An appeal, therefore, does not lie to the Supreme Court, to review the judgment of the Common Pleas upon certiorari to the judgment of a Justice of the Peace, in a proceeding under the above Acts. And such an appeal, if imprudently issued, will be quashed.

Appeal of the Borough of Mahanoy City, plaintiff, from the judgment of the Common Pleas

of Schuylkill County, setting aside the proceedings had before a Justice of the Peace, against A. M. Wadlinger, John Wadlinger, and Frank Wadlinger, trading as A. M. Wadlinger & Sons, defendants, for a penalty for the violation of a borough ordinance.

On October 7, 1889, the borough of Mahanoy City brought suit before a Justice of the Peace against the defendants for maintaining a nuisance in violation of a borough ordinance, and judgment was entered in favor of the borough. The record was removed by the defendants by certiorari to the Common Pleas where the judgment of the magistrate was reversed by BECHTEL; J., whereupon the plaintiff took this appeal, assigning for error this action of the Court.

Before the Supreme Court, a motion was made to quash the appeal.

James Ryon (*T. H. B. Lyon* with him), for appellant.

George J. Wadlinger, for appellees.

May 11, 1891. MCCOLLUM, J. This was an action of debt, commenced and successfully prosecuted before a Justice of the Peace, for the recovery of the penalty prescribed for a violation of a borough ordinance. The record was removed by certiorari to the Court of Common Pleas where the judgment of the magistrate was reversed, and from the decision of that Court this appeal was taken. When the case was called for argument here, a motion was made to quash the appeal on the ground that the judgment of the Common Pleas was final by force of the 22d section of the Act of March 20, 1810 (Pur. Dig. 708, pl. 30.) It is provided by the 7th section of the Act of April 15, 1835 (Pur. Dig. 807, pl. 4), that "the aldermen and justices of the peace of every city, incorporated township, and borough in this Commonwealth, shall have power to hear and determine all actions of debt for penalty, for the breach of any ordinance, by-law or regulation of such city, township, or borough, in the same manner and subject to the same right of appeal as debts under one hundred dollars; and such action shall be instituted in the corporate name of such city, township, or borough." It is provided by section 2 of ordinance No. 8, of the borough of Mahanoy City, "that if any person or persons shall use or occupy any slaughter-house or other building in connection therewith, so as to annoy or offend any neighbor or any person whatsoever, or shall keep at or near a slaughter-house or other building aforesaid any offal or filth whatsoever which shall annoy or offend any neighbor or any person whatsoever, every person so offending shall forfeit and pay a penalty of not less than five nor more than fifty dollars for the use of the borough."

The present suit was brought under the Act and

for an alleged violation of the ordinance we have quoted, and our inquiry is whether it falls under the provisions of sections 22 and 24 of the Act of 1810. The act for which the ordinance prescribes a penalty is not an indictable or public offence. The person injured by it might maintain an action against the party committing it, for the recovery of his damages, but there is no element of criminality in it. The proceeding to recover the penalty is a civil action to be prosecuted in the same manner as actions of debt for a like amount and subject to the same right of appeal. The plain purpose of the Act of 1835 was to give to the justices of the peace jurisdiction of suits for penalties for the violation of municipal ordinances, and to make the procedure therein subject to the laws governing other civil actions within their jurisdiction. In *Spicer v. Rees* (5 Rawle, 119), it was held that an action for a penalty for the violation of a city ordinance was within the provisions of the Act of 1810 and the authority of this case was recognized in *Commonwealth v. Betts* (76 Pa. 465), to the extent "that where the action is by a private citizen in debt for a popular penalty, it is such a civil action as may not be removed by certiorari or writ of error." In the case last cited it was determined that an action in the name of the Commonwealth to recover a penalty for a statutory offence was not a civil action within the meaning of secs. 22 and 24 of the Act of 1810, but that it was in effect a proceeding for a criminal offence "the supervision of which the essential interests of the public require to belong to this Court."

The case at bar is within the principle settled by *Spicer v. Rees*. It is an action for a penalty prescribed for the violation of a borough ordinance. It is brought by the municipality, which, under the ordinance, is entitled to the penalty. It is as clearly a civil action as if brought by a private citizen under an ordinance which gave him one-half the penalty and the municipality the other half of it. In *Penna. Pulp Co. v. Stoughton* (106 Pa. 458), it was ruled that an Act enlarging the jurisdiction of magistrates and extending the affidavit of defence law to their Courts, placed the cases arising under it subject to the restrictions as to review imposed by sections 22 and 24 of the Act of 1810. We are of opinion that these restrictions are applicable to the case before us and that it is not therefore reviewable here.

The appeal is quashed.

S. H. T.

Common Pleas.

C. P. No. 1.

May 9, 1891.

Wolf et al. v. Binder & Kelly.

Practice—Affidavit of defence—Statement of claim—Copy served—The copy of statement served should set forth the names of all the plaintiffs of record and the affidavit thereto.

Sur rule for judgment for want of a sufficient affidavit of defence.

This was an action on two promissory notes given by Binder & Kelly to order of Wolf Bros.

The affidavit of defence set out that the statement of plaintiffs' claims did not disclose the names of all the plaintiffs, but simply read: "Clarence Wolf et al.," and that the said statement of claims as appeared by the alleged copies thereof which were served upon the defendants, was not signed by any one of the plaintiffs, nor did it appear to have been sworn or affirmed to by any of the plaintiffs, or to have been subscribed, sworn, or affirmed to by any one having authority to act for the plaintiffs in that capacity, as required by the rules of the Court in such case made and provided.

Clinton O. Mayer, for the rule.

The summons contains the names of all the parties, and they therefore appear of record, to which the defendant is referred by the number and term upon the copy of the declaration. The Act of Assembly does not require that a copy of the affidavit appended to the statement should be served upon a defendant, but simply requires that a copy of plaintiffs' statement of demand shall be served.

Avery D. Harrington, contra.

The statement of claim should follow the summons and give the names of all the plaintiffs and show in what capacity they sue.

Chitty's Pl., 14 Am. ed., pp. 245, 246, 251.

Brewster's Pr., p. 74.

The writ of summons has spent its force when it has brought the defendants into Court, and an affidavit of defence is not an answer to a writ of summons but to the statement of claim which is the foundation of the plaintiffs' right of action. The statement of claim does not show any right of action upon the notes. The Act of May 25, 1887, was intended to simplify practice. The affidavit is a material part of the statement of claim, and if appended to the statement filed a copy thereof should appear upon the copy served.

Eo die. Rule discharged, and leave given to file an amended statement of claim.

H. J. H.

C. P. No. 2.

May 2, 1891.

Harvey v. Thacher et al.*Equity—Injunction—Sale of real estate through an auctioneer—Statute of Frauds.*

Sur motion for preliminary injunction.

The petition of the plaintiff alleged that on April 8, 1891, a certain lot of ground in the city of Philadelphia was exposed for sale by James A. Freeman & Co., auctioneers, and was sold to the plaintiff for \$2400, of which sum \$100 was then paid on account. That the legal title to the said property was at that time in Watson F. Thacher and wife, the defendants. That the defendants refused to deliver the papers or give the data to the plaintiff for the preparation of his deed, and that the defendants had entered into an agreement to sell the said lot to one Rudolph Partenheimer.

The plaintiff therefore prayed for an injunction to restrain the said defendants from negotiating or transferring the said lot of ground to any person or persons.

Edwin D. Hoffman, for the motion.

[*FELL, J.* There is no contract in writing for the sale of the land, and therefore the case comes within the Statute of Frauds.]

THE COURT. Motion refused.

HARE, P. J., absent.

J. W. T.

Orphans' Court.

March 17, 1891.

Fow's Estate.*Decedent's estate—Will—Caveat—Administration pendente lite—Account—Practice.*

An administration *pendente lite* continues during the litigation, and when that is determined an account is to be filed.

An administrator *pendente lite* during the pending of an appeal to the Supreme Court will not be compelled to file an account.

Sur petition and answer.

The petition of Anna E. Howell and others, executors under the will of George Fow, the decedent, alleged that said will was offered for probate in April, 1890, and a caveat having been filed by three of testator's sons, the will and testimony taken in its support were certified by the register to this Court and letters granted, *pendente lite*, to the Merchants' Trust Company.

An Examiner was appointed, and upon a review of the testimony the issue was refused by the Orphans' Court, and the register directed to admit the will to probate, to which finding an appeal was taken February 19, 1891, to the Supreme Court. The petition also alleged that the petitioners duly notified the Merchants' Trust Company to submit their accounts and hand over the assets in their hands, which was refused.

The prayer of the petition was for a citation to the Merchants' Trust Company, administrators *pendente lite*, to show cause why an account should not be filed and the assets of the estate surrendered.

An answer was duly filed by the Merchants' Trust Company, which admitted all the facts, but denied the right of the petitioners to an account, and cited the Act of March 15, 1832, section 42 (Purd. Dig. 1477, pl. 21.)

Joseph M. Pile, for the petitioners.

F. Carroll Brewster, for the respondents.

April 25, 1891. *HANNA, P. J.* This petition is not in accord with, and overlooks, the proper practice, to be followed in the case where a settlement by an administrator *pendente lite* is sought by parties interested. As well settled, such administration continues during the pendency of the litigation. When that is determined, the administrator *pendente lite* files an account of his administration, as any other administrator, with the register, which in due course is settled by the Court, where all parties interested may be heard as to its correctness, and distribution of the balance appearing from the account. In the present case the appeal from the decree of this Court has not been disposed of, and it would therefore be improper to direct either the filing of an account or payment of the funds now held by the administrator *pendente lite* to the executors.

The petition is accordingly dismissed.

W. L. S.

March, 1891.

Cooper's Estate.*Trusts—Perpetuities—Restraints in enjoyment of estates given in fee—When trusts declared invalid on account of them.*

Sur exceptions to adjudication.

Upon the audit of the account of Samuel W. Cooper, executor and trustee under the will of Emily W. Cooper, deceased, *HANNA, P. J.*, the Auditing Judge, found as follows:—

“The account was conceded to be correct, so that the only question is as to the validity of the trusts declared by the testatrix. Testatrix died February 22, 1886, and letters testamentary upon

her will were granted on March 6, 1886, to her son, the present accountant, who is named in her will as executor and trustee.

"The account of the executor was filed in April, 1888, and duly confirmed by this Court without objection from any of the parties interested, and the balance in his hands was awarded to him to be held under the terms of the will of the testatrix.

"Two further accounts as executor and trustee were submitted by the trustee, without being filed, and ratified by all the parties in interest.

"The said testatrix left seven children, viz., William B., Emily, Colin C., Edward E., Samuel W., Alice, and Frank Cooper, all still living, and *sui juris*, and all but one are satisfied with the trusts declared in the will, and wish the same to be sustained. The oldest son, William B. Cooper, however, seeks to set aside the trust and have his share awarded to him absolutely.

"The material parts of the will of testatrix are as follows:—

"I give, devise, and bequeath all my property, real, personal, or mixed of whatever nature or description to my children who may be living at my death, share and share alike; if any one of my children now living shall have died before me leaving children, then the share of such a one shall go to such children; all the said property to be subject to the control of my executor and trustee as hereinafter set forth.

"I nominate, constitute, and appoint my son, Samuel W. Cooper (or in event of his death, my son Colin C. Cooper), to be the executor of this my last will and testament, and as trustee of all my property, real, personal, or mixed.

"I authorize, empower, and direct my said executor and trustee to manage the said property committed to his charge as far as possible after the manner in which it has been conducted by my husband, Colin C. Cooper. I authorize him to receive the rents, profits, and issues of whatever nature and character, and apply them to the payment of the debts which may be or arise against the said property, in such manner and under such circumstances as may seem to him fit and proper. The money which may come into his hands after the payment of such debts or incumbrances, I desire shall be equally divided, from time to time, among the persons entitled under the previous provisions of this will, in such manner as shall seem proper to him. This direction shall apply to the rents, issues, and profits of my estate, and also to the money arising from the sale or sales of real estate which may be made by my executor from time to time under the provisions of this will.

"I hereby give to my said executor and trustee full power and authority to do everything whatsoever, which may be requisite and necessary to be done in reference to the management and direction of all business relating to my property, real, personal, or mixed, and, for this purpose I hereby authorize and empower him to rent or mortgage, or to sell and dispose of all or any part of my real or personal estate at public or private sale or sales, for such price or prices, and upon such terms and conditions as to him may seem best, and to grant and convey the same to the purchasers thereof, his, her, or their heirs or assigns, free from all liability for or on account of the application of the purchase-money.

"When demanded by a majority of those interested in my estate, but not oftener than once a year, my said

executor and trustee shall file in the register's office of the city of Philadelphia an account showing the manner in which he has conducted the estate.

"In regard to the final distribution of my estate I direct my said executor and trustee, when two-thirds of the persons interested in my estate shall so demand, to sell all my property, real or personal, and divide the proceeds among those interested under the provisions of this will."

The Auditing Judge sustained the trusts declared in the will, and awarded the balance in the hands of the accountant to him as trustee to be hereafter accounted for.

To this award William B. Cooper, one of the legatees and devisees, filed exceptions, claiming that the trust was invalid because it was an attempt by the testatrix to incumber and restrain the enjoyment and alienation of the fee-simple or absolute estate given in the first clause of the will, and because it created a perpetuity as to the one-third interest in the estate, which was tied up until two-thirds of the persons interested in the estate should demand a division.

T. B. Stork, for exceptant.

There is no purpose disclosed in this will sufficient to sustain a trust. The imposition of active duties on the trustee is not of itself enough.

Kuntzleman's Estate, 26 WEEKLY NOTES, 445.

Yarnall's Appeal, 70 Pa. 339.

The only purpose here disclosed is that the trustee shall manage the estate, collect income, sell the corpus, and divide the proceeds of the property previously given to the legatees absolutely and in fee. In other words, the trust is nothing more than an attempt by means of a trust to limit and restrain the ownership of the estate previously given absolutely and in fee to the children of the testatrix. There is no separate use, no life estate, no remainder to be preserved; no lawful purpose that will sustain a trust. Such a trust is bad on its face; its purpose is unlawful.

Ulrich v. Merkel, 81 Pa. 332.

Livezey's Appeal, 106 Id. 205.

Willard v. Davis, 3 Pennypacker, 86.

The trust, however, if sustained, offends the rule against perpetuities; for if two-thirds of the persons interested do not demand the sale and division of the property, the minority in interest may have their estates tied up for more than a life or lives in being, and twenty-one years afterwards.

Samuel W. Cooper, contra.

Where the will requires active duties it is not necessary that the testator should set forth reasons that prompted him to create the trust.

Lightner's Appeal, 11 WEEKLY NOTES, 181.

The testatrix desired to create a family trust for the convenient management of her property. This is lawful and will be sustained.

Perry on Trusts, § 305, and cases there cited.

April 11, 1891. *ASHMAN, J.* The testamentary gift which is the subject of these ex-

ceptions is as follows: "I give, devise, and bequeath all my property, real, personal, or mixed, to my children who may be living at my death, share and share alike; if any one of my children now living shall have died before me leaving children, then the share of such an one shall go to such children. All the said property to be subject to the control of my executor and trustee as hereinafter set forth." The testatrix then directed the trustee to manage the property as it had been conducted by her husband, to apply the rents and profits to the payment of debts, and to divide the net income and the proceeds of any sales of real estate, equally from time to time as he should deem proper, among the persons entitled under her will. She gave the trustee power to rent, mortgage, or sell, and she ordered him when two-thirds of the parties interested as distributees should so demand, to sell all of the property and divide the proceeds among the devisees and legatees. She died seized of an undivided interest in a large amount of real estate. It was objected that the trust was void because it restrained the right of alienation in the donees of the legal title, and also because it tended to a perpetuity.

It is quite apparent that the purpose of the trust was what the Auditing Judge assigned to it, to effect a division of the estate at the smallest sacrifice of values. It is also clear that the powers which to this end were conferred upon the trustee, and the duties which were required of him, were such as rendered the trust active. (Barnett's Appeal, 10 Wr. 392; Earp's Appeal, 25 P. F. S. 119; Lightner's Appeal, 11 WEEKLY NOTES, 181.) The purpose was entirely legitimate, and the *cestuis que trust*, with one exception, appear to be willing that it shall be carried out on the lines indicated by the testatrix. The way is stopped, however, by two legal principles. One is, that the gift of an absolute estate carries with it every incident of ownership. The testatrix infringed this principle when she gave such an interest to the donees, and then tied up their hands from exercising any proprietary rights. She might have cut down the absolute estate to a life interest, by a simple direction that the donees were to have the use and income for life, as in *Urich v. Merkel* (31 P. F. S. 332), or by a formal trust, as in *Sheets's Estate* (2 P. F. S. 257.) Her intent, however, was not to reduce the original estate, but to fetter it, and to fetter it, moreover, with a trust of indefinite duration. On this point, STRONG, J., said, in *Sheets's Estate*, *supra*: "No principle is better settled than that if a testator in one part of his will give to a person an estate of inheritance of lands, or an absolute interest in personalty, and in subsequent passages unequivocally shows that he means the devisee or legatee to take a lesser interest only,

the prior gift is restricted accordingly. Subsequent provisions will not avail to take from an estate previously given, qualities that the law regards as inseparable from it, as for example alienability; but they are operative to define the estate given, and to show that what without them might be a fee, was intended to be a lesser right." And he adds, what seems directly applicable here: "It is difficult to see how the executor could convert an estate into money which had been absolutely and unconditionally given to the testator's children. It is more than difficult, it is impossible." The rule is concisely stated by Mr. Gray, in his work on Perpetuities, § 120, "When a person is entitled absolutely to property, any provision postponing its transfer or payment to him is void;" and it has but one exception, in separate use trusts for married women. That the testatrix intended simply to postpone the enjoyment of the estate taken by the first takers, and not to substitute a lesser interest, is evident not only from the absence of any limitation over, but from her direction to the trustee to pay over all moneys, principal as well as income, from time to time, to the parties to whom she had given the absolute estate. The trust was therefore directly in conflict with the principle which forbids the non-alienability of such an estate, and it was also obnoxious to the rule against perpetuities. The trustee was at liberty to exercise his functions until two-thirds of the persons interested under the will should see fit to order a sale. These were not necessarily children of the testatrix, but might be remoter descendants, who were not living at her death. But until that demand was made, there was a mere power to sell; nothing short of an imperative direction to sell, irrespective of contingencies, and independent of discretion, being able to work a conversion. (Peterson's Appeal, 7 Nor. 403.) Hence the power might have continued to subsist beyond a life or lives in being and twenty-one years thereafter. It is not necessary to inquire whether or how an effective trust might have been created which would have subverted the purpose which was contemplated by this will. Mr. Gray says: "If a term is given to trustees to pay debts, and, subject to the term, the property is devised to A., the interest of A. is vested, and like all vested interests, is not obnoxious to the rule against perpetuities." (§ 415.) In such case, the payment of debts is not a condition precedent, but the vesting is immediate, and the trustees will be regarded as holding in trust for A. subject to the payment of debts. Nothing of the kind was attempted by this testatrix, and we are of opinion that the trust was void, and that the exceptant is entitled to immediate payment.

The exceptions are sustained.

WEEKLY NOTES OF CASES.

VOL. XXVIII.] FRIDAY, JUNE 12, 1891. [No. 8.

Supreme Court.

Jan. '91, 53.

April 21, 1891.

Irvin v. Irvin.

Evidence — Practice — Cross-examination — Parol evidence to vary written contract—Illegal consideration—Agreement to procure a divorce.

In an action upon a promissory note not payable to nor in possession of the plaintiff, but indorsed in blank, and claimed to have been given in compliance with a written contract, and intended to be delivered to plaintiff, it is not competent for a witness, called by the plaintiff solely to prove the signatures to the agreement and to identify the note, to testify on cross-examination that the note was delivered to him to be held until the performance by the plaintiff of certain conditions not mentioned in the contract. Such evidence, if relevant at all, was so only by way of defence, and could only be proved by the direct testimony of the defendant's witnesses and not by the cross-examination of the witnesses for the plaintiff.

In an action on a written contract under seal, evidence is not admissible to prove a contemporaneous oral agreement between the parties purposely omitted from the written contract, when the effect of such evidence is not only to reform the contract, but also to inject into it a stipulation which the defendant claims will render the contract null and void, and prevent the recovery of a valid consideration stipulated to be paid to the plaintiff for its execution; at least, in the absence of fraud, accident, or mistake.

In an action by a married woman against a third party on a note given by defendant to plaintiff in pursuance of a written contract, wherein the plaintiff agreed "that in any proceeding she may institute against her husband for divorce, she will not assign any other reason therefor than the desertion of her by her husband," it is not competent for the defendant, in the absence of fraud, accident, or mistake, to prove that the plaintiff had further agreed to procure a divorce from her husband.

If evidence to prove such a collateral contract is admissible, and the plaintiff denies the same, a paper signed by her certifying that having considered the propriety of carrying out the written contract, and consulted with friends and counsel, "I have definitely determined to carry out the same, and hereby authorize my attorneys to . . . proceed forthwith with the divorce case, and in all respects carry out the agreement according to its tenor and effect," does not strengthen the defendant's case, the reference therein to the divorce case being entirely consistent with what is said about it in the written contract.

Whether under any circumstances a party to a writ-

ten contract may be permitted to prove that the other party, a married woman, in addition to the considerations expressed in the contract, further agreed to procure a divorce from her husband, and the legal effect of such a transaction, not decided.

An oral contract, made at the same time with a written contract under seal, and purposely omitted therefrom, may not be set up to contradict or destroy the written agreement, in the absence of fraud, accident, or mistake.

Appeal of Martha Jane Irvin, plaintiff, from the judgment of the Common Pleas of Clearfield County, in an action of assumpsit, brought against John Irvin, on a promissory note of which he was the maker.

On the trial, before KREBS, P. J., the following facts appeared: The plaintiff was the wife of James A. Irvin, who was a member of the firm of John Irvin & Bros. The firm owned extensive tracts of real estate. The plaintiff and her husband ceased to live together about 1883, at which time John Irvin & Bros. had contracted to sell a tract known as the Elk Lick land to C. B. Howard *et al.* The plaintiff refused to sign the deed. Subsequent proceedings to sell the interest of James A. Irvin in that land, under writs of execution, were restrained on proceedings in equity for that purpose by the plaintiff. Negotiations thereupon followed resulting in an agreement under seal, between plaintiff and John Irvin, dated September 11, 1884, stipulating as follows:—

1. Said Martha Jane Irvin agrees to forthwith execute and deliver to said John Irvin a quit claim deed such as he may procure, conveying all her right, title, and interest of every kind in a tract of land in Burnside Township, Clearfield County, Pennsylvania, known as the Elk Lick tract, and within twenty days from the date hereof execute and deliver to said John Irvin, or any person he may name, a deed to be by him prepared conveying all her right, title, and interest of every kind in all the remaining real estate owned by said James A. Irvin, wheresoever situated, and personal property and assets which he may own or be interested in, excepting only the personal property in and about the house in which she now resides.

2. She agrees to surrender up and deliver possession of the premises in which she now lives, without notice to quit, on or before December 1, 1884.

3. She agrees within twenty days from this date to discontinue the equity suit pending in the Court of Clearfield County, Pennsylvania, to No. 1, September Term, 1883, against the said James A. Irvin and others.

4. In consideration of the foregoing, said John Irvin agrees and binds himself to pay to said Martha Jane Irvin the sum of six thousand dollars, as follows: One thousand dollars in hand, one thousand dollars on delivery of second deed within contemplated, to be made within twenty days, and the remaining four thousand dollars on November 1, 1885, for which he is to give, on the delivery of said second deed a negotiable promissory note, with an indorser such as Murray & Gordon, her attorneys, may approve; said note to be with interest from December 1, 1884; the same to be de-

livered to said Murray & Gordon, as custodians for the parties hereto. Further, he agrees to pay to said Martha Jane Irvin the sum of three dollars per week, from the date hereof, until December 1, 1884. He also agrees on the discontinuance of said equity suit, to pay all docket costs thereon, including the printing of paper-book of plaintiff, but not to include any costs for witnesses or for subpoenaing the same.

5. He agrees to procure to said Martha Jane Irvin, within said twenty days, the transfer of the title to the personal property now in her possession, and herein reserved.

6. Said Martha Jane Irvin agrees that in any proceeding she may institute against her husband for divorce, she will not assign any other reason therefor than the desertion of her by her husband.

On September 12, 1884, plaintiff joined with her husband in executing a deed to defendant for the Elk Lick land, and received \$1000 the consideration mentioned in said deed. A second deed was prepared under the above agreement, and dated October 8, 1884, but plaintiff then refused to sign it. Subsequently she signed the following paper:—

Now Clearfield, Pa., March 28th, 1885. This is to certify that after having considered the propriety of carrying out the arrangement in writing made with John Irvin in September last, and after consulting with my friends and other counsel, I have definitely determined to carry out the same, and hereby authorize my said attorneys, Murray & Gordon, to discontinue the equity suit, proceed forthwith with the divorce case, and in all respects carry out the agreement according to its tenor and effect.

On April 24, 1885, she executed the second deed. Whereupon the defendant paid plaintiff's attorneys, Murray & Gordon, \$1000 in cash, delivered to them the bill of sale of personalty, and also 'the note now in suit, which was as follows:—

\$4000. CURWENSVILLE, Pa., October 8th, 1884.

On or before November 1st, 1885, after date I promise to pay to the order of Annie M. Irvin, Four Thousand Dollars, at the County National Bank of Clearfield, Pa.

Value received. With interest from December 1st, 1884.

(Signed) JOHN IRVIN.
(Indorsed) ANNIE M. IRVIN.

This note was never delivered to plaintiff by her attorneys, and in her pleadings she declared upon the contract above set forth, and calling Cyrus Gordon, one of those attorneys, she proved the agreement, and identified the note as produced by him.

On cross-examination, this witness was interrogated as follows:—

Mr. Orris. Q. State what was to be done with that note under the agreement made between these parties on the eleventh day of September, 1884?

Mr. Peale. We object to the question.

THE COURT. The best evidence is the written agreement itself.

Mr. Orris. The written agreement only states that it was to be placed in their hands as custodians. It does not state for what purpose. The agreement that was not put in writing did provide—

Mr. Peale. This is not cross-examination. That is a part of their own case. We simply called the witness to identify the note.

THE COURT. I do not think it is properly a part of the cross-examination.

Mr. Peale. It is a part of their own case.

Mr. Orris. It is proper to show that this note did not at the time belong to this plaintiff. The contingency upon which she was to have it never arose.

Mr. Peale. I simply asked the witness to identify the note.

Mr. Orris. That does not make it her (Mrs. Irvin's) property.

THE COURT. State your objections to the question.

Mr. Peale. It is objected to—

(1) Because it is not proper cross-examination.

(2) That it is an attempt, upon cross-examination, to introduce parol testimony for the purpose of proving other considerations than named in the agreement, which considerations, as set out in the affidavit of defence of the defendant, are illegal; and where a legal consideration is expressed in a written agreement, parol evidence is not admissible to prove and couple an illegal consideration therewith, for the purpose of defeating recovery for the debt named in the written agreement.

(3) That where the illegal consideration alleged does not appear on the face of the writing, but is interposed by way of defence by the obligor, he becomes the actor, and the doctrine *in pari delicto* applies against him and not in his favor.

THE COURT. "Inasmuch as the contract of the 11th of September, 1884, provides that a note of \$1000 shall be delivered to Murray & Gordon in these words: 'The same to be delivered to Murray & Gordon as custodians for the parties hereto,' or John Irvin and Martha Jane Irvin, the parties to the said contract, we are of the opinion that until it is shown that the conditions of the contract have been complied with, whether expressed in the contract or contemporaneous therewith—which may be inferred—the legal owner of this note, the defendant, has a right to cross-examine and see what these conditions were, whether or not they are illegal or void, as against the policy of the law, as I understand the law, which cannot be determined at this time. We cannot know what they are until we hear them.

"Objections overruled, evidence admitted, and a bill sealed for the plaintiff; reserving for our

future consideration the question of the validity or legality of what the consideration may be on the parol contract, the question itself not disclosing whether there was any illegal consideration or any illegal conditions attached to the delivery of this note."

The question was read to the witness as follows: Q. State what was to be done with this note under the agreement made between these parties on the 11th of September, 1884.

Mr. Peale. Is that the question?

THE COURT. I have decided that this question is a proper question just as it is. What the effect of the answer may be is an entirely different question.

Mr. Peale. My colleague suggests additional objections.

(4) That the question is vague and indefinite in that it is not limited to the written agreement of the 11th of September, 1884.

(5) That the relations of client and attorney existed between Murray & Gordon and Martha Jane Irvin, the plaintiff, and they are not at liberty to testify to a privileged matter.

THE COURT. Just ask the question.

The question was again read to the witness, who answered: "Well, it was left with us as custodians, and was to be held by us until the terms of the contract between them were complied with; among which was that she was to procure a divorce from her husband, provided he made no defence to it or did not prevent her from procuring it." (First assignment of error.)

The same witness was further interrogated on cross-examination, as to whether the agreement to procure a divorce was part of the agreement of September 11, 1884, as to the divorce proceedings themselves, and as to the cause of the delay in executing the second deed and the note, all of which was objected to, the objections overruled, and exceptions noted. (Second, third, fourth, and fifth assignments of error.)

The defendant offered direct evidence as to the receipt given by Murray & Gordon for the note, which recited that it was to be held by them until the plaintiff shall have procured a divorce from her husband; the receipt for the money and bill of sale received by them, the record in the divorce suit begun by plaintiff, but never concluded, the evidence of Thomas H. Murray, of the firm of Murray & Gordon, that there was an agreement additional to that of September 11, 1884, by which plaintiff was to obtain a divorce from her husband, which was part of the consideration of that agreement and left out of the agreement by design of both parties; and the above paper, dated March 28, 1885, signed by the plaintiff, all of which evidence was objected to by the plaintiff, objections overruled, the evi-

dence admitted, and exceptions taken. (Sixth to tenth and twelfth assignments of error.)

The plaintiff offered the deed from John Irvin *et al.* for the Elk Lick land to Charles B. Howard, to show the value of the land, the consideration in the deed being \$150,000, that consideration being one means to interpret the contract of September 11, 1884. Objected to as irrelevant. Objection sustained. Evidence excluded. Exception. (Eleventh assignment of error.)

The plaintiff and defendant each presented numerous points to the Court bearing upon the question of the effect of plaintiff's agreement to procure a divorce from her husband, and the evidence to prove the same, the answers to which and the portions of the charge bearing upon the same question were duly assigned for error. (Thirteenth to thirty-second assignments of error.)

Verdict for defendant and judgment thereon; whereupon the plaintiff took this appeal, assigning as error the admission and rejection of evidence, the answers to points, and the portions of the charge above referred to.

Frank Fielding (*Oscar Mitchell* and *S. R. Peale* with him), for the appellant.

John H. Orvis (*J. F. Snyder* with him), for the appellee.

May 4, 1891. PAXSON, C. J. There are thirty-two assignments of error in this case. A discussion of them in detail is impracticable. We can only refer in a general way to the controlling principles presented by the record.

The action in the Court below was brought upon a promissory note for \$4000, made by the defendant to the order of Annie M. Irvin and by her indorsed. At the time the note was made it was delivered to Murray & Gordon, attorneys, and had remained in their possession to the time of the trial below, when it was produced by them upon call. The circumstances under which the note was given and placed in the custody of Murray & Gordon may be briefly stated as follows:—

Martha Jane Irvin, the plaintiff, was the wife of James A. Irvin. The latter was a member of the firm of John Irvin & Bros. The firm owned valuable real estate in the counties of Clearfield and Indiana, which it became the interest of the firm to sell. They contracted to sell one tract, known as the Elk Lick land, to C. B. Howard and others, for the sum of \$150,000. The appellant was requested to sign the deed with her husband, and she refused. It is not necessary to refer in detail to the subsequent litigation and proceedings which culminated in the agreement dated September 11, 1884, between the appellant and John Irvin. By the terms of

this agreement Mrs. Irvin agreed, *inter alia*, to execute a quit claim deed to certain real estate described therein, and to convey to the said John Irvin, the defendant, "all her right, title, and interest of every kind in all the remaining real estate owned by said James A. Irvin." By the fourth clause of said agreement it is provided as follows: "In consideration of the foregoing, said John Irvin agrees and binds himself to pay to the said Martha Jane Irvin the sum of six thousand dollars, as follows: one thousand dollars in hand; one thousand dollars on delivery of the second deed within contemplated, to be made within twenty days, and the remaining four thousand dollars on November 1, 1885, for which he is to give, on the delivery of said second deed, a negotiable promissory note, with an indorser such as Murray & Gordon, her attorneys, may approve: said note to be with interest from December 1, 1884; the same to be delivered to said Murray & Gordon as custodians for the parties hereto," etc.

And by the sixth paragraph the agreement further provides that "said Martha Jane Irvin agrees that in any proceeding she may institute against her husband for divorce, she will not assign any other reason therefor than the desertion of her by her husband."

Upon the face of the note in controversy the plaintiff had no title. Her name did not appear upon it, and it was not, and never had been in her possession. Upon the trial below she called a witness to prove the signatures to the agreement, and also to identify the note as the one referred to therein. With this proof in, her case was complete, and upon the face of the papers she would have been entitled to recover, provided she had complied with the terms of the agreement. Just here occurred the first departure upon the trial in the Court below. It is fully set forth in the first assignment, which is as follows: "The Court erred in permitting the defendant to introduce his defence on cross-examination of Cyrus Gordon, Esq., called by plaintiff as a subscribing witness to the signatures to the contract, and to identify note offered by plaintiff." The same question was raised by a number of subsequent assignments, but they do not conform to the rules of Court. The first assignment, however, enables us to rule it.

The witness was allowed, against the objection of the plaintiff, to inject the defence into the case upon cross-examination. He was called for a single purpose, viz., to prove the signatures to the agreement, and to identify the note. The witness was permitted to say: "Well, it (the note) was left with us as custodians, and was to be held by us until the terms of the contract between them were complied with; amongst which was that she was to procure a divorce from her

husband, provided he made no defence to it, or did not prevent her from procuring it."

It will be seen that this directly contradicts the written agreement. It contains no clause by which Mrs. Irvin agreed to procure a divorce from her husband. On the contrary, she merely stipulates that in case she should proceed against him for a divorce she would not assign any other reason than his desertion. To meet this difficulty the defendant was permitted to prove by the cross-examination of the witness, and against objection, that it was the understanding at the time the agreement was executed that the plaintiff was to procure a divorce from her husband before she would be entitled to receive the four thousand dollars; that this understanding was in parol, and was purposely omitted from the writing. It was contended on the part of the defendant that the divorce was the consideration, or a part of the consideration, of the agreement; that such a contract was against public policy and tainted the entire transaction.

It is almost needless to observe that an ample consideration appears upon the face of the paper. The plaintiff was relinquishing valuable dower rights for a moderate compensation. She denies that any such agreement existed in regard to the divorce. Upon this point there is a conflict of testimony, which we are not required to discuss. I will observe, however, that in our view the paper of March 28, 1885, purporting to be signed by the plaintiff, does not strengthen the defendant's case upon the facts. The reference therein to the divorce is entirely consistent with what is said about it in the written agreement. It is evidence merely that she had commenced divorce proceedings; not that she had bound herself as a part of the consideration of the contract to procure a divorce.

It is very clear that all this evidence was improperly received, upon cross-examination. The agreement itself explained the terms upon which the note was held. If relevant at all, it was only by way of defence. We do not think, however, it was competent at any time, or for any purpose. The effect of it was to reform a written instrument executed under the hands and seals of the parties; not only to reform it, but to inject into it a stipulation, which the defendant claims renders it null and void, and prevents the recovery of a valid consideration stipulated to be paid for its execution.

The principle is too well settled to need the citation of authority, that where by fraud, accident, or mistake, something is omitted from an instrument, a Chancellor will reform it in accordance with the actual agreement of the parties. But neither fraud, accident, nor mistake was alleged in this case. The contention is, that the alleged clause, stipulating for a divorce was pur-

posely omitted from the paper. It is in direct conflict with the written instrument; the defendant contends that it destroys it in part at least. I know of no decided case, and no principle of law, which permits an oral contract, made at the same time with a written contract under seal, and purposely omitted therefrom, to be set up not only to contradict but to destroy it. The two agreements cannot possibly stand together; one or the other must fail. When parties without fraud or mistake have put their engagements in writing, that is not only the best, but the sole evidence of their agreement. We may well be excused at this late day from entering upon an elaborate discussion of the law in relation to the admission of oral evidence to affect written instruments. It may be received to explain the subject-matter of such papers. (*Barnhart v. Riddle*, 29 Pa. 92), to prove a consideration not mentioned in a deed, provided it be not inconsistent with the consideration expressed in it (*Lewis v. Brewster*, 57 Id. 410), but not to contradict or vary the terms of the instrument itself (*Martin v. Berens*, 67 Id. 459). The exception is where there has been fraud, accident, or mistake in the making of the agreement. And even in such case the instrument can only be reformed by clear, precise, and indubitable evidence of what occurred at the time of the transaction. As was well said by this Court in the case last cited: "Where parties without any fraud or mistake have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only evidence of their agreement, and we are not disposed to relax the rule."

When the plaintiff had proved the agreement of September 11, 1884, and had identified the note in suit, she had a clear case. There was not a trace of anything in it that offended against morality or public policy. Hence we can understand the anxiety of the defendant to inject into it upon cross-examination something to discolor it. Had the evidence referred to been rejected the defendant would have been compelled to set up what he designates as an unlawful, if not immoral transaction, by way of defence. As he was a party to it he might have found this difficult. Without expressing an opinion as to the legal effect of the transaction, it is sufficient to say that it did not properly appear in the plaintiff's case, and her right to recover could not be defeated for such reason.

Judgment reversed, and a venire facias de novo awarded. c. k. z.

July '90, 137; Jan. '91, 308. February 24, 1891.

In re Road in Roaring Brook Township.

Appeals and writs of certiorari—Road law—Duties of supervisors—Order of Court to open road—How enforced—Act of June 13, 1836.

No appeal lies in road cases; and although since the passage of the Act of May 9, 1889 (P. L. 158), the writ taken in such cases is called an appeal, it is in reality a certiorari, and brings up nothing but the record.

Under the Act of April 1, 1874 (P. L. 50), a writ of certiorari to a Court of Quarter Sessions, in the matter of the proceedings to locate a township road, must be taken within two years from the date of the confirmation of the report of the viewers appointed by the Court. A writ taken more than two years from such date will be quashed.

In re Road in Salem Township, 103 Pa. 250, followed.

The refusal by supervisors to open a highway as soon as practicable after it has been laid out and confirmed, or the neglect or refusal to keep it in repair, is an injury to the public, and indictable as a public or common nuisance.

The report of viewers to locate a certain road having been confirmed absolutely, the supervisors were ordered by the Court to open said road. This the supervisors neglected to do, and filed reasons, (1) that in their judgment the road was not necessary; (2) that to open the road would increase the debt of the township beyond the constitutional limit. Whereupon the Court below awarded an attachment against them for contempt. On appeal by the supervisors:

Held, that the Court had power to enforce its order.

Held, also, that the supervisors had no discretion in the matter, and, therefore, the reasons assigned by them in their answer were insufficient.

The power of the Quarter Sessions to issue an attachment in such a case not decided.

Appeals of Jacob Wesser and Alfred Griffin, supervisors from the decree of the Quarter Sessions of Lackawanna County awarding an attachment and commitment unless the order of Court to open a certain road in Roaring Brook Township, Lackawanna County, be complied with; and also from the decree refusing the prayer of a petition to stay the order to open said road, and refusing to grant a rule to show cause why the original report of viewers should not be stricken off. The two appeals were argued together.

On June 28, 1886, a petition was filed in the Quarter Sessions of Lackawanna County, setting forth that the inhabitants of the township of Roaring Brook labored under great inconvenience for want of a public road or highway to lead from a point in a public road known as the Philadelphia and Great Bend Turnpike at the railway station in said township of Roar-

ing Brook, to a point in a public road known as the Roaring Brook Turnpike, at or near the store-house of Joshua S. Miller, in said township. The viewers reported that they had laid out and returned for public use the road described in their report. On October 18, 1886, the report of viewers was confirmed *nisi*, and the width of the road fixed at fifty feet. On January 21, 1887, the report was confirmed finally.

On October 19, 1887, a petition was filed and order made appointing viewers to inquire as to whether the road should be vacated. On February 8, 1888, the last named viewers reported, and recommended that the road be vacated from the line of J. S. Huntington to the Roaring Brook Turnpike. On November 26, 1888, exceptions to the report of the viewers to vacate were sustained and the report set aside. A second petition to vacate was filed June 19, 1889, and viewers appointed.

On June 24, 1889, the order directing the road to be opened was issued. On October 21, 1889, the report of viewers was filed recommending that the road should not be vacated, but that the opening of the same would be inconvenient and burdensome to the township of Roaring Brook. On March 24, 1890, the report of the second viewers appointed for the purpose of determining whether the road should be vacated or not, was set aside.

The order to open the road issued October 21, 1889, while proceedings were pending to vacate the road, and was served upon the supervisors April 24, 1890.

On May 8, 1890, the supervisors filed a petition praying the Court to stay the order to open and to set aside the original report of viewers. On May 26, 1890, the Court, ARCHBALD, P. J., refused the petition to stay the order and to set aside the report. Whereupon the supervisors appealed (Supreme Court, July, '90, 137).

On July 3, 1890, the affidavit of U. G. Schoonmaker was filed, setting forth the service of the order to open on the supervisors, and that the road had not been opened, and a rule was granted to show cause why the supervisors should not be committed for contempt, returnable August 25, 1890.

An attachment was awarded and the supervisors were brought in by the sheriff. They then filed an answer setting forth that the proposed road was not necessary or convenient for the travelling public; and that it would be burdensome to the township and would increase the debt thereof beyond the constitutional limit, which expense they were advised they had no power to incur as all the funds in their hands were required for other necessary work. The Court again ordered an attachment and that the

supervisors be committed unless they complied with the order issued June 24, 1889. Whereupon the supervisors appealed, assigning for error this action of the Court. (Supreme Court, Jan. '91, 308.)

S. B. Price, for appellants.

To obey the order of the Court would increase the debt of the township beyond the constitutional limit.

Constitution, Art. 9, § 8.

Pike County v. Rowland, 94 Pa. 249.

Wheeler v. Phila., 77 Id. 338.

Ackerman v. Buchanan, 109 Id. 254.

City of Wilkes-Barre's Appeal, Id. 554.

Cooley's Const. Lim., 5 ed., pp. 233-4, 641-2.

Endlich on the Int. of Stats., p. 757, § 538.

Dillon on Municipal Corp., § 381.

Cooley on Taxation, p. 209.

This case is not analogous to that where a municipality has brought upon itself a liability by the commission of a tort, as were the cases cited by the Court below.

Bartle v. Des Moines, 38 Iowa, 414.

Rice v. Des Moines, 40 Id. 638.

McCracken v. San Francisco, 16 Cal. 632.

Charles H. Welles, contra.

Though called an appeal since the passage of the Act of May 9, 1889 (P. L. 158), this writ is a certiorari. No appeal lies in a road case, which is reviewable only by writ of certiorari, and, therefore, the Court will not go into the merits of the case, but will only examine what appears on the record.

Rand v. King, 26 WEEKLY NOTES, 81.

Supreme Court Rule 34.

Widening Chestnut Street, 86 Pa. 88.

Kensington v. Oxford Tyke Co., 97 Id. 260.

Church Street, 54 Id. 353.

Kirk's Appeal, 28 Id. 165.

Road in Lower Macungie Twp., 26 Id. 221.

Spring Garden Road, 43 Id. 144.

Com. v. Curley, 45 Id. 392.

Gidding's Appeal, 81 Id. 72.

Election Cases, 65 Id. 20.

The Court had power to enforce its order by attachment for contempt, and could commit for refusing to obey.

Act of June 16, 1836, § 23.

The certiorari in this case having been taken more than two years after the judgment signed or entered of record, or the decree was pronounced, the writ must be quashed.

Act of April 1, 1874, P. L. 50.

Road in Salem Twp., 103 Pa. 250.

JANUARY, '91, 308.

March 9, 1891. PAXSON, C. J. This case is entitled as an appeal and has been argued as such. It is not, however, for no appeal lies in such a case. It is a certiorari and brings up nothing but the record. We must examine it by what appears therein.

The appellants are the supervisors of Roaring Brook Township, and were ordered by the Court

below to open a road in said township. The report of the viewers upon said road was finally confirmed January 21, 1887. The order to open was issued June 24, 1889, and served upon the supervisors April 24, 1890. Between these dates there appears to have been an unsuccessful attempt to have the road vacated, and the record contains some evidence, as is not infrequent in road cases, of a local wrangle over the matter. The supervisors neglected or refused to open the road, whereupon the Court below awarded an attachment against them as for contempt. It was this order of which they now complain.

In the answer to the order or rule for the attachment the supervisors set forth their reasons for not opening the road, the principal of which are the following: (a) That the road is not necessary, or in their precise language, "On examination the road ordered to be opened, we say, upon our oaths, that we do not and did not think it necessary or convenient for the travelling public." (b) That to open the said road would involve an expense of at least two thousand dollars, which would increase the debt of the township beyond the constitutional limit.

The sixth section of the Act of June 13, 1836 (P. L. 556), provides that "Public roads or highways laid out, approved, and entered on record as aforesaid, shall, as soon as may be practicable, be effectually opened," etc. Under this Act it is the duty of the supervisors to open a public road as soon as practicable after it has been laid out and confirmed. Not opening a highway, or refusing and neglecting to keep it in repair, is an injury to the public, and is indictable as a public or common nuisance. (*Graffins v. Com.*, 3 P. & W. 502.) The supervisor is enjoined by statute to open and repair public roads, and it is essential to the convenience of the public, that the remedy to enforce compliance on the part of the officers should be emphatic, and at the instance of the public authorities of the State. (*Edge v. Com.*, 7 Pa. 275.)

With this brief reference to the law we will consider the reasons given by the supervisors for their neglect. The first does not require discussion. The law does not make them the judges of the necessity for the road, nor does it clothe them with power to reverse the finding of the jury and the order of the Court below.

Nor do we attach much weight to the second reason. The order of Court which they have refused to obey does not require them to increase the debt of the township beyond the constitutional limit. It appears that a portion of the road has been already opened, and that only a small part thereof remains to be opened. It was stated at bar, and not denied, that a responsible party had filed in the Court below an offer in writing to open the balance of the road in a satisfactory

manner for the sum of two hundred and fifty dollars. Be that as it may, the supervisors admit funds in their hands, without stating how much, but allege that they are needed for other purposes. In other words, they propose to apply such moneys in their own way and in disregard of the order of the Court. They are clothed with the power of taxation, and there is nothing to show that they have exhausted it or have even the disposition to lay such taxes in the future as may be necessary to enable them to obey the order. We may assume that the Court below would grant them any reasonable indulgence rendered necessary by the financial condition of the township were they engaged in a *bona fide* attempt to carry out the order. No such attempt appears however; no move has been made in that direction, although months have elapsed since the order was served upon them. Their position is not one of obedience but of defiance to the Court. This cannot be permitted.

It is proper to say that no question was raised as to the power of the Quarter Sessions to issue the attachment. We decide only what is before us.

Order affirmed.

JULY '90, 137.

March 9, 1891. *PER CURIAM.* The report of viewers was confirmed absolutely January 21, 1887. The certiorari having been taken out more than two years thereafter must be quashed. (Act of April 1, 1874, P. L. 50; *In re Road in Salem Township*, 103 Pa. 250.)

Writ quashed.

S. H. T.

Jan. '90, 388.

February 2, 1891.

Appeal of Fox, Moore & Co.

Parol testimony to vary written instrument—Mistake—When mutual mistake may be explained.

However plain the words of a written instrument, and however obvious their meaning, a mutual mistake may undoubtedly be corrected.

A debtor confessed a judgment to his attorney-at-law as "trustee for my creditors." A mortgage-creditor claimed to participate in the fund raised by the sale of personal property by virtue of a judgment obtained on the bond accompanying her mortgage. Whereupon evidence was offered showing that the debtor had specifically told his attorney that the judgment was to secure his "business creditors," and that he had two mortgage creditors who were not to be included, and a contemporaneous paper was prepared setting forth the names of the unsecured creditors only. The sum for which the judgment was confessed was a few dollars less than the total of the unsecured debts. It was further shown that the position of the said mortgage creditor was not preju-

diced by the fact that the judgment and execution seemed to be in part for her benefit:

Held, that the above evidence was admissible to explain the mutual mistake by which the class of creditors for whom the judgment was confessed was omitted from the instrument, and that the said mortgage creditor must be excluded from the distribution.

Appeal of Fox, Moore & Co., from the decree of the Common Pleas of Montgomery County, distributing a fund arising from a sheriff's sale of the personal property of David Davis.

The facts are as follows: David Davis being in business difficulties confessed a fraudulent judgment to one Eadline, his brother-in-law; a sale was made, and Eadline purchased and went into possession under an agreement with Davis which he subsequently failed to carry out. Davis thereupon consulted counsel (J. P. Hale Jenkins, Esq.) who advised him to confess a judgment to a trustee for his creditors. Davis prepared a list known in the proceedings as Exhibit A, containing twelve names with the amounts, subsequently at the same interview adding two more and saying that there were still two aggregating less than \$50, the names and amounts of which he had forgotten. These also were added at a later date. The total amount of these claims was \$1515.90. Davis being asked about his other indebtedness said he owed his father \$300, but that he did not want to come in on this judgment; that there was also a mortgage of \$6000 on his real estate store property, held by Mary G. Stacker, and one of \$3500 by some one else on 9 acres of land in Lower Merion against him. He said these mortgage debts and his father's debt were not to be included in the judgment, but were to be excluded. He was told by Mr. Jenkins that there would be no trouble about that. Thereupon a judgment note was executed by Davis in favor of Jenkins "trustee for my creditors," in the sum of \$1500 payable on demand. An execution was issued the same day, and the net sum of \$965.03, having been paid into Court was referred to Walter S. Jennings, Esq., an Auditor, for distribution. Davis subsequently became insane.

Before the Auditor the fund was claimed by the creditors whose names appeared on the paper, Exhibit A, and by Mary G. Stacker, on the bond for \$6000 accompanying the mortgage, for the said sum above referred to. The latter claim was resisted on the ground that the claimant was not included among the beneficiaries in the judgment.

Mr. Jenkins testified distinctly that the intention of Mr. Davis was to confess a judgment in favor of his "business" or unsecured creditors only, and to exclude the mortgages and his father, and that it was through hurry that this intention was not expressed on the face of the

note. Frank L. Murphy, a member of the bar in Mr. Jenkins's office, corroborated this, and J. A. Strassburger, Esq., counsel for Fox, Moore & Co., claimants, testified that the facts were similarly explained to him by Jenkins in the presence of Davis in the prothonotary's office at the time the judgment was entered, as an inducement to him not to proceed with the suit then pending, in favor of his clients.

The Auditor excluded the above testimony, saying, *inter alia* :—

"Nor does the Auditor believe, even if Mr. Davis testified to the same facts relative to the parties to be included in the judgment, and his testimony were believed as confidently as is Mr. Jenkins's, that it would be admissible to exclude Mrs. Stacker's judgment.

"The bond of Mrs. Stacker was entered in the Court of Common Pleas February 11, 1886, more than one month prior to the entering of the trust judgment; interest was then due and unpaid upon it, and Mrs. Stacker had the right to rely upon its terms and forbear execution upon her judgment, unless she had timely notice from Davis that she was not included. There is no evidence that she had such notice till long after, when it was too late for her, if she desired, to test the validity of the other debts, and it is impossible to say what effect, if any, the entry of the confessed judgment had upon the course which otherwise Mrs. Stacker might have pursued."

He accordingly admitted the Stacker judgment to participation in the fund, and reported a *pro rata* distribution of 11 per cent.

Exceptions were filed on behalf of Fox, Moore & Co., the largest of the unsecured creditors, which were dismissed by the Court, and a decree made in conformity with the Auditor's recommendation; whereupon the exceptants appealed, for error this action of the Court.

J. A. Strassburger, for appellants.

Montgomery Evans (Louis M. Childs with him), for appellee.

April 6, 1891. CLARK, J. It is conceded that on the 17th of March, 1886, when David Davis executed the judgment bond of \$1500 to J. P. Hale Jenkins, trustee for his creditors, he was indebted to Joseph Davis, his father, in the sum of \$300; that there was a mortgage of \$6000 on the store property at Merion Square, and one of \$3500 on the nine acres, and that he had "business creditors" to the amount of about \$1500. According to the terms of the obligation as written, Jenkins held it for the creditors generally; he was to make a *pro rata* distribution among all the creditors share and share alike.

But it appears from the findings of the Auditor, and from the testimony, which is of the most pre-

cise, clear, and indubitable character, that this was not the intention of either of the parties to the obligation. The bond it would seem was drawn in the sum of \$1500, to cover certain claims, which were scheduled in writing at the time of the execution of the bond, and which it was the purpose and intention of the parties to secure. The testimony is wholly to this effect, and is of the clearest and most satisfactory character; indeed there is no evidence to the contrary, apart from the words of the obligation itself.

It is contended, however, that as the words contain no ambiguity, but are plain and clear in their meaning, they must be read as they are and be construed according to their obvious import, especially as Davis himself is silent, and has done nothing to vary their effect.

But however plain the words and obvious their meaning, if the bond was in fact given to secure certain creditors only, and there was a mistake made in the expression of the uses to which the proceeds were to be applied, that mistake, if it was mutual, may undoubtedly be corrected, if the correction does no injury to those who may have supposed themselves entitled to participate. Nor can it be doubted that the parties for whose special use the bond is alleged to have been given, have meritorious standing in Court to show that a mistake was in fact made; they are not mere volunteers. David Davis is insane; he is confined in a lunatic asylum, and is now, in respect of this case, as if he were dead. The claim of Fox, Moore & Co. is in their own right; it would not now be in the power of David Davis to gainsay that right if he were sane; their standing in Court is distinct and independent of Davis, and it is a matter of no concern that he does not complain. He cannot now, either by his silent acquiescence or his acts, divert the fund from the persons entitled.

It appears, from the report of the Auditor, that some time prior to this transaction David Davis had transferred his stock of merchandise, in fraud of creditors, to one George W. Eadline, who seemed disposed to take advantage of his position to apply the same to his own use rather than for the benefit of Davis, as they had agreed. Davis thereupon employed Mr. Jenkins as his counsel. The Auditor in stating the facts which followed, in substance says: Mr. Jenkins advised him that if he had any *bona fide* creditors he should compile a statement of them the next morning and bring it to him. On March 17, 1886, pursuant to advice, Davis called with the statement marked "A." The first twelve names of the creditors, and the amounts due to them respectively, were written on the paper. The names of E. S. Reeves, Hague & Co., and Carey Bros. & Gravemeyer were added by Jenkins that

morning before the judgment was confessed, and Davis said there were two other creditors whose claims amounted to less than fifty dollars, but he had forgotten their names. The names and amounts of these two claims were also obtained and appended to the schedule within the week. Davis, on being asked if he had any other indebtedness, said that he owed his father \$300, a mortgage of \$6000, and one of \$3500, but that these amounts were not to be included in the judgment, but were to be excluded. Mr. Jenkins said there would be no trouble about that, but he prepared the judgment hurriedly, intending to insert in it the words "business creditors," and he was surprised afterwards to find that the words "business creditors" were omitted. That the judgment was in fact given to Jenkins as trustee to secure the payment of the claims of the creditors named in the paper "A," and none other; and it was expressly so understood before the judgment was confessed; that the paper was supplemental to the judgment and was prepared for the purpose of ascertaining the persons and amounts for whom Mr. Jenkins was to hold the judgment.

The evidence to establish these facts is abundant, and equity will not permit the clear purpose of the parties to be defeated. It was, perhaps, negligent in the parties not to have read and considered the effect of the words they employed in the obligation, but as the position of Mary G. Stacker is not in any respect changed in consequence, we cannot see why the paper may not be read so as to conform to their actual intention.

Davis had a right, by a judgment confessed in good faith, to prefer his unsecured creditors. The judgment note was given and the *fi. fa.* issued on the same day. It does not appear that Mary G. Stacker was misled by the general expression of the judgment or that there was anything she might have done which, because of that, she refrained from doing; or that she was prejudiced in the slightest degree by the fact that the judgment and execution seemed to be in part for her benefit. Indeed it does not appear that she knew anything about it until after the sheriff's sale of the personal property, and until the question of distribution arose, when she presented her claim.

Her judgment had been entered for a month or more prior to the Jenkins judgment. She might during that time have issued execution but she did not do so. She could not have refrained from doing this because of the Jenkins judgment, for the judgment was entered and the writ issued on the same day, and it does not appear that she was aware that this had been done for some time afterwards. We are of opinion that the testimony fully sustains the claim of the appellants, and that the claim of Mary G. Stacker should not participate in this fund.

The decree of the Common Pleas is reversed at the cost of the appellee, and it is ordered that the record be remitted in order that distribution may be made in accordance with this opinion.

R. H. N.

July '90, 64.

February 3, 1891.

Catasauqua Manufacturing Co. v. Hopkins and Storm.

Challenge to juror—What will disqualify—Practice—Evidence to contradict testimony given on an irrelevant matter, when admissible—Conspiracy to defraud—Standard of proof required—Charge of the Court.

Where a juror testifies on his *voir dire* that he is on intimate terms with one of the parties, who has explained the case to him, and given his version both before and after he was summoned as a juror, it is improper to permit him to sit as a juror.

The propriety of permitting him to sit is, however, dependent on the facts to be found by the Court of his impartiality, which may be conclusive in that class of cases where the Court sits in place of triers; the Supreme Court, therefore, in a cause where the judgment is reversed for other reasons, will not reverse for the reason that in their opinion the Court below erred in not sustaining a challenge to the juror.

In an action for damages for a fraudulent conspiracy testimony offered by the plaintiff of a particular fraudulent act was excluded because not contained in the bill of particulars. One of the defendants was afterwards cross-examined on this subject without objection, and subsequently re-examined. The plaintiffs renewed their offer in rebuttal for the purpose of contradicting the defendant:

Held, that it was admissible for this purpose.

It is error for a Court in charging a jury to refer to the consequences of an unfavorable verdict to either party. Such references can serve no other purpose than that of enlisting the sympathies of jurors, and so obscuring the real questions to be decided.

In actions of the ordinary kind involving rights of property, a mere preponderance of the evidence is the standard of proof required, and the verdict should follow the weight of the evidence; where, however, the plaintiff's cause of action is founded upon a crime imputed to the defendant, the presumption of innocence comes into the case in aid of the defendant, and must be overcome by evidence so preponderating as fairly to lead to the conclusion that the act complained of was committed.

In an action for damages for a fraudulent combination between the defendants, whereby the plaintiff was systematically charged for a greater weight of iron than that actually furnished, it is error to charge that the circumstances relied on by the plaintiff "ought to be such as are inconsistent with the theory of innocence;" the standard required in such cases is that the evidence shall lead fairly and satisfactorily to the belief that the acts charged were committed.

Appeal of the Catasauqua Manufacturing Company, plaintiff, from the judgment of the

Common Pleas of Lehigh County, in an action of trespass against John W. Hopkins and Philip Storm, to recover damages for an alleged fraudulent combination between the defendants, whereby the plaintiff was defrauded of over \$13,000, by means of false weights returned for old iron bought by the plaintiff from the defendant Storm.

On the trial, before ALBRIGHT, P. J., James C. Beitel, having been called as a juror; was challenged for cause and examined on his *voir dire*. He testified that he was on intimate terms with one of the defendants, and had talked over the case with him, the said defendant giving his version, etc. The examination proceeded as follows: Q. When was it that you were talked to by him, was it before or after you were drawn as a juror? A. It was before, and I think afterwards too. Q. When was the last time that you were talked to about it, by one of the parties? A. I might say we talked nearly daily, because we met each other often; and before this happened, you know, he always came to my store, and sometimes we talked about the thing, you know, and sometimes we did not. Q. When do you say was the last time he spoke to you? A. The last time we spoke about it, I guess was a couple of days ago. Q. Do you mean about the facts of this case? A. Only said this you know, that they were ready to meet them. Q. When did he last speak to you about the facts of the case, about his explanation of the case? A. Well, he did not give me any facts at all, you know. Q. At no time? A. Not particularly. Q. I thought you said that he had given you his version of the case? A. Of course, you know, we spoke about different things. Q. You say you heard one of the defendants explain his view of the case when it came out? A. Yes. Q. You keep a store in Catasauqua? A. Yes. Q. And he is a customer of yours, this one that spoke to you? A. Yes. Q. And he comes to your store frequently? A. Yes. Q. And you are quite intimate? A. Yes. Q. Did he explain in this version that he gave you his view of the case; explain away the articles in the newspapers and the talk? A. Yes. Q. And since you have been drawn as a juror he has talked to you about the case? A. Yes, of course, we talked about it, but the explanation was before I was drawn as a juror. Q. After you were drawn as a juror was there any explanation, or any statement about the facts of the case? A. I do not believe there was, in talking about it afterwards.

Challenge for cause; challenge overruled and juror sworn. Exception. (First assignment of error.)

The bill of particulars furnished under a demand of the defendants specified a large number of items between January 16, 1886, and March

22, 1889, of alleged overweights at plaintiff's mill "A" at Catasauqua. The plaintiff offered to show by R. S. Van Horn "that on December 15, 1888, and on other dates, to wit, December 20, January 22, July —, February 19, February 27, and March 22, 1889, Philip Storm delivered car loads of scrap-iron to the Catasauqua Manufacturing Company, at mill "D," and returned the same as weighing a certain amount for which weights he was paid by the Catasauqua Manufacturing Company, to be followed by proof that the weights so returned by him were false and excessive in each instance; offered for the purpose of showing Philip Storm's knowledge of the fact that excessive weights were being returned by him, and as bearing upon the question as to his being engaged in a conspiracy or device to obtain the moneys from the Catasauqua Manufacturing Company fraudulently, without making any claim for these specific items." Objected to. Objection sustained.

When the defendant Storm was on the stand he was cross-examined without objection as to this matter relating to mill "D," and subsequently re-examined thereon, and specifically denied the irregularity charged.

In rebuttal the plaintiff renewed the offer to prove the above facts by Van Horn.

Objected to, because the testimony was elicited from Philip Storm on cross-examination and not in examination in chief, and the Court at that time expressly stated that it would be confined to an examination of him to that extent, and as incompetent and irrelevant, and as not in the bill of particulars.

THE COURT: This evidence is excluded, as it was excluded when it was offered in chief by the plaintiff, because it is not in their bill of particulars. In their bill of particulars they claim only for alleged shortages at mill "A," and this relates to mill "D," at Ferndale. The Court permitted Philip Storm to be examined as to this matter only for the purpose of showing the good faith with which he dealt with the company, and not as a basis for any claim by the plaintiff. The objection is sustained and bill sealed for the plaintiff. (Fourth assignment of error.)

In the general charge the Court said:—

[“The charge against the defendants in this issue is something more than that of a simple indebtedness by them to the plaintiff. The charge is one of tort, of wrong, and if there is a recovery it will be, in effect, that the defendants pay to the plaintiff the amount of the verdict and judgment, and if it is paid that ends the proceeding. One of the consequences, however, of this proceeding is, that if the judgment is not paid, unlike the case of an ordinary judgment for a simple debt, that the defendants are not entitled to the benefit of the exemption law, and, if it

appears that the transaction involved fraud, as would necessarily be the case here, they could be imprisoned for several months—I think sixty days—if they did not pay the judgment.] So, if it should appear that the defendants, or either of them, is indebted to the plaintiff and nothing more, that lawfully, or by a mistake without knowledge of the mistake, he or they obtained the money which did not belong to him, then you cannot find against the defendants in this issue. Before you can find against them it must be proved that they acted unlawfully, that they contrived and dishonestly schemed to defraud the company, and that they did actually defraud it. But if it is proved that they acted fraudulently, unlawfully, then the plaintiff is entitled to a verdict for the amount of money that it was deprived of thereby.

“The charge in this case is one of fraud, as I have said. In the investigation of fraud a wide latitude is necessarily allowed because the parties who commit fraud usually do it by stealth, and in an underhand way, and they do not usually make or leave very plain evidence of their crooked paths behind them, and, therefore, in the investigation of alleged frauds a wide latitude is allowed to the inquiry.

“A fraud, such as this which is charged here, is not always proved by direct evidence for reasons which I have already alluded to. Often it must be proved by circumstances indicating the unlawful conduct, and, where the circumstances convince a jury that the fraud was actually perpetrated, there may be a verdict against the defendants without direct evidence. But the circumstances which would warrant a verdict against the defendants ought to be such as clearly indicate the guilt of the party complained of, and the unlawfulness of the transaction. [The circumstances ought to be such as are inconsistent with the theory of innocence. Although this is not a criminal case, yet it involves moral turpitude, and, therefore, before a jury find against the defendants they ought to be satisfied by clear and full evidence that the defendants are guilty. Unlike a criminal case, however, the jury need not be satisfied beyond a reasonable doubt.] And the law presumes every one to have acted honestly until the contrary is established, and, therefore, in this case the burden is upon the plaintiffs to satisfy you that the defendants were guilty of unlawful conduct such as is charged here.”

Verdict and judgment for defendants. Plaintiff thereupon took this appeal, assigning for error, *inter alia*, the overruling of the challenge and offers of testimony above specified, and (5) the charge of the Court as a whole, and (7 and 8) the portions of the charge inclosed in brackets.

Edward Harvey and Robert E. Wright (Austin F. Glick and J. Marshall Wright with them), for appellant.

It was error to refuse to sustain the challenge of the juror Beitel.

Comm'th v. Mosier, 135 Pa. 221.
Comfort v. Mosser, 121 Id. 455.

The offer of Van Horn's testimony should have been received in rebuttal. Evidence is always admissible of declarations and acts of a witness to contradict what he has stated in his examination.

1 Whart. Ev., § 559.
1 Greenl. Ev., § 461.
Stalle v. Spohn, 8 S. & R. 317.
Masterson v. Masterson, 121 Pa. 605.
Fehley v. Barr, 66 Id. 196.
Brubaker v. Taylor, 76 Id. 83.
Baldorf v. Bank, 61 Id. 179.

Where the tendency of the charge is to mislead the jury, it is ground for reversal.

Canal Co. v. Harris, 101 Pa. 80.
R. R. v. Brandtmaier, 113 Id. 610.
Bisbing v. Bank, 93 Id. 79.
Norton v. Lehr, 2 Penny. 302.

It was error in the Court to set forth the consequences to the defendants of an unfavorable verdict.

Comm'th v. Switzer, 134 Pa. 383.

The standard of proof required of the plaintiff was no more than that the testimony should be clear and satisfactory and naturally and logically lead the mind to the conclusion contended for.

1 Greenl. Ev., § 1.

John G. Johnson (C. J. Erdman and William H. Glace with him), for appellees.

If any cause of challenge at all existed, and we deny such existed, it was to the favor, and this could only be determined by triers.

1 Coke, 157 (a).

However, when a challenge is to the favor, and the fact submitted to the Court instead of triers, it is decided on the conscience and discretion of the Court, and not reviewable.

Wirebach's Ex. v. Bank, 97 Pa. 552.
Cummings v. Gann, 52 Id. 487.

Much latitude is allowed to the Court in reviewing the testimony.

Yundt v. Newhardt, 132 Pa. 340.

The language of the Court in stating the standard of proof must be taken in its ordinary acceptation, and when so taken was not erroneous.

Spencer v. Colt, 89 Pa. 314.

March 23, 1891. WILLIAMS, J. The plaintiff is a manufacturer of iron. Philip Storm is a dealer in old iron who made large sales of scrap and wrought iron to the manufacturing company. Hopkins was an employé of the company, who weighed the iron delivered by Storm and reported its quantity to the book-keeper. The plaintiff charged that Storm and Hopkins conspired to

cheat and defraud the company in the weight of the iron delivered by Storm at its mills, and that in pursuance of this conspiracy Hopkins returned each week, for about two years, the weight of the old iron delivered by Storm during the week at fourteen thousand six hundred pounds more than it really was, and that Storm, with full knowledge of the facts, received regularly pay for the false and fraudulent weights returned.

On the trial, James C. Beitel was called as a juror, challenged for cause, and examined on his *voir dire*. The examination disclosed the following facts: that he was on intimate terms with one of the defendants, who was his customer; that this defendant had explained to him the nature of the plaintiff's claim, and given his own "view of the facts;" had "explained away the articles in the newspapers and the talk" about the charge made against him; that such interviews had occurred on several occasions before and after Beitel was summoned as a juror, the last of them having taken place after both were in attendance upon the Court, and but a day or two before the trial was entered upon. We find it impossible to understand why this challenge was not sustained, but it was not. It was dependent on the facts, to be found by the Court, of the impartiality of the juror, and this may be conclusive in that class of cases where the Court sits in place of triers to try the question of impartiality. (*Wirebach's Ex. v. First Natl. Bk. of Easton*, 97 Pa. 543.) When the position of the juror is such that his incompetency to sit is a conclusion of law, a different rule prevails. (*Cummings v. Gann*, 52 Pa. 484.) We do not reverse this case, therefore, because of the action of the Court below in overruling this challenge, although we think it should have been sustained, but proceed to consider the other questions raised.

Upon the trial, the plaintiff offered to prove that Storm had delivered several car-loads of old iron to the plaintiff at mill "D," for which false weights were returned by him to the company, and payment received by him. This constituted no part of the claim in this case, and was offered only for the purpose of showing knowledge on the part of Storm that excessive weights of iron sold by him were returned to the company and paid for by it in accordance with such returns. It was rejected by the Court. After Storm had testified as a witness that he had no knowledge that excessive weights had been returned, it was again offered, for the purpose of contradicting him, and was again rejected. The learned Judge gave the reason for his ruling as follows: "This evidence is excluded, as it was excluded when it was offered in chief, because it is not in the bill of particulars."

The Rules of Court for the Common Pleas of Lehigh County provide at sec. 61, that "the

plaintiff's bill of particulars shall contain a full, direct, and concise statement of his cause of action." If this evidence had been offered in support of the cause of action, the Rule of Court would have been applicable; but it was not so offered. It was offered in the first instance to show Storm's knowledge of fraudulent overweights of his iron, and his adoption of them, and receipt of money because of them. It was offered next for the purpose of contradicting Storms. The Rule of Court therefore presented no obstacle to its admission.

The seventh assignment of error relates to that part of the charge which instructed the jury in the consequences to the defendant of a finding against him. This was a mistake. The jury should determine questions submitted to them upon the evidence, and not upon the possible consequences of a given verdict to either party (*Commonwealth v. Switzer*, 134 Pa. 383). Whether the defendant is able to pay a judgment if one is entered against him, whether he will be entitled to the benefit of the exemption laws or liable to arrest on a *capias ad satisfaciendum*, are questions with which the jury have nothing to do. They can serve no other purpose than that of enlisting the sympathies of jurors in behalf of defendants, and so obscuring the real questions to be decided.

The eighth assignment is also well made. The learned Judge in speaking of the measure of proof necessary, gave this instruction to the jury: "Although this is not a criminal case, yet it involves moral turpitude, and, therefore, before a jury find against the defendants, they ought to be satisfied by clear and full evidence that the defendants are guilty." He went on to say that they need not be satisfied beyond a reasonable doubt, but told them the circumstances relied on by the plaintiff "ought to be such as are inconsistent with the theory of innocence." But if the circumstances disclosed by the evidence were so convincing as to be inconsistent with, and so to exclude, the theory of innocence, they would exclude a reasonable doubt of the defendants' guilt. The learned Judge was really giving the rule which he did not intend to give, and was telling the jury in effect that the evidence must be so strong as to exclude a reasonable doubt or the defendants would be entitled to their verdict.

What was the measure of proof which it was incumbent on the plaintiff to furnish? In actions of the usual kind involving rights of property, a mere preponderance of the evidence in the minds of the jury is enough. The verdict should follow the weight of the evidence. When the plaintiff's cause of action is founded upon a crime imputed to the defendant, something more is necessary. The presumption of innocence comes into the case in aid of the defendant, and it must be

overcome by evidence so preponderating as fairly to lead to the conclusion that the act complained of was committed. If the crime is presented on behalf of the public with a view to the punishment of the criminal, then in favor of the life and the liberty of the citizen, a still higher measure of proof is required, and the guilt of the defendant must be established beyond a reasonable doubt.

In this case the plaintiff was seeking to recover damages for the personal injury inflicted on it by the defendants' wrongful acts. If the evidence led fairly and satisfactorily to the belief that the defendants had obtained money from the company by means of a false return of the weight of iron delivered to it, then the plaintiff's case was made out, and a verdict should have been rendered accordingly. If it did not lead the jury to believe that overweights had been knowingly returned and money received by means of them, by proofs that fairly led up to such a conclusion and justified it, then the defendants were entitled to a verdict in their favor.

The judgment is reversed, and a *venire facias de novo* awarded.

R. H. N.

Oct. '90, 200.

October 8, 1890.

Commonwealth v. Brown.

Landlord and tenant—Forcible detainer—Rights of tenant refused admission prior to beginning of lease—Indictments—What necessary in.

One who has leased certain premises to another is not guilty of the crime of forcible detainer if he refuse to admit the tenant to the premises. A prior possession of the premises by the prosecutor, and an unlawful detention of them by the landlord, are necessary to sustain a conviction.

The indictment must follow the words of the statute "and with strong hand." The words *vi et armis* are not a sufficient substitute. The same description and degree of force is necessary to constitute a forcible entry as forcible detainer.

An indictment which does not contain a sufficient averment in it that the prosecutor has an estate either of freehold or of leasehold in the premises, does not authorize an award of restitution.

A prosecution for forcible detainer is not an appropriate remedy for the breach of an agreement to give possession of lands and tenements.

Appeal of J. Seward Brown, defendant, from the sentence of the Quarter Sessions of Westmoreland County, upon an indictment charging him with forcible detainer.

The facts of the case are sufficiently set forth in the opinion of the Supreme Court, and in the opinion of RAYBURN, P. J., in the Court below, overruling a motion in arrest of judgment, *infra*.

The indictment set forth that defendant on April 1, 1890, "and continuously thence hitherto at the county aforesaid, and within the jurisdiction of this Court, with force and arms, etc., did and yet does unlawfully hold and keep the possession of a certain store-room in the southern half of the building owned by the said defendant, J. Seward Brown, on Pennsylvania Avenue, in the borough of Greensburg, and county aforesaid the possession of said store-room of right belonging to one Lizzie M. Ohr, who leased the same of and from the said J. Seward Brown, but possession thereof the said J. Seward Brown with force and arms unlawfully holds and keeps, contrary to the form of the Act of the General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania."

The jury rendered a verdict of guilty, and the defendant moved in arrest of judgment for the following reasons:

(1) The indictment does not set forth the estate claimed, as the law requires.

(2) There was no evidence of actual force, threats, or menaces, as the Act provides and contemplates.

(3) That the defendant was in peaceable possession three years previous and immediately preceding the 1st of April, 1890, and comes under the proviso of the Act, the indictment alleging possession in him since.

(4) The bill of indictment is fatally defective because it does not aver in the language of the statute, that it was done "by force and with a strong hand," or by menaces or threats.

(5) The bill of indictment is fatally defective because it does not aver any possession of the premises in the prosecutrix.

The Court overruled the motion and filed the following opinion: "This case comes before the Court on a motion in arrest of judgment. On the trial of this cause it appeared in evidence that the defendant, some time in January, 1890, leased to the prosecutrix a certain store-room in the borough of Greensburg; that by the terms of said lease the prosecutrix was to have possession of said room on the first day of April, 1890; that some few days prior to the said 1st of April the defendant permitted the prosecutrix to have the possession of said room for the purpose of measuring and making ready for repairs she was about to put in said room so that it would be adapted to her business, which was that of a milliner. The prosecutrix testified that she was in the possession of said room for the purpose aforesaid, and when she went back with the workman and the material to make said repairs she was refused admittance to said building, and although she demanded the possession from said defendant he refused and kept possession himself. [In sub-

mitting the case to the jury we left it to them to find as a fact whether or not the prosecutrix had been in the possession of said property and whether or not the defendant detained the property from the said prosecutrix, and they found the facts as stated and found the defendant guilty of detainer as he stood indicted.] We think the evidence was sufficient to warrant us in submitting the case to the jury, and they having found the defendant guilty we will not undertake to disturb the finding of the jury. [If Miss Ohr was in the possession of the property under the contract and arrangement with the defendant, she is entitled under the law to maintain this action against the defendant, and it is not necessary that she be kept out of the possession by violence, threats, or a breach of the peace. The fact that the defendant being there and having the control of the property and refusing admission thereto to the prosecutrix, or those representing her, is sufficient, and the offence of detainer is complete.] [As to the reason that the title to the property is not fully set forth in the indictment, it will not avail the defendant, as there is substantial setting forth of the title to show that the prosecutrix was entitled to the possession of the property, and the evidence supported the claim as laid.] For the reasons set forth in the foregoing, the motion in arrest of judgment is overruled."

Sentence was pronounced upon the defendant; whereupon he took this appeal, assigning for error the action of the Court and the portions of the opinion inclosed in brackets.

Denna C. Oyden (James A. Hunter and W. S. Kerr with him), for appellant.

Unless the bill of indictment avers that the possession of the lands and tenements was unlawfully kept and held "by force and with a strong hand, or by menaces or threats," the very gist of the offence under the statute, whatever other crime it may charge, it is fatally defective as to "forcible detainer."

Updegraff v. Com., 6 S. & R. 3.

Res publica v. Devore, 1 Yeates, 501.

Res publica v. Tryer, 3 Id. 451.

Hamilton v. Com., 3 P. & W. 142.

The Criminal Procedure Act of 1860 has not changed the law in this respect, but requires the indictment still to charge the crime substantially in the language of the Act.

Act of March 31, 1860, § 21, P. L. 390.

Pardon's Dig., page 407, note C.

Kramer v. Lot, 50 Pa. 498.

The bill of indictment must also aver peaceful and lawful possession in the plaintiff.

Penna. v. Lemmon, Addison, 315.

Penna. v. Waddle, Id. 41.

Com. v. Housknecht, 1 Kulp, 367.

Burd v. Com., 6 S. & R. 257.

Torrence v. Com., 9 Pa. 184.

Com. v. Knapp, 26 WEEKLY NOTES, 345.

I. F. Lauffer, district attorney, and *Williams & Griffith*, for appellee, made no argument and presented no paper-book.

January 5, 1891. *MCCOLLUM, J.* The substance of the charge contained in the indictment in this case is that the appellant "with force and arms unlawfully holds and keeps" the possession of a certain store-room in the southern half of his building on Pennsylvania Avenue in the borough of Greensburg, while the possession of that room of right belongs to one Lizzie Ohr, who claims she leased it from him. It was regarded in the Court below as a good indictment for the statutory offence of forcible detainer, and upon it the appellant was tried, convicted, and sentenced to pay a fine of twenty-five dollars and the cost of prosecution, and to make restitution of the lands and tenements detained. In the information on which the warrant for the arrest of the appellant was issued, the prosecutrix did not allege that she had any interest in or claim upon the store-room, and it is not charged in the indictment that she had possession of it at any time. It is true that the latter avers that she leased the room from the appellant, but when, and whether for life, for years, on condition, or at will, does not appear. We learn, however, from the statement of the learned Judge in his opinion overruling the motion in arrest of judgment, that she was to have possession of the room, under a lease, on the first of April, and that a few days prior thereto the appellant allowed her to make some measurements therein preparatory to some contemplated repairs, but that when she brought the workman and materials there, he refused her admittance. The opinion does not inform us whether this refusal was before, on, or after the first of April.

While this brief reference to extrinsic matters is not essential to a decision of the question whether the indictment is sufficient to support the conviction, it serves to show the real nature of the controversy and the importance of adherence to forms in criminal procedure. For aught that appears in the indictment or the opinion of the Court, the appellant is under sentence for the crime of forcible detainer, when the main ingredients of the offence are wanting. A prior possession of the premises by the prosecutrix, and an unlawful detention of them by the appellant "by force and with a strong hand or by menaces or threats," were necessary to a lawful conviction, and should have been charged in the indictment. (Wharton Cr. Law, vol. 2, 7th ed., secs. 2042 and 2048; Archbold Criminal Pl. & Pr., 8th ed., vol. 2, p. 1131; Act of March 31, 1860, *Purd. Dig.*, 10th ed., vol. 1, p. 320.) Greater force must be averred than is expressed by *vi et armis*. The words "and with strong hand" should

never be omitted (Wh. Cr. Law, sec. 2047). These words mean something more than a common trespass; they imply that the entry was accompanied with that terror and violence which constitute the offence, (*Commonwealth v. Shattuck*, 4 Cush. 141.) The same description and degree of force is necessary to constitute a forcible detainer as a forcible entry (Wharton's *Precedents of Indictments and Pleas*, vol. 1, p. 490 and notes). The indictment under consideration does not authorize an award of restitution because there is no sufficient averment in it that the prosecutrix has an estate either of freehold or of leasehold in the premises (*Burd v. The Com'th*, 6 S. & R. 252). It is fatally defective in form and substance, and the judgment entered upon it cannot be sustained. A prosecution for forcible detainer is not an appropriate remedy for the breach of an agreement to give possession of lands and tenements.

The judgment is reversed, and the defendant is discharged.

S. H. T.

Common Pleas.

C. P. No. 1.

March 13, 1891.

Mulligan v. Fitzpatrick.

Party wall—Equitable jurisdiction—Remedy at law—Equity will not entertain a bill for the removal of a party wall which is defectively constructed—There is a complete remedy at law under the statutes.

This was a demurrer to a bill in equity.

The bill set forth that complainant and defendant were owners of adjoining properties, on the fronts of which were erected two houses, and that to the rear of the buildings the lots were separated by a division fence. That in November, 1890, the defendant had erected in the rear of the front building and adjoining the same an additional building, and for that purpose had removed the division fence, and in its place constructed a party wall nine inches wide, that encroached four and one-half inches on plaintiff's lot, which wall was built without the foundations required by law. That by reason of such faulty construction the wall had settled and spread, so as to require a tiebolt to support it; and that a tin drip and shutter of defendant projected over plaintiff's lot.

The bill prayed (1) for an injunction to restrain

defendant from maintaining the wall on plaintiff's premises. (2) An order to remove the same. (3) That defendant be enjoined from maintaining the bolt, tin drip, and shutter. (4) A decree adjudging the wall insufficient and commanding its demolition.

The defendant demurred to the bill, assigning as grounds, (1) That the surveyor and regulator should be a party. (2) That the bill alleged no grant or agreement that plaintiff had a right to the light or air over defendant's premises, or to relieve his property from the servitude of a party wall. (3) That if the wall was defective plaintiff had an adequate remedy at law. (4) That the complaint as to bolt, drip, etc., was not sufficient to give equitable jurisdiction.

William H. Shoemaker, for demurrer.

Property owners in Philadelphia take subject to the servitude of a party wall.

Western National Bank's Appeal, 102 Pa. 178.

Nor is this right impaired by a failure to exercise it.

Monroe v. Conroy, 1 Phila. 441.

There is no grant of an easement for light and air by implication in Pennsylvania.

Haverstick v. Sipe, 33 Pa. 371.

Rennyson's Appeal, 94 Id. 153.

Donnelly v. Krosskop, 19 WEEKLY NOTES, 560.

The building laws afford the complainant ample remedy if he is entitled to any.

Act of May 7, 1855, §§ 5, 6, 10.

Act of April 15, 1782.

Burns v. Supple, 3 WEEKLY NOTES, 22.

Volmer's Appeal, 61 Pa. 126.

And the decision of the building inspectors or surveyors is conclusive.

Evans v. Jaynes, 23 Pa. 34.

Godshall v. Memam, 1 Binn. 352.

Childs v. Napheys, 112 Pa. 508.

Equity will not assume jurisdiction of a trespass by merely the tiebolt and shutter.

Daniell's Chan. Pr. 329, 558.

Thomas Diehl and *John A. Scanlan*, contra.

It is not necessary that the surveyor should be made a party to the bill. The bill avers absence of notice of his action, which the Act of April 15, 1782, requires.

Johnson's Appeal, 3 Phila. 264.

And in its absence parties are not affected.

Duncan v. Hanbest, 2 Brewst. 362.

Sutcliffe v. Isaacs, 1 Pars. Eq. 499.

It is not necessary to show an express grant of light and air.

Rodearmel v. Hutcheson, 2 Pearson, 324.

Whether or not a party wall is sufficient is a question of fact.

Newhall v. Baine, 14 WEEKLY NOTES, 420.

Clark v. Martin, 49 Pa. 289.

Vollmer's Appeal, 61 Id. 118.

Shoemaker, in reply.

Rodearmel v. Hutchinson was a case in Dau-

phin County to which the building laws of this county do not apply.

Sheel v. Kemmerer, 2 Pearson, 294.

Eo die. THE COURT. Demurrer sustained and bill dismissed. H. J. H.

C. P. No. 4.

June 6, 1891.

City v. Conyers.

Taxes—Limitation of lien—Act of March 11 1846—Meaning of words "duly proceeded in to judgment."

Rule to strike off tax claim.

A claim was filed May 27, 1885, for taxes due the city of Philadelphia for the years 1880, 1881, 1882, 1883, and 1884, and sci. fa. issued thereon November 25, 1889, returnable the first Monday of January, 1890, duly returned, "made known by posting and advertising, and *nihil habet* as to Mary Conyers, owner," etc.

It was admitted by the city that the lien of the taxes for the years 1880 to 1883 inclusive was gone under the ruling in *City v. Heister* (*ante*, p. 43), and the contention was as to those for 1884 only.

Augustus J. Rudderow, for the rule.

So much of the Act of April 15, 1845, as requires claims for taxes to be filed in the office of the prothonotary, and the revival of the same, as in the case of mechanics' claims, to continue the lien thereof, is repealed by the Act of March 11, 1846 (P. L. 114), and it is provided that "all taxes registered . . . shall cease to be liens after the expiration of five years from the first day of January in the year succeeding that in which they became due, unless suit be brought to recover the same, . . . and *duly proceeded in to judgment*," and thereafter the lien of the judgment is and continues to be a lien as other judgments.

No provision is made to revive and continue the lien, and so far as the tax of the year 1884 is concerned, the same not having been sued for and duly proceeded in to judgment prior to the first of January, 1890, the lien is gone and the sci. fa. should be quashed.

Isaac H. Shields, assistant city solicitor, contra.

This point is not decided in *City v. Heister*, as it did not arise in that case. In a doubtful case the Court should give the benefit of the doubt to the sovereign power, which here is the City exercising the taxing power. If suits be brought within the five years the lien is thereby continued until that suit is "*duly proceeded in to judgment*."

Eo die. Rule absolute.

R. H. N.

WEEKLY NOTES OF CASES.

VOL. XXVIII.] FRIDAY, JUNE 19, 1891. [No. 9.

Supreme Court.

July '91, 86.

June 4, 1891.

Commonwealth ex rel. Hensel, Attorney-General, v. Oellers.

Constitutional law—City treasurer of Philadelphia—County officers—Vacancy in such office—By whom filled—Art. XIV. sec. 1 of the Constitution—Acts of March 31, 1876, and May 15, 1874.

The office of city treasurer in the county of Philadelphia, by virtue of section 1 of Article XIV. of the Constitution, and the Act of March 31, 1876, is a county office: and by virtue of the Act of May 15, 1874, a vacancy therein is to be filled by the governor.

GREEN, WILLIAMS and MITCHELL, JJ., dissent.

Taggart v. The Commonwealth (102 Pa. 354; 12 WEEKLY NOTES, 465) followed.

Appeal of the Commonwealth of Pennsylvania ex rel. William U. Hensel, attorney-general, from the judgment of the Common Pleas No. 4, of Philadelphia County, upon a writ of *quo warranto*, brought against Richard G. Oellers, to determine the right of respondent to hold the office of city treasurer in the city and county of Philadelphia.

The suggestion filed by the relator set forth substantially—

(1) That by the 1st and 2d sections of Article XIV. of the Constitution, it was provided—

Section 1. County officers shall consist of sheriffs, coroners, prothonotaries, registers of wills, recorders of deeds, commissioners, treasurers, surveyors, auditors or controllers, clerks of the courts, district attorneys, and such others as from time to time may be established by law.

Section 2. County officers shall be elected at the general election, and shall hold their offices for the term of three years, beginning on the first Monday of January next after their election, and until their successors shall be duly qualified: all other vacancies not otherwise provided for shall be filled in such manner as may be provided by law.

(2) That by the Consolidation Act of February 2, 1854 (P. L. 21), there were created certain city offices, therein enumerated, and among them the office of city treasurer.

That by the 17th section of the Act of March 31, 1876 (P. L. 13), entitled "An Act to carry into effect section 5 of Article XIV. of the Constitution relative to the salaries of county officers, and the payment of fees received by them into

the State and county treasury in the counties containing over one hundred and fifty thousand inhabitants," it was provided, *inter alia* :—

In all cases where a city containing over three hundred thousand inhabitants is co-extensive in boundaries with the county, all of the officers known therein as city treasurer, city controller, and city commissioner shall severally be regarded as county officers, and as such shall severally be subject to all the provisions of this Act, and shall have all the powers, and perform all the duties herein enjoined, and be subject to the same penalties as if they had each been elected or appointed as county officers, and had been designated as such.

That at the time of the passage of the Act the city of Philadelphia was, and has continued to be, a city containing over 300,000 inhabitants, whose boundaries are co-extensive with the boundaries of the county in which it is situated.

That the legal effect of the above provisions of the Constitution and Acts of Assembly was to make the officer known in said city as "city treasurer," a county officer, to whose office were attached the constitutional qualifications and attributes to be found in Article XIV. of the Constitution.

(3) At the general election held on the Tuesday next following the first Monday in November, 1876, that being the first election for city treasurer after the adoption of the Constitution of 1873, Delos P. Southworth was elected to fill the office of county treasurer, designated city treasurer, and entered upon the duties of the office until the expiration of his term, and that subsequently at the general elections in November, 1879, 1882, and 1885, Joseph J. Martin, William B. Irvine, and Frank F. Bell, were respectively elected to fill said office from the 1st day of January, 1880, 1883, and 1886, respectively, and served their terms of office.

(4) That at the general election in November, 1888, John Bardsley was elected to fill said office for three years from the 1st of January, 1889, and that said office has become vacant by the resignation of said Bardsley [which was made to city councils].

(5) That it then became the duty of the governor to fill the vacancy, who had appointed William Redwood Wright to fill the office.

(6) That Richard G. Oellers had unlawfully intruded into and usurped said office, etc.

The relator prayed for a writ of *quo warranto* to said Oellers, etc., which writ was issued on June 2, 1891, returnable forthwith.

Upon the same day service was accepted and a plea filed which set forth that the power to fill said vacancy did not rest with the governor, but with city councils, who in joint meeting on May 28, 1891, by a *viva voce* vote had elected said Oellers city treasurer, to fill the office so designated within the city and county of Philadelphia,

there being then a vacancy in said office, whereupon defendant entered security, which had been duly approved, and entered upon his duties.

To this plea the Commonwealth demurred.

Upon the same day an agreement was entered into that the sole questions to be disposed of upon the argument were:—

(1) Has the governor of the Commonwealth a right to fill the vacancy existing from the cause stated in the suggestion, in the office designated city treasurer, within the city and county of Philadelphia?

(2) Have the councils of the city of Philadelphia the right to fill the vacancy existing from the cause stated in the suggestion in the office designated city treasurer, within the city and county of Philadelphia?

Upon the same day, by request of counsel, and without hearing argument, the Court overruled the demurrer and entered judgment for the defendant, so that a speedy decision should be rendered by the Supreme Court.

The Commonwealth then appealed, assigning the action of the Court for error.

Mr. Oellers had also been elected city treasurer by the city commissioners of Philadelphia, who also claimed the right to fill the vacancy.

The arguments of counsel are not reported, as they are sufficiently set forth in the opinions filed.

William U. Hensel, attorney-general, and *Furman Sheppard* (with whom was *Samuel S. Hollingsworth*), for the Commonwealth, appellants.

Mayer Sulzberger and *John G. Johnson* (with whom was *Ovid F. Johnson*), for Oellers, appellee.

Charles F. Warwick, city solicitor, for the city of Philadelphia.

June 12, 1891. *PAXSON, C. J.* The Commonwealth through her attorney-general demands to know by what authority the defendant, Richard G. Oellers, claims to hold the office of county treasurer, designated as city treasurer, of Philadelphia, and to exercise the functions thereof.

It appears by the defendant's plea that he claims title to said office by virtue of his election thereto by a *viva voce* vote of the councils of said city, at a joint meeting thereof, on the twenty-eighth day of May, 1891, to fill a vacancy occasioned by the resignation of John Bardsley.

It is contended by the attorney-general that by the Constitution and laws of this Commonwealth it was the duty of the governor to appoint a suitable person to fill such vacancy, and that in the performance of that duty he had appointed *William Redwood Wright* as such suitable person.

We have thus the issue, sharply defined, whether the power to fill the vacancy in question is lodged in the city councils or in the governor.

If this were a new question, or one involving a new principle, we might feel it necessary to discuss it at some length. As, however, it is a mere threshing of old straw an elaboration of it is not requisite. Every question now presented was raised and decided in *Taggart v. The Commonwealth* (102 Pa. 354). It is true that contention was over the office of controller while this is over the office of treasurer, but this makes no essential difference as the same law applies to each. Both offices have been changed by Article XIV. section 1, of the Constitution, and by the Act of March 31, 1876 (P. L. 13), from a mere city or municipal office which the Legislature may destroy at will, to a county office, resting upon the organic law, and which is beyond the power of the Legislature to abolish. We do not propose to re-open the discussion of the case upon this point. *Taggart's* case was carefully considered and properly decided. We were aided by a very clear and able opinion by the late Judge *LUDLOW*, who decided that case below, and subsequent reflection has but confirmed us in the correctness of that decision. It is not needed, therefore, to discuss this point again. It is sufficient to say that for the purposes of this case we must regard the office designated as city treasurer as a county and not a city office. The treasurer, by whatever name he may be called, is a county officer, exercising his functions over the entire territory of the city of Philadelphia, which is co-extensive with that of the county, just as the sheriff, recorder of deeds, and other county officers exercise their functions over the same territory.

Assuming then, as we are bound to do, that the treasurer is a county officer, we come directly to the only question in the case, in whom is the authority lodged to fill a vacancy in said office?

The law is not even doubtful upon this point. It is declared by section 2 of Article XIV. of the Constitution, that "all vacancies not otherwise provided for shall be filled in such manner as may be provided by law." The law which provides for the filling of such vacancies is the Act of May 15, 1874 (P. L. 205), which declares "that in the case of a vacancy happening by death, resignation, or otherwise, in any office created by the Constitution or laws of this Commonwealth, and where provision is not already made by said Constitution and laws to fill said vacancy, it shall be the duty of the governor to appoint a suitable person to fill such office," etc.

Just here the point comes in which the defendant contends distinguishes this from *Taggart's* case. His allegation is that the Governor cannot fill this vacancy because another mode of doing so is provided by the Constitution and laws, and he points us to the tenth section of the Act of February 2, 1854 (Consolidation Act) (P.

Lu. 21), which provides, *inter alia*, that "any vacancy in said office (city treasurer) shall be filled by the city councils by *viva voce* vote in joint meeting."

This very point was made in Taggart's case. It was raised by the pleadings, argued by counsel, and decided by the Court. It is true no reference was made to it in the opinion of Chief Justice MERCUR. It was fully discussed in the Court below, and the case having been decided here upon the broad ground that the controller was a county officer, the point in question became of no practical importance. It is too plain for argument that city councils cannot fill a vacancy in a county office. They might as well attempt to fill a vacancy in the office of sheriff.

In view, however, of the peculiar circumstances of this case, and the zeal with which this point has been again pressed upon us by the able counsel representing the defendant, a brief reference to it may not be inappropriate.

As before observed, the tenth section of the Act of 1854 provided for the filling of a vacancy in the office of city treasurer by a *viva voce* vote of city councils. The forty-sixth section of said Act contains the further provision that "whenever any elective officer of said city shall die, or become incapable of fulfilling the duties of his office, his place, except where other provision is made for filling the vacancy, shall be filled by a joint vote of city councils until the next city election, and the qualification of the successor in office, *provided*, that such vacancy shall exist at least thirty days before the next city election, otherwise such vacancy shall be filled at the next election thereafter."

The controller was "an elective officer of said city," and came directly within this provision. A vacancy in his office was as fully provided for in the Act of 1854 as was a vacancy in the office of treasurer. It was contended in Taggart's case, just as it was in this, that, because of such provision, the governor had no power to fill the vacancy. We had precisely the same arguments then that we have now.

It will be observed that the tenth section of the Act of 1854 does not fix the term during which a treasurer elected by councils to fill a vacancy shall hold said office. It was contended that as the term was not designated, he would be entitled to hold for the balance of the unexpired term, whatever that may be. This position cannot be sustained. It is in direct conflict with our whole system and policy in filling vacancies. In all our legislation upon this subject it is plain to see that in filling vacancies in elective offices the policy of the law has uniformly been to return to the people as soon as reasonably practicable the election of a successor. Hence in nearly, if not quite all, elective offices, from the

governor down, if a vacancy occurs more than three calendar months prior to the next election, it can only be filled until said election and the qualification of his successor. That a departure from this rule was not intended by the tenth section of the Act of 1854 is manifest by an examination of the forty-sixth section thereof, which, as before observed, provides that vacancies of all elective officers of said city shall be filled only until the next city election. The tenth and forty-sixth sections of the Act of 1854 must be construed together. They are a part of the same Act and the same system. Thus considered, we find that in case of a vacancy in the office of treasurer his successor is to be elected by a *viva voce* vote of councils, while in the case of every other elective officer the vacancy shall be filled by a joint vote of city councils; in both cases the person so elected shall hold until the "next city election."

It follows necessarily that if the election by councils in this case has the authority of law, the defendant would hold the office until the next city election in February, 1892 (except for the accident that his term expires in January next), at which time it would not be possible to elect his successor. Being a county officer, his election can only take place at the general election, and this has been the uniform practice under the Constitution and the Act of 1876. The next election for county treasurer will be held in November next, and the term of the person then elected will commence on the first Monday of the following January. This would be several weeks prior to the expiration of defendant's term under his election by councils, except for the accident above stated. The principle contended for would go to this extent.

This incongruous, if not absurd, result would necessarily follow any attempt to force the Constitution into harmony with legislation existing at the time of its adoption.

It is proper to say, in justice to the learned Judges of the Court below, that their judgment was practically *pro forma*, and entered for the sole purpose of sending the case up for an early decision. Under the circumstances we decided to hear and dispose of it in that shape, at the earnest request of both parties.

The judgment is reversed, and judgment is now entered for the Commonwealth upon the demurrer. It is further considered and adjudged by the Court that the defendant, Richard G. Oellers, be and he hereby is ousted from the office of county treasurer, designated as city treasurer, of Philadelphia, and from the fees and emoluments thereof.

GREEN, J. I concur in dissenting from the opinion of the majority of the Court.

Dissenting opinion by WILLIAMS, J.:—

There is no public question involved in this case. It is a struggle between rival appointees for a few months' possession of an office that is to be filled by the voters of Philadelphia at the next election. No personal objection is made to either. On the other hand it is freely conceded that both are men of ability, experience, and personal integrity, so that, whichever of them may succeed, the funds of the city and the interests of tax-payers will be secure. This case has nevertheless a remarkable history. The suggestion of the attorney-general was filed in the Court below on the second day of this present month. On the same day a writ of quo warranto issued and was served. On the same day a demurrer was filed, overruled, and judgment entered. On the same day a certiorari issued from this Court and the record was removed. Paper-books were prepared on the third. On the fourth, in the last hours of the session for the Middle District, the case was fully heard. Now, on the twelfth, this Court is reconvened in adjourned session for the sole purpose of entering a final judgment. Any other case on the calendar has an equal claim to consideration and to prompt decision.

The question is raised upon the following facts. By the Consolidation Act of 1854 the limits of the city of Philadelphia were extended so as to include the entire county. In the merger and consolidation of the several local governments previously existing the office of county treasurer was, among others, abolished and most of its duties transferred to the city treasurer. Since 1854 the office of county treasurer has not been restored by any distinct legislative enactment, nor has that of city treasurer been abolished or its duties diminished or modified. No person has been elected to an office styled county treasurer, in the county of Philadelphia, for nearly forty years. A person has been regularly elected and commissioned as city treasurer during all that time. The last person so elected and commissioned was John Bardsley. He gave bonds as city treasurer and entered upon the duties of the office, which had been very clearly and distinctly defined by the recent legislation known as the "Bullitt Bill" or new city charter. On the thirtieth of May last he sent his resignation to the city government. It was accepted by the councils and a person was appointed to fill the vacancy so made, who has qualified and entered upon the duties of the office. The governor has also appointed a person to the same vacancy, claiming that the office is not that of city treasurer but that of county treasurer. If the office is a city office then it is admitted that the power to appoint resides in the councils.

Our question then is, What kind of a treasurer-ship did John Bardsley hold? Did he hold the

office of city treasurer, which is unquestionably an existing office, and to which he was elected and commissioned, or did he hold the office of county treasurer, which was abolished in 1854, and to which he was neither elected nor commissioned? The latter branch of the alternative is affirmed, and the position rests on two considerations. First. The Constitution, in enumerating county officers, names a county treasurer as one. Second. The Act of 1876 declares that in cities of the first class the office of city treasurer shall, for certain purposes, "be regarded as" a county office.

As to the first of these it is only necessary to say that at the adoption of the Constitution the office of county treasurer in Philadelphia had been abolished. If, as we have repeatedly held is not the case, such constitutional provisions are self-enforcing, it is nevertheless true that in this city this one has not been obeyed by the election of such an officer, and I cannot understand by what modification of the *cy pres* doctrine the State can seize and appropriate that city office whose functions most nearly resemble those of the vacant county office.

As to the second, the answer seems to be equally plain. The Act of 1876 relates to existing county officers in large counties having a population of one hundred and fifty thousand or more. Its title declares its object and scope fully. It is "to carry into effect section 5 of Article XIV. of the Constitution relative to salaries of county officers." To do this it requires such officers to pay over the fees collected by them to the State or county as the case may be, and provides in lieu thereof a fixed salary as compensation for their services. That of county treasurer in the counties affected is fixed at ten thousand dollars per annum. But there was one county in the State whose boundaries were at the same time the boundaries of a city including exactly the same territory. In this county the Legislature knew that there was no county treasurer, but that the same functions were exercised by the city treasurer. They did not intend to leave the old system of fees to survive in the city whose lines were coincident with those of the county, any more than they would have survived in the county. Accordingly, the seventeenth section of the Act of 1876 makes a special provision for cities whose lines include an entire county, and declares that in such cities "all the officers known therein as city treasurer, city controller, city commissioners shall severally be regarded as county officers," and as such have the same salary and pay over fees collected by them in same manner "as if they had been elected or appointed as county officers, and had been designated as such." In other words, the city officers enumerated shall, for the purpose of fixing their salaries and requiring them to pay over fees collected by

them, be regarded as county officers, so as to be included in the operation of the Act as fully as if they "had been elected" and "been designated" as county officers. This does not profess to change the character, powers, or designation of these officers, or the manner of their election or appointment. It changes only their compensation and the manner in which it is received by them. This it does by extending the law relating to county officers, so as to include them in the same manner as if they had been elected and designated as county officers, instead of having been, as the fact was, elected and designated as city officers. The title of the Act gives no hint of any other purpose. If its provisions would, by any fair interpretation, abolish the office of city treasurer, or revive that of county treasurer, or change the mode of election or appointment of the city treasurer, it would be to that extent clearly unconstitutional, because no such purpose is expressed by or included in the title. If John Bardsley held a county office he holds it still. He has resigned only the treasurership of the city, and this he has surrendered to the only body having power to fill the vacancy.

My own conclusions may be formulated thus:—

1. The office of city treasurer is an existing office in the city of Philadelphia. Its existence is shown and its powers are defined by several Acts of Assembly, beginning with the Consolidation Act and including the New Charter of 1885.

2. The office of county treasurer is not an existing office in Philadelphia County. It was abolished in 1854, and has never been restored or treated as surviving for any purpose whatever.

3. Both these propositions are assumed by the Act of 1876, and are the basis on which its provisions rest. It treats the city treasurer for one purpose only, as though he was a county officer, and distinctly recognizes the fact that for other purposes he is not one.

4. The vacancy occasioned by the resignation of the office of city treasurer by John Bardsley is properly filled by the appointment of the respondent by the city councils.

For these reasons I would affirm the judgment of the Court below. In so doing, the authority of Taggart's case (102 Pa. 354) is not disturbed. In that case there was no specific provision in the Act of 1854 for filling a vacancy in the office of city controller, and the case is therefore distinguishable from this.

Dissenting opinion by MITCHELL, J.:—

The authority of the governor to fill a vacancy in the office of treasurer of Philadelphia rests solely upon the Act of May 15, 1874 (P. L. 205). If not found therein, it is admitted that it does not exist. That Act provides for an appointment by the governor in case of a vacancy

in any office created by the Constitution or laws of the Commonwealth "where provision is not already made by said Constitution and laws to fill said vacancy." Hence, if there is any existing provision for filling the vacancy, the governor obtains no power to do so by the Act of 1874.

The office of city treasurer of Philadelphia, as it has in substance existed since 1854, was created by the Consolidation Act of February 2, 1854 (P. L. 21). That Act prescribes the mode of his election, his bond and oath of office, his duties, powers, and liabilities. The office as it exists to-day is defined and regulated by the city charter under the Act of June 1, 1885 (P. L. 37), popularly known as the Bullitt Bill. Under this Act the office is a department of the city government of which the city treasurer is the head, and the Act provides that "he shall be elected and give security," and his duties shall remain "as now provided by law," that is, as already seen, by the Act of 1854. It is not claimed by any one that the Constitution or any other statute than those cited makes any express provision for the definition, limitation, or regulation of the office. Turning then to the Act of 1854, we find that the case of a vacancy is fully, exactly, and specifically provided for in section 10, by which "any vacancy in said office shall be filled by the city councils, by *visa voce* vote in joint meeting." There is no doubt or ambiguity about this provision, nor is there any pretence that any subsequent Act has in express terms repealed or supplied it. Why then is it not a sufficient "provision already made by the law" to exclude the only power given to the governor by the Act of 1874? It is said that the office has been made a county office by the Constitution, section first of Article fourteenth of which declares that "county officers shall consist of sheriffs . . . treasurers," etc. It is argued by appellee that this clause worked no change in the position of the city treasurer, inasmuch as there were in all the counties except Philadelphia, treasurers who unquestionably were county officers to whom this provision would apply and the Constitution while aiming at an unbending cast-iron uniformity in many things in which the people had hitherto been free to consult their own diversities of situation and interest, nevertheless did not intend to affect existing local and special laws, except in cases expressly named. And such has been the uniform construction by this Court. If the present question were open I should deem this the sound view, but I am constrained by the case of Taggart v. Com. (102 Pa. 354), to consider the question closed. By that decision, from the authority of which I do not desire in any way to derogate, though I think it was wrongly decided, it was settled that the section of the Constitution cited made the officers named therein county officers, though they re-

tained their titles of city controller, city treasurer, etc. But this of itself does not advance the argument a single step. The change of position from a city to a county office is a mere change of schedule, so to speak, a change from one class to another, not necessarily involving any change in the office itself. To determine the effect of the change in this respect we must look at matters of substance, at the mode of election, the powers, and the duties of the officer by whatever name he may be called. And when we so look we find nothing. By the wording of the Constitution the election for a county officer was put in November while that for a city officer is in February. But the constituency which elects and the functions of the officer when elected remain the same. As already shown these were and are, before the Constitution of 1873 and since, established, defined, and regulated by the Acts of 1854 and 1885. The Constitution did not repeal the Act of 1854, nor in any way affect section 10, except by making the treasurer elected under it a county instead of a city officer, a change which in no wise affected any matter of substance in regard to him or his office. The distinction between the county of Philadelphia and the city of Philadelphia is from any point of view of the most technical and shadowy kind, and with regard to this particular office it has no existence except in theory. The county has no taxes, no taxpayers, no treasury, and no treasurer, which are not the taxes, taxpayers, treasury, and treasurer of the city. It suited the doctrinaire tendency of the Constitutional Convention to make the office one of the county list for the sake of nominal uniformity, but the change in no manner affected the practical substance of the office or the officer, and so clear has this been to all eyes that no change has been made even in his title. He is still under the Constitution as under the Act of 1854, legally known as the city treasurer and under that title, county officer though he be, that Act prescribes the scope of his office, its powers, duties, and liabilities, and expressly and specifically, the mode in which a vacancy shall be filled. He has been transferred from one class to another, but in all other respects he and his office are unchanged.

A strenuous effort was made on behalf of appellant to get away from this conclusion by harping on the forty-sixth section of the same Act, and the decision of this Court in *Taggart v. Comm'n* (*supra*). But that section has no application to this case. The Act provided for the election, duties, etc., of seven principal executive officers of the city, viz., mayor, marshal of police, city treasurer, receiver of taxes, controller, commissioners, and solicitor. Section 7 provides in case of a vacancy in the office of mayor that councils shall forthwith in joint meeting, elect *viva voce* a quali-

fied person to serve, etc. Section 10, as already discussed, provides expressly for filling a vacancy in the office of treasurer. No specific provision is made as to the other five principal officers, they are lumped together as elective officers of the city in section 46, and the method of filling the vacancies is not the same as in the case of the treasurer, though also by the councils. This part of the section in its very terms, is excepted from application "where other provision is made for filling the vacancy," and has no relevancy to the mayor or the treasurer. It might have been repealed at any time without in any way affecting the mode of filling a vacancy in either of those offices. Herein is the essential and very obvious distinction between the present case and *Taggart v. Comm'n*.

In that case the office in question was city controller as to which there was no specific provision for a vacancy. It could be filled by councils only as a city officer, under the general terms of section 46, and hence, that case, by a very narrow construction which disregarded the substance of the law, and stuck in the very outside of the bark, held that when it ceased to be a city office it was taken out of the terms of the Act of 1854, and there being no other law regulating the vacancy, the appointment went to the governor under the Act of 1874. Section 46 continued in force notwithstanding the Constitution, and its application to the case of an admitted city officer is not disputed. All that *Taggart's* case decided was that the city controller was not within its terms. But as to the city treasurer, section 10 of the Act of 1854, also still in force, provides specifically for the filling of a vacancy. The Act of 1874 therefore, by its own terms, has no application.

There remains only to be noticed the Act of 31 March, 1876 (P. L. 13), which it is argued makes the city treasurer a county officer. This may be very briefly dismissed. First, I have endeavored to show that the mere nominal change from a city to a county office, while the whole scope and functions of the office continue unchanged under the old law, does not in any degree abrogate the specific provision of that law for filling a vacancy. If this is so, in the case of a change by the clause of the Constitution, *a fortiori* it is so in the case of a statute. But secondly the Act does not make any such change. The title and the body of it are alike limited to the subject of fees and salary under section five of Article fourteen of the Constitution; and section 17 of the Act which applies to Philadelphia does not provide that the city treasurer, etc., shall be county officers, but that they shall "*be regarded as county officers*" for the purposes of the Act, to wit, shall be salaried and pay their fees into the public treasury. The Act has no wider scope, and therefore no applica-

tion to this case. Thirdly. Even if the Act could be regarded as having a broader effect, and as changing the treasurer from a city to a county officer, and waiving the question of constitutionality which would be raised in that view, such effect would be repealed by the Act of 1885, already cited, which clearly makes him the head of a city department. Of course, if he is made a county officer by the Constitution, the Act of 1885 cannot turn him back into a city officer, but the argument from the Constitution must stand by itself. It cannot get any aid from the Act of 1876, because that Act if it meant to make such a change, is clearly repealed by the latter Act of 1885 on the same subject. The fact is, as already discussed, the change was a merely nominal one, which had no effect on the previously existing law, and neither the Constitution, the Act of 1876, nor the Act of 1885, ever contemplated it in any other light.

For these reasons I would affirm the judgment.

Since writing the foregoing I have had the opportunity of hearing the opinion of my brother WILLIAMS, and I concur in what he has said, except that I concede somewhat more weight to the decision in *Taggart v. Comm'th* as settling the construction that the Constitution made the treasurer a county officer. That is the only difference in our views upon this case.

H. C. O.

Jan. '91, 229.

April 8, 1891.

In re Howard Street. Rice's Appeal.

Road law—Damages—Vacation of streets—Assessment of benefits on property owners to pay damages—Road juries—Practice—Appeal to Common Pleas—Constitutionality of Act of April 21, 1858, § 6—Act of June 13, 1874—Section 8, Article XVI, of the Constitution.

The Act of April 21, 1858, § 6, directing that the damages awarded to property owners for the vacation of a street shall be assessed upon the owners of properties benefited, is constitutional.

While the State is under no constitutional obligation to pay for the damage caused by vacating a street, the Legislature may impose such obligation upon it by statute.

The imposition of the assessed benefit upon the owner instead of upon his land only, is within the discretion of the Legislature; as is also the extension of the system of road damages to the consequential injury caused by the vacation of streets, and the mode in which the principle is applied.

In re Centre Street (115 Pa. 247), followed.

Although neither the Act of April 21, 1858, nor any previous Act, contains an express provision for the appointment of a jury in the case of the vacation of a

street, the power to appoint such jury arises by necessary implication from the express prescription of "the duties of juries selected to assess damages for the opening, widening, or vacating roads or streets," etc.

Although no appeal from the finding of such jury is given by express words either of the Act of April 21, 1858, the Act of June 13, 1874, or section 8 of Article XVI of the Constitution, the provisions of the Constitution and the Act of 1874, giving an appeal to either party from "any preliminary assessment of damages" in the case of the taking, injury, or destruction of property, give the right to such appeal by necessary implication, the Legislature having put damage by vacation of streets upon the same basis as damage by taking from opening, and having made it a part of the general system of road damages.

Appeal of William Rice, Louis Bean, and Clayton G. Rice, trading as Rice, Bean & Co., from the decree of the Quarter Sessions of Philadelphia County, dismissing exceptions filed to the report of a jury appointed to assess damages for the vacation of Howard Street from Cresson to Apple Street.

On January 25, 1889, John Hare, Jane Hare, and Henry Siegele, presented a petition to the Court of Quarter Sessions, averring that they were the owners of houses and lots fronting on Howard Street. That by a decree of the Court, on December 3, 1888, Howard Street was vacated. That this was done without the appointment of any jury of view either to report upon the advisability of the same or to assess damages for such properties as might be damaged. That the vacation of said street had caused great damage to each of their properties and greatly depreciated their value without corresponding benefits; and prayed the Court to appoint a jury of view to examine the site of said street and report what damage had been done to their property by the vacation.

In pursuance of this petition the Court appointed a jury of six, who reported that each of the petitioners was entitled to damages for the vacation, viz: John Hare \$825, Jane Hare \$200, and Henry Siegele \$250, in all \$1275, which several sums they awarded to them. They further reported that the land of William Rice, Louis Bean, and Clayton G. Rice, trading as Rice, Bean & Co., situate on both sides of the said Howard Street, had received special benefit from the said vacation of said Howard Street, and that said land was benefited by such vacation over and above any benefit which may have been received by it in common with neighboring lands in general; that the said benefit was to an amount of not less than one thousand two hundred and seventy-five dollars, which sum they assessed against the said Rice, Bean & Company, as owners of the land.

Rice, Bean & Company thereupon filed exceptions, *inter alia*, because (15) no authority

exists in law to select juries to assess damages for vacating streets within the city of Philadelphia; (16) the jury had no authority in law to exercise any of the powers assumed by them under the appointment of the Court; (17) the appointment of the said jury was unauthorized by law; (18) the Act of Assembly of April 21, 1858, under which the jury was appointed, is unconstitutional; and further moved to quash the report.

The Court dismissed the exceptions and refused the rule to quash, without delivering an opinion; whereupon exceptants appealed, assigning for error the appointment of the jury, the entertaining jurisdiction, the refusal to quash, and the dismissal of the exceptions.

George P. Rich (*Francis S. Cantrell* with him), for appellants.

John Dolman, for appellees.

May 27, 1891. **MITCHELL, J.** The most serious question presented by this appeal is the constitutionality of the provisions of the Act of 21 April, 1858, sect. 6 (P. L. 386), which direct that the damages awarded to property owners for the vacation of a street shall be assessed upon the owners of properties benefited. It was held *In re Centre Street* (115 Pa. 247), that the imposition of the assessed benefit upon the owner, instead of upon his land only, was within the discretion of the Legislature, and that the Act was not unconstitutional on that account. But it is argued in the present case that the Commonwealth's power of taxation is only for the purpose of raising funds to discharge the public obligations, and as, under the Act, the State, or its representative, the city, is not interested in the payment of the damages, it has no power to impose a special tax for their payment, under the name of benefits, upon individuals; or in other words, that such procedure is taking the property of one man to pay the debts or damages due to another, for the public benefit, and therefore outside the limit of constitutional legislation. In the case of opening or widening streets, it is said, the city as the agent of the Commonwealth, is liable primarily for the damages, and it therefore pays them to the parties injured and collects them from those benefited; but in the case of vacating streets the city is not bound to pay, and therefore cannot collect. This is the corner-stone of the argument, but it rests upon a misapprehension. That the Commonwealth was under no constitutional obligation to pay for the damage caused by vacating a street was decided in *Paul v. Carver* (24 Pa. 207), and is so held under the present Constitution (*McGee's Appeal*, 114 Pa. 470). But it has never been held, nor, so far as I am aware, seriously contended, that the Legislature might not put such obligation on the Commonwealth or its agents, by statute. The

principle of compensation was extended by the present Constitution so as to include in certain cases not only property taken but property injured. This provision might have been, and to some extent was, in fact, anticipated by statutes providing for such compensation by assessments in the nature of special and local taxation. The progress of such taxation is tersely sketched by *AGNEW, J.*, in *Washington Ave.* (69 Pa. 352, 358-60) through its various stages; first, local municipal taxation for roads, bridges, culverts, school-houses and other local improvements; next, assessments upon certain properties for improvements of special advantage to them, such as foot-walks, pavements, etc., and finally, the assessment of such benefits, and the application of the money so raised to pay the compensation due others for their property taken. This mode has long been established in Philadelphia, and in some other cities of the Commonwealth, in regard to the taking of land for the opening and widening of streets. By the Act of 1858 the Legislature took another step forward in the same direction, and extended the system to the consequential injury caused in the city of Philadelphia, by the vacation of streets. It was clearly within the legislative power to do so. The basis of the assessment, as well as of the compensation, was the special benefit or the special injury to the properties concerned, and that principle has been held to sustain legislation of this character through the whole history of the Commonwealth.

Nor is the mode in which the principle is applied by the Act of 1858 beyond the legislative discretion. The jury is directed to ascertain both damages and benefits, and to apply the latter directly to the payment of the former. This is doing directly by a single proceeding what had usually been done theretofore by two separate acts. But it is in effect no more, and no different from assessing the benefits in favor and the damages against the city, which thus collected with one hand and paid out with the other. In the city of Philadelphia it has of late years been the usual practice to pay contractors for paving and like municipal improvements by assessment bills upon the property owners liable, and letting the contractors collect them at their own risk and expense. Suits were brought in the name of the city, to use, etc., but the connection of the city with the proceeding was of the slightest and most technical nature. It was but a step beyond this to drop the city out of the procedure entirely and pass the money directly from the hand which had ultimately to pay to the hand which was ultimately to receive. As said by *AGNEW, J.*, in *Washington Avenue* (*supra*), "His money, it is true, passes directly into their compensation, but this is merely to avoid circuitry of payment by an immediate appropriation of his tax. In principle

therefore it is an independent transaction and is the same thing as the money paid by an abutting lot owner for the pavement before his door, into the public treasury, and thence paid out to the paver of the street. Yet in that case what difference would it make were the money of the abutting lot-owner appropriated directly to pay the paver, provided his assessment be made on the principle of his paying according to his proportionate benefit?" So here, we see no transgression of the limits of legislative authority by the provision for the direct assessment of the damages upon the parties benefited, always of course keeping within the fundamental principle of such special taxation that it shall be measured by the special benefit. The method is subject to some serious inconveniences, and the form of expression is not good, as the language, taken literally, might imply that the damages to be assessed upon the properties benefited were to be measured by the injury to the others rather than by the benefit to themselves, which would be clearly unconstitutional. But such has not been the construction of this or similar Acts, and no such question arises in this case. The inconveniences of the Act are matters of legislative, not judicial consideration.

We have thus considered the constitutionality of the Act at some length because in the case of Centre Street (115 Pa. 247), the attack upon it was made on other grounds, and did not call for the special discussion of this point. But the consideration of the subject was necessarily involved in that case, and we see no reason to change the views there expressed.

The main question being thus disposed of, we have next to consider whether the Act of 1858 is inoperative for want of specific provisions for its enforcement.

It is objected that there is no authority in this or any previous Act for the appointment of a jury in the case of vacation, and certainly no express provision therefor has been shown. But as already discussed there was a well known and long established system of proceeding in regard to the opening and widening of streets in Philadelphia, under which juries were appointed and their duties regulated. To this system the Act of 1858 brought the vacation of streets by the express command that "it shall be the duty of juries selected to assess damages for the opening, widening, or vacating roads or streets," etc. It would be utterly nugatory and meaningless for the Act thus to prescribe the duties of a jury which was not to come into existence at all. The words of the Act expressly including and assimilating the duties of juries for the opening and vacating of streets, necessarily imply the appointment in the latter cases as well as in the former.

There are other questions argued with great

force by the learned counsel for appellants, but so far as they are necessarily raised in this case they are settled by the decision *In re Centre Street*. Very serious difficulties are suggested, in the lack of provisions for process, means of collection, and method of distribution of the assessments, etc. But none of them arise in this case, and perhaps they may never arise. The report of the jury must receive the approval of the Court, and if it should show assessments for damages in excess of benefits, with no general benefit which the city could properly be called upon to pay, it would not be likely to be approved. Some embarrassment may be created by the verdicts of petit juries on appeals, but we may well leave these to be solved when they arise. Our duty is to give effect to the Act if we can reasonably do so in accordance with settled legal principles, and we have no serious difficulty in doing so to the extent called for by the present case.

Judgment affirmed.

H. C. O.

[See next case.]

Jan. '91, 22.

January 23, 1891.

Hare v. Rice.

Appeal of John Hare, plaintiff, from the judgment of the Common Pleas No. 4, of Philadelphia County, upon an issue framed upon an appeal from the report of a jury appointed by the Quarter Sessions of Philadelphia County to assess and apportion damages for the vacating of Howard Street from Cresson to Apple Street, in which William Rice, Louis Bean, and Clayton G. Rice, trading as Rice, Bean & Co., were defendants.

A jury having assessed plaintiff's damages at \$825, and having assessed the amount against defendants as owners of land benefited to that amount by said vacation, defendants filed exceptions in the Quarter Sessions, which were dismissed [see preceding case]; and also appealed to the Common Pleas.

Plaintiff took a rule to strike off the appeal, upon the ground that no appeal lay to the Common Pleas.

This rule was discharged, whereupon plaintiff appealed, assigning the action of the Court for error.

John Dolman, for appellant.

George P. Rich (Francis S. Cantrell with him), for appellees.

May 27, 1891. MITCHELL, J. This case involves the consideration of the Act of April 21, 1858, sec. 6 (P. L. 386), and is practically ruled by the views expressed in Rice's Appeal, opinion

filed herewith. [Preceding case.] It was there shown that damages arising from the vacation of streets in the city of Philadelphia were written into the general system of what are comprehensively called road damages by the Act of 1858, and the proceedings assimilated to those in cases of opening or widening streets, although neither the Act itself nor any previous Act, so far as shown, contains any express provision for the appointment of a jury in such case. The power to appoint arises by necessary implication from the assimilation to the other proceedings, and the express prescription of the duties of such a jury.

It must be conceded to the argument of appellant that there is no appeal given by express words either of the Act of 1858, the Act of June 13, 1874 (P. L. 283), or sec. 8 of Art. XVI of the Constitution. There has been no taking of property within the constitutional provision. (McGee's Appeal, 114 Pa. 470.) But as shown in Rice's Appeal, already referred to, the Legislature has put the vacation of streets on the same footing as to the damages thereby accruing to property owners, as the taking for opening or widening. And the mode of assessment of damages and benefits, though condensed into one proceeding, was there shown also to be in effect the same as an assessment of benefits to be collected, and of damages to be paid by the city. This view brings the case at once within the spirit and the principle both of the Constitution and the Act of 1874. There being no taking the Commonwealth was not bound by the Constitution to make compensation, but the Legislature could so bind it by statute, and by the Act of 1858 did so in effect, by directing damages to be awarded for property injured, and assessments in the nature of local and special taxation to be made upon property specially benefited. The petitioners stand in the place of the Commonwealth for the purpose of vacation, and the parties assessed stand in the place of the Commonwealth for the purpose of payment. They are to be treated as if the Commonwealth stood between them for that double purpose. The Constitution and the Act of 1874 give an appeal to either party from "any preliminary assessment of damages" in the case of the taking, injury, or destruction of property, and when the Legislature put damage by vacation of streets upon the same basis as damage by taking for opening, and made it a part of the general system of road damages, the same right of appeal was given by necessary implication.

Judgment affirmed.

H. C. O.

Jan. '91, 40.

February 18, 1891.

Brennan v. Franey.

Life insurance—Insurable interest—Outstanding interest—Liability of one having no insurable interest who has collected the proceeds to repay the same to his predecessor in title who has insurable interest.

Where one is sued to recover money alleged to have been received to plaintiff's use, a defence that there is an outstanding title in a third person to a portion of the fund in controversy, is fully met by the sworn disclaimer of the latter on the witness stand in the course of the trial.

Where one having no insurable interest in a life covered by a life insurance policy receives an assignment thereof and collects the proceeds after the death of the insured, a payment of part thereof to one interested with him and whose title is no better than his own, is no defence to a suit by his assignors, who had an insurable interest in the said life, to recover the sum received by him from the company.

Appeal of James J. Franey, defendant, from the judgment of the Common Pleas of Schuylkill County, in an action of assumpsit, brought by Mary L. Brennan, to recover the amount of a policy of insurance on the life of John Dalton, collected by the defendant.

On the trial, before GREEN, J., it appeared that Dalton had insured his life on April 6, 1883, in the U. B. Mutual Aid Society of Pennsylvania, in the sum of \$3000, and caused the policy to be made payable to his daughter, Mary L. Brennan, the appellee. Shortly afterward the latter assigned \$1000 of the policy to her sister, Annie O'Brien (also a daughter of the insured), and on January 20, 1885, another \$1000 was assigned to William Delaney, whose insurable interest was only that of a creditor to a small amount and for assessments subsequently paid.

On November 4, 1885, Mary L. Brennan, Annie O'Brien, and the only other child of Dalton, the insured, joined with Delaney in assigning the policy to James J. Franey, the appellant, who after Dalton's death collected the money, and this suit was then instituted to recover the amount less what he was entitled to credit for assessments paid and amount paid at the time of the assignment.

The defendant claimed that the plaintiff could not recover the proportion originally assigned to Mrs. O'Brien in any event, and farther, that he had paid the same to M. D. Malone, who had purchased Mrs. O'Brien's interest (though no assignment was shown) and had thereafter regularly repaid to defendant one-third of the assessments and other expenses attendant on keeping the policy alive.

Mrs. O'Brien testified that shortly after the assignment to her, finding herself unable to pay

the assessments, she told her sister that if "she wanted it [the interest in the policy] she could have it," and farther, "I make no claim as against my sister to this money or policy. . . . Franey would not take the paper unless all the children signed it. . . . I told him that I did not claim anything; that I had given it to my sister long ago."

The testimony as to the Malone assignment is stated by the Court below in the answer to the defendant's third point, and in the opinion of the Supreme Court, *infra*.

The defendant requested the Court to charge, *inter alia* :—

(2) That if the jury believe that Annie O'Brien had transferred to her one thousand dollars of the policy, to wit: one-third of the same, and the same was transferred to Franey by said Annie O'Brien, then the title to this \$1000 still remains in Annie O'Brien, and Mary L. Brennan cannot recover the interest now in Annie O'Brien. *Refused*.

(3) That if the jury believe that Michael D. Malone received one-third of this policy by reason of an assignment to him from Annie O'Brien and this assignment was known to and concurred in by the plaintiff, and she took no steps and gave no notice to keep Franey from paying Malone the said one-third interest in this policy, then the said Mary L. Brennan is estopped from now claiming the amount so paid to the said M. D. Malone. *Answer*. This point we decline to affirm under the uncontradicted facts of the case. There is no evidence of an assignment to Malone. It is uncontradicted that the assignment was made to Franey. The fact that Malone may have claimed a beneficial interest which was known to the plaintiff who gave no notice, will not stop her from claiming the amount paid to the said Malone.

(9) That this action being brought by Mary L. Brennan for money received for her use and not upon the policy of insurance itself, she can only recover the amount of money to which she would be entitled upon a distribution of the proceeds of that policy, and therefore, if the jury believe that Annie O'Brien was the owner of one-third of the said policy, to wit, one thousand dollars, at the time of the payment to Franey, then the said Annie O'Brien only could sue for and recover the said one-third, and the said Mary L. Brennan, the plaintiff, could not recover that interest in this action. *Answer*. We have already answered that.

In the general charge the Court said: "So far as the claim is concerned that Mr. Malone had received one-third of the money, we have already disposed of that by saying that Mr. Franey would be liable for the whole of it for the reason that Franey received the money from the company

and he had no right to pay it over to Malone. He had only a right to pay it over to the parties who were entitled to receive it, and the party who was entitled to receive it was Mrs. Brennan, and therefore as far as that is concerned we say to you Franey would be liable for the whole amount."

Verdict and judgment for plaintiff for \$2061.62 being the full amount less the consideration paid by Franey and assessments, etc., paid by him. Defendant thereupon appealed, assigning for error, *inter alia*, the above answers to his points, and portion of the general charge above quoted.

John A. Nash, for appellant.

John W. Ryon and *James Ryon*, for appellee.

May 11, 1891. McCOLLUM, J. The appellee is the beneficiary named in the policy which was issued on the life of her father. In that life the appellant, to whom the policy was finally assigned, had no insurable interest; but at its expiration he received the insurance money. From it he was allowed to deduct the amount of the assessments he paid to the insurance company and the sums he paid to the appellee and the intermediate assignees for their advances to maintain the policy. With this allowance he is not satisfied, and he brings the case here on the claim that he is entitled to retain one-third of the balance for Annie O'Brien, and to a credit for another third of it which he alleges he paid to M. D. Malone. Annie O'Brien is a sister of the appellee, and joined in the assignment to the appellant, who required that all the children of the insured should execute it. At one time she held an assignment from her sister of a one-third interest in the policy, but being unable to pay her proportion of the assessments she surrendered it, and now disclaims any interest in the policy or its proceeds. Upon the trial she testified that she had told the appellant she did not claim anything, and that she "had given it to her sister long ago," and it appeared from the undisputed statement of the latter that this surrender was prior to the assignment to him. On this branch of the case, therefore, the claim of the appellant is without merit, because he is seeking to retain for Annie O'Brien money which she admits, and the uncontradicted testimony shows, legally and equitably belongs to the appellee. If he had paid this money to the appellee on the assurance of Annie O'Brien that she had no interest in or claim upon it, she would be estopped from subsequently demanding it from him, and her sworn statement in aid of her sister's suit for it will afford him the same protection. The Act of March 14, 1873 (P. L. 46), enables the assignee of a policy of life insurance to maintain an action thereon in his own name against the company for the recovery of

the insurance money, but it is inapplicable to the facts and can have no influence in the determination of this case. It is not necessary to consider the effect of this Act on the rule in *Armstrong v. The City of Lancaster* (5 Watts, 68) or to decide whether the appellee could recover the interest which Annie O'Brien once held in the policy if the same had not been surrendered to her. It is enough for the present to say that, upon the undisputed evidence, the appellee has a clear legal right to that interest and that the appellant is as effectually protected by the disclaimer of Annie O'Brien in aid of her sister's recovery as if he held her receipt for the money or her formal release from any liability to her arising from the transaction. On this point there was nothing for the jury. The defence was built on the claim that she was entitled to one-third of the balance in the hands of the appellant, and her own testimony was a complete and conclusive answer to it. The appellant cannot retain the money on the plea that she owns it when she admits she has no claim upon it and that it belongs to the appellee.

The learned Judge correctly ruled that the appellant's transactions with Malone furnished no ground of defence beyond the advances already mentioned. If they were jointly interested in the speculation it was by virtue of their agreement, to which neither Mary Brennan nor Annie O'Brien was a party. Malone, by his own confession, appeared to them as the agent of Francy in the purchase of the policy. The claim of the appellee is not impaired by any division between Malone and Francy of the supposed profits of the enterprise. They cannot adjust their accounts at her expense.

Judgment affirmed.

MITCHELL, J., dissented.

GREEN and CLARK, JJ., absent. R. H. N.

Common Pleas.

C. P. No. 4.

June 1, 1891.

Hall v. Tobin et al.

Recognizance sur appeal—Fraud—Illiterate surety.

One who executes as surety a recognizance sur appeal, knowing it to be a recognizance, is not discharged from liability thereon, by the fact that she was illiterate and ignorant of the effect of the instrument, and was led to sign the same through misrepresentations of the principal appellant.

Rule for judgment for want of a sufficient affidavit of defence.

This was a scire facias sur recognizance on appeal to the Supreme Court, against F. T. Tobin, Esq., appellant, H. J. Driscoll, E. T. Tobin, and Matilda Tracy, sureties. Hannah J. Driscoll filed an affidavit of defence setting up that she was an illiterate woman who could neither read nor write; that Tobin was her counsel; that he informed her that the bond was a mere matter of form; that in fact he, Tobin, had a judgment against Hall, and that he, Tobin, was entitled to the money for which Hall had sued him, when in fact Hall had recovered a judgment upon a verdict for said money and the judgment entered against Hall in favor of Tobin had been opened and set aside, and that when the bond was read over to the affiant in the office of the Supreme Court, the amount, \$1300, was not read or explained to her, and she was ignorant of the effect of the bond until explained to her in May, 1891; that she was misled by the false assertions of Tobin, and that under no circumstances, had she been informed of the facts, would she have executed the recognizance.

Frank B. Stockley, for the rule.

There is no case in which an illiterate person, who knew what he or she was signing, although not informed as to the effect of the instrument, has been held absolved from liability. All the cases are those of persons who have believed they were signing something other than the paper in fact presented to them for signature.

A. S. Ashbridge, Jr., contra.

Fraud either in the execution or consideration of a bond is admissible under a plea of payment.

Baring v. Shippen, 2 Binn. 154.

Carpenter v. Groff, 5 S. & R. 162.

McCulloch v. McKee, 16 Pa. 289.

A distinction exists between a case in which facts are mis-stated to induce a person to execute a bond of whose contents he is informed, and one in which its contents themselves are misrepresented to an illiterate person. In the latter case, the instrument is not the bond or deed at all of the illiterate person signing it.

Green v. N. Buff. Twp., 56 Pa. 114.

Schuykill Co. v. Copley, 67 Id. 386.

See also bearing upon this case—

Stoeve v. Weir, 10 S. & R. 25.

Bauer v. Roth, 4 Rawle, 93.

C. A. V.

Eo die. Rule absolute.

H. B.

C. P. No. 4.

March '91, 218.

Leinau v. Albright.

Sheriff's sale—Preferred claims—Acts of April 9, 1872, and June 13, 1883—Draughtsman—Practice—Claim for preference—Power of Court over fund in sheriff's hands.

A draughtsman in an architect's office is not within the purview of any Act of Assembly giving claimants of wages a preference.

A notice of claim for preference which does not set out the kind of business in which the defendant is engaged, is defective.

The Court has no power to direct the sheriff to distribute a fund concerning which there is any dispute.

Rule on sheriff and claimants for wages to show cause why sheriff should not pay the proceeds of sale of personal property to plaintiff, after deducting rent due and costs.

The evidence showed that the sheriff had, by virtue of a fi. fa., returnable first Monday in May, 1891, sold the contents of the defendant's offices and place of residence, and received therefor the sum of \$441.33 in excess of costs; that the landlord of the premises had a lien upon the goods sold for \$195 for rent; that after payment of the landlord the balance in the sheriff's hands would not be sufficient to pay the plaintiff's claim; that before the sale, one Ladd, a draughtsman, in the employ of the defendant, had presented a claim for "labor and services rendered as a laborer" for the defendant, "in and about said business, within six months immediately preceding the date of the proposed sale; the nature and kind of work being as follows: three weeks, at \$20 per week, as a draughtsman;" and one Lockington has filed a claim in all respects like that of Ladd, except that the amount claimed was \$160 instead of \$60. Both Ladd and Lockington claimed under the Act of April 9, 1872, as preferred creditors.

Warren G. Griffith, for the rule.

The return-day having passed, it is the duty of the sheriff to distribute the money.

Marble Co. v. Burke, 5 WEEKLY NOTES, 124.

The Act of April 9, 1872, upon which, as amended in 1883, the claimants rest, provides for a preference "for moneys due for labor and services rendered by any miner, mechanic, laborer or clerk, from any person or persons or chartered company employing clerks, miners, mechanics or laborers, either as owners, lessees, contractors or under owners of any works, mines, manufactory or other business, where clerks, miners or mechanics are employed." The words "other business" in this Act relate only to business of a similar character.

Allen's Appeal, 32 P. F. Smith, 302.

The amendment of 1883 extended the prefer-

ence to servant girls, servants or helpers about houses of entertainment and private houses, porters, hostlers, persons employed about livery stables, laundrymen, washerwomen, seamsters and seamstresses employed by merchant tailors, milliners, dressmakers, clothiers, shirt manufacturers, and clerks in stores, hands, laborers, mechanics, printers, apprentices hired for wages or salary. The amendment extends to all kinds of business in which any of the classes named in the Act are engaged.

In re Clymer Distilling Co., 17 WEEKLY NOTES, 374.

But a draughtsman is embraced in none of the above classes. A draughtsman is not a laborer.

A notice which does not set forth a business of the defendant coming within the statute, is insufficient.

Zealberg's Appeal, 3 Cent. Rep. 253.

Adamson's Appeal, 110 Pa. 459.

Pepper's Appeal, 2 Penny. 113.

Sanger v. Skinner, 16 WEEKLY NOTES, 16.

Swartz v. Dannehower, 1 Pa. C. C. 147.

Bright v. Osterman, Id. 148.

The Act has been held not to apply to a civil engineer.

R. R. v. Luffer, 4 WEEKLY NOTES, 77.

A skilled florist.

Pfaender v. Hoffman, 4 WEEKLY NOTES, 171.

A postmaster's clerk.

Cary v. Ewing, 7 Pa. C. C. Rep. 1.

A base-ball player.

In re Base Ball Assn., 3 Kulp, 23.

Kaercher v. Sullivan, 2 Chest. 461.

Employé of skating rink.

Merriman v. Mullett, 2 Pa. C. C. Rep. 360.

Nor to a singer and dancer in concert saloon.

Cleveland v. O'Neil, 4 C. P. 148.

The Court can make the order asked.

Act of June 16, 1836, § 86 (P. D. 763, pl. 116).

William Grew, contra.

A draughtsman in an architect's office, is a mechanic, and comes within the meaning of the first section of the Act of 1872, which includes "miners, mechanics, laborers and clerks."

A mechanic is one employed in mechanical or manual labor, an artisan, an artificer.

In re Clymer Distilling Co., *supra*.

Sanger v. Skinner, *supra*.

June 3, 1891. **ARNOLD, J.** The claimants are draughtsmen—skilled workmen—and as such do not come within any of the Acts of Assembly giving claimants of wages a preference. A draughtsman is neither a mechanic nor a laborer. Besides this, the kind of business in which defendant was engaged should be set forth.

But we have no right to direct the sheriff to distribute, and for that reason we discharge the rule. Our power is confined to requiring him to pay the fund into Court, when we distribute it by an Auditor.

Rule discharged.

H. B.

Orphans' Court.

Plate's Estate.

April, 1891.

Will—Execution of—Signature thereto—What constitutes a sufficient signing.

Whatever a testator or grantor is shown to have intended as his signature, is a valid signing, no matter how imperfect or unfinished, or fantastical, or illegible, or even false, the separate characters or symbols he has used may be when critically examined.

A person in *extremis*, but possessed of disposing ability, and fully informed of the contents of the testament, attempted to sign it in the presence of two witnesses, but succeeded only in making, in the proper place, a character which was apparently the first letter of his name:

Held, to be a sufficient signature, and that the will should be admitted to probate.

Sur appeal from the decision of the register of wills, refusing to admit to probate a paper purporting to be the will of Hermann T. Plate, deceased.

The facts are fully set forth in the opinion of the Court.

John F. Keator, A. Sydney Biddle, and George W. Biddle for appellant, cited—

On the extremity of last sickness preventing a signature by the testator or the directions to another person to do so for him—

Loomis v. Kellogg, 17 Pa. 60.

Greenough v. Greenough, 11 Id. 489.

Showers v. Showers, 27 Id. 485.

On what is a signature—

Main v. Ryder, 4 WEEKLY NOTES, 173; 84 Pa. 217.

Baldwin's Estate, 16 WEEKLY NOTES, 300.

Jakob's Will, 21 Id. 510.

Carson's Appeal, 59 Pa. 493.

Knox's Appeal, 25 WEEKLY NOTES, 133; 131 Pa. 220.

Vernon v. Kirk, 30 Pa. 218.

Cozens' Will, 61 Id. 196.

Gustavus Remak, Jr., and George Junkin, contra.

May 9, 1891. ASHMAN, J. The evidence has placed the material facts in this case beyond dispute. The testator was attacked on February 2, 1890, with the disease that proved fatal to him on February 10, 1890. He was a bachelor, without any kindred nearer than cousins, and was then boarding with Mrs. Runge, the widow of his former partner, whose house he had made his home for fourteen years continuously, from a date preceding her husband's death. By his will dated some years before, he had bequeathed to her for life or widowhood, the income of

\$15,000. On Thursday, February 6, he sent for counsel and told him he desired to increase that provision to \$25,000, and to give two additional legacies to charities. He asked to see his original will, but as that could not be found, counsel drew a codicil, providing therein for the charitable bequests, which was executed the following day; and he commenced the preparation of a new will in which he embodied the provision for the increased allowance to Mrs. Runge. The draft was in these words: "Philadelphia, February 6, 1890. I, Hermann Theophilus Plate, make this my last will. I give and bequeath the income of twenty-five thousand dollars to be paid to the widow of my former partner, George Runge, for life, in semi-annual payments." The paper was read over to the testator, and the latter approved it, but refused to sign until the will should be found. Counsel saw the testator on the three following days, but the will not being produced, he did nothing more with the paper. In his absence, Mr. Weidig, the clerk and business agent of the decedent, tried to induce the testator to sign it, but was put off with the replies "not now," and "some other time." On Sunday, the day preceding the death, Mr. Weidig read the paper to him again, and asked him if it was right, and if he would sign it, and the testator answered "yes." What followed, the witness narrated, thus: "I raised him up in bed; I went into the other room, I asked for a pen and ink, and a pen was handed to me, and a pad, about fourteen inches long; and I placed the paper before Mr. Plate. I handed him the pen, and he made this stroke, and he stopped and said, 'I can't sign it now' or something to that effect, and then he laid back on the bed." The stroke alluded to was described as the first up and down stroke of the letter H. He was at this time excessively weak, and in the effort to write, trembled so violently, according to the statement of Mrs. Runge, that she was overcome by the sight and left the room. Throughout his sickness his mental vigor declined with his waning physical strength, and he was said by the doctor to be flighty in spells. On Thursday, however, his mind was so clear that he conversed with his counsel at some length, upon various topics connected with the details of his business and of his will. On Friday he executed the codicil with full intelligence of the nature of the act. His intellect remained substantially unchanged until Monday, but he grew physically weaker, so that on Sunday his condition was that of extreme debility. His mind, up to Monday when he died, to use the doctor's words, "was still right, from time to time, particularly if he was aroused. His replies were intelligent." On this point all the witnesses agreed. On Mon-

day, as the doctors testified, he was in a constant stupor and delirium, without any lucid intervals.

The probate of the paper appears to have been refused upon two grounds: That it did not express the whole will of the testator, and that it was not properly executed. The first point rests on the circumstance that the writing was merely the beginning of the draft of a new will. But if the testator, for any reason, chose to adopt it as the final expression of his testamentary purpose, it certainly became his last will. The proof shows that he did so adopt it, and that he adopted it intelligently. The only real question in the case is, whether, in the execution of the paper, he complied with the requirements of the Statute of Wills. The Act of 1833 declares that a will shall be signed at the end, unless the testator is prevented from signing by the extremity of his last sickness. The Act of 1848 permits a testator to make his mark or cross in lieu of signing. Exactly what constitutes a signing has never been reduced to a judicial formula. Legibility is not a requisite; if it was, the autographs of some of the most distinguished men, as MITCHELL, J., in *Knox's Estate* (16 Crum. p. 229), pointed out, would have been necessarily invalid. Completeness is not a requisite; in *Palmer v. Stephens* (1 Denio, 478); *Sanborn v. Flagler* (9 Allen, 474); *Salmon Falls Co. v. Goddard* (14 How. 446), the initials; in *Knox's Estate* (*supra*), the first name; and in *Williamson v. Johnson* (1 B. & Cress. 146), and *Main v. Ryder* (3 Nor. 217), a fictitious name; and in *Brown v. Bank* (6 Hill, 443), an indorsement in figures, were held a sufficient signing. The principle upon which these cases proceeded was, that whatever the testator or grantor was shown to have intended as his signature, was a valid signing, no matter how imperfect or unfinished, or fantastical, or illegible, or even false, the separate characters or symbols he used might be, when critically judged. The principle is so just that any other rule would be cruel; it respects the infirmities of age and sickness; and so long as it can reach the intention, it does not scan with microscopic curiosity the grammar or the penmanship of the dying. We believe that, in this instance, if the scrawl which the testator made was all that his failing strength permitted, and was meant by him to represent his name, it was a valid signature within the Act. His remark, "I can't do it now," may have meant simply that he could not complete the signing. Yet, unfinished as it was, it bore certain characteristics which enabled two witnesses to say that they recognized it as the work of the testator. Even conceding that we may not hold it to be the signature of the testator, what is there to prevent it from being taken as his mark? That he himself regarded it as either the one or the other

is reasonably certain from his remark after he had signed, "That matter is fixed, is it?" and to the question, What matter? "You know what I wanted to give her, Mrs. Runge; I want her to have that." It was duly witnessed. Mr. Weidig handed the pen and ink to the testator, and stood by him while he used them; Mrs. Runge stood at the foot of the bed, and saw the pen in the testator's hand, and then turned and stood in the open doorway; and both she and her mother saw the paper in blank just before it was given to the testator, and immediately afterwards when it bore his mark at the end. The evidence, which need not be detailed, sets it beyond question that the testator was never afterwards able to do more in the way of signing than he had done. He might have asked some one to sign for him; but if he had already signed or made his mark, the law did not require him to call upon another. There is no reason to doubt the judgment or the truthfulness of the four witnesses, including the physician, who were present on Sunday, and who declared that he understood the nature of the testamentary act which he performed that day. We have then a person *in extremis*, but possessed of disposing ability, fully informed of the contents of the testament, attempting to sign the paper, and making, in the proper place, a character, which, if it were too imperfect to be accepted as his signature, was unquestionably sufficient to serve as his mark; and all this testified to by two witnesses who were actually present. If, by a super-refinement of reasoning, the last statement shall be objected to, we have at least the testimony of one witness who was present, supplemented by testimony as to the immediate act of disposition which fully supplied the want of another witness (*Eyster v. Young*, 3 Yeates, 511; *Reynolds v. Reynolds*, 16 S. & R. 87; *Carson's Appeal*, 9 P. F. S. 493).

We think the paper should have been admitted to probate, and we therefore sustain the appeal. [See *Jakob's Will*, 21 WEEKLY NOTES, 510.]

E. F. H.

April 16, 1891.

Pritchett's Estate.

Decedents' estates—Testamentary paper—Definition of testament—When construed as a will.

Any instrument which is revocable and whose disposition of property is intended to take effect after the death of the maker is a testament.

Sur appeal from register, and petition for citation.

The petition of William H. James, attorney for Mary Ritchie, set forth the following facts, viz., that the decedent, Ann E. Pritchett, shortly before her death, in September, 1890, executed the following:—

This Indenture made this 10th day of September, A. D. 1890, by and between Ann E. Pritchett of the first part, and James K. Magie of the second part, is evidence that the said party of the first part, for and in consideration of the sum of one dollar (\$1) to her in hand paid by the said party of the second part before the sealing and delivering of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, and conveyed and does by these presents grant, bargain, sell, and convey unto the said party of the second part all of her property both real and personal consisting of two houses and lots and one store and lot in the city of Philadelphia and State of Pennsylvania, and all household and kitchen furniture and money and accounts and notes of all kinds, together with all improvements, privileges, and appurtenances to the same belonging or in any wise appertaining and all the estate, right, title, interest, claim, and demand either at law or in equity or otherwise of the said party of the first part of, in and to all of said land and personal property to have and to hold the same unto the said party of the second part, in trust for the following purposes, that is to say:—

She directs that said party of the second part shall take charge of all of said property and hold as her attorney for her during her lifetime and render to her such accounts for rents and use, as she may need for her necessary support during her said life if the same shall amount to sufficient, and at her death she directs that her said property be held by said party of the second part in the manner following, that is to say: In trust for her cousin, Mary Ritchie, with full power to sell and convey the said property in fee simple as the said Mary Ritchie may in writing direct, and to reinvest the proceeds. One-third of the rents, issues, and profits of the said property she directs shall be given to her cousin, Mary Louisa Mason, during her lifetime. The rest, residue, and remainder of the rents, issues, and profits to be given to the said Mary Ritchie during her lifetime and to her heirs, until the death of the said Mary Louisa Mason, should she survive the said Mary Ritchie. Upon the death of the said Mary Ritchie and Mary Louisa Mason, the said party of the second part is to convey the said property in fee simple to the heirs of the said Mary Ritchie or as she may by will direct.

In Witness Whereof the said party of the first part has hereunto set her hand and seal the day and year first above written.

(Signed) ANN L. ^{her}X PRITCHETT. [SEAL.]
_{mark.}

The petition further alleged that the decedent was a widow, with no children, her nearest relatives being cousins and their children. In January, 1891, the petitioner presented the paper as above, to the register, and requested that it be admitted to probate and letters of administration c. t. a. be issued to said attorney, which the register refused. The petition prayed for a citation to Louisa Mason and others, by whom a caveat had been filed, to show cause why the decision of the register should not be set aside and the above paper admitted to probate as the last will and testament of Ann E. Pritchett.

Louisa Mason and others demurred to the above petition.

John A. Burton, for the petitioner.
Ernest H. Davis, contra.

May 16, 1891. ASHMAN, J. Whatever may be its form, an instrument which is revocable, and whose disposition of property is intended to take effect after the death of the maker, is a testament. The writing in question answers fully to this definition. Under its terms the testatrix parted with none of her property in her lifetime; she merely gave to a person whom she called a trustee, a power of attorney, which was coupled with no interest; and she was at liberty to revoke the authority on the day she conferred it. The duty imposed upon the grantee was that he "shall take charge of all of said property and hold as her attorney for her during her lifetime, and render to her such accounts for rents and use as she may need for her necessary support during her said life, if the same shall amount to sufficient." Nothing can be clearer than that the testatrix intended by this no more than to appoint an agent to collect and pay over to her the income of her estate, and that she also intended, in case the income was inadequate for her support, a matter of which she alone was to be the judge, to use the principal herself. In *Fellows's Appeal* (12 Nor. 474), the circumstance that the grantor's language did not indicate that he regarded his deed as a letter of attorney was one of the reasons for holding that it was not testamentary in character. The cases of *Eckman v. Eckman* (18 P. F. S. 460); *Ritter's Appeal* (9 P. F. S. 9); and *Mattocks v. Brown* (7 Out. 16), which were cited by the demurrant, can have no application, because in each of them the grantor parted with his estate and vested it *in presenti* in the grantee; while here the testatrix did not part with her estate at all. Her conveyance was meant to operate only in the future, and it therefore could not be a deed which conveys *in presenti* (*Greenfield's Estate*, 2 Har. 489). The case is clearly within the line drawn by *Turner v. Scott* (1 P. F. S. 126); *Frederick's Appeal* (2 Id. 338); *Rick's Appeal* (9 Out. 528), and *Rife's Appeal* (14 Id. 232), and needs no further discussion.

The appeal is sustained.

W. L. S.

WEEKLY NOTES OF CASES.

VOL. XXVIII.] FRIDAY, JUNE 26, 1891. [No. 10.]

Supreme Court.

Jan. '91, 222.

April 9, 1891.

Bemisch v. Roberts.

Negligence—Contributory negligence—Employer and employé—Duty of employer to furnish safe machinery—Visible defect—Negligence of fellow-employé.

Where an employer has furnished his employé with tools and appliances which, though not the best possible to be obtained, may, by ordinary care, be used without danger, he has discharged his duty and is not responsible for accidents.

When an employé, after having the opportunity of becoming acquainted with the risks of his situation, accepts them, he cannot complain if subsequently injured.

A workman employed at an iron mill was engaged in pushing a "buggy" loaded with iron over a tramway or track. The buggies used for this purpose had a flat floor, in the four corners of which were holes into which iron rods twelve to eighteen inches long were placed to prevent the load from moving. The holes in the buggy in question had become worn and the rods would not remain in place. The iron fell off and injured the workman, who brought suit. There was some evidence that the load was improperly placed, and there was no evidence of knowledge on the part of the employer of the defect in the buggy:

Held, that the plaintiff was chargeable with knowledge of the fact that the pins were not in place; because he either saw that it was so and assumed the risk, or failed to see what was plainly visible, and therefore it was his duty to see, and that in either event he could not recover:

Held further, that if the accident was the result of improper loading, it was the negligence of the plaintiff's fellow-workmen, for which the employer was not liable.

Appeal of Percival Roberts, trading as the Pencoyd Iron Works, defendant, from the judgment of the Common Pleas No. 3, of Philadelphia County, in an action of trespass brought by Johan Bemisch, to recover for injuries caused by the alleged negligence of defendant.

On the trial, before FINLETTER, P. J., it appeared that the plaintiff was employed at the defendant's iron works, and that part of his duty was to push an iron wagon (known as a buggy) loaded with material from the rolling mill department over a track to various departments of the works, and that while so engaged on December 9, 1888, he was injured by the falling of

some iron bars from the vehicle upon him. It was shown that the buggies were made with holes in the flooring, into which iron pins twelve to eighteen inches long were inserted to hold the load in place, and that on the one in question these holes had become so large by wear that the pins would not remain in place, which caused the accident. It was further shown that there were from one hundred and ten to one hundred and twenty-five buggies, and that a workman might make his own selection. The defendant's manager testified that when a workman found a buggy out of repair it was his duty to report the matter and it was at once taken to the repair shop, and that a skilled machinist was specially employed for the purpose of repairing. The plaintiff had been working for the defendant about a month, and had been at this particular work for something over a week; he testified that he had nothing to do with loading the buggy, which was done by fellow-workmen, and had not seen that the holes were worn. There was some evidence that the iron was improperly loaded, and that if this had not been the case the accident might not have happened. Some of the defendant's witnesses testified that the plaintiff did assist in loading the buggy, and the plaintiff admitted that it was loaded on Saturday, "and stood there Sunday and Monday. I saw what was loaded on it." Other facts appear in the opinion of the Court.

The defendant requested the Court to direct a verdict in his favor. *Refused*. (First assignment of error.)

In the general charge the Court said:—

"If the buggy was out of repair, had the defendant notice of it, or should he have known it? It is the duty of an employer to supervise his machinery, or have some one whose duty it is to keep the machinery in good condition. If the defendant had any one whose duty it was to keep the buggy in good condition, he did his whole duty in the premises to his workmen, and the plaintiff cannot recover.

"If you should determine from the evidence that the buggy was out of repair, and that the defendant knew it or should have known it, and that he had no one whose duty it was to keep the buggy in good condition, then the question arises, Was the want of repair the sole cause of the accident? Unless it was the sole cause, and nothing else contributed to the accident, the plaintiff cannot recover.

"There is evidence in reference to the manner in which the iron was loaded upon the buggy, and in reference to how far the manner in which it was loaded tended to cause the iron to fall from the buggy and injure the plaintiff.

"If you are satisfied from the evidence that the manner of loading the iron on the buggy con-

tributed to the accident, the plaintiff cannot recover.

"If, after a careful consideration of these matters, you are satisfied that the defendant was negligent, then the question arises, Was the plaintiff negligent, or were the persons who were working with him in and about the buggy upon that occasion negligent?"

"The plaintiff cannot recover if he or those who were working with him were negligent and their negligence contributed to the accident.

"The plaintiff and those who were working with him are presumed to know how to operate the buggy and wherein it was or might become dangerous, and they assumed all the dangers of that employment, and the defendant is not responsible for any injury which was the result of a visible condition of the buggy. In any event the plaintiff and those who were working with him were bound to use ordinary care, and if they did not, and the want of that ordinary care contributed to the accident, the plaintiff cannot recover.

"If the defect complained of was visible, it was the duty of the plaintiff and those working with him to know that it existed, and know the danger which was incident to that defect.

"If, upon a full and careful consideration of the evidence and principles of law as I have given them to you, you find that the defendant was negligent, and that the plaintiff was not negligent, then the question of damages arises."

Verdict and judgment for plaintiff for \$1500. Defendant appealed, assigning for error the refusal of his point.

John G. Johnson (*Franklin Swayne* with him), for appellant.

William W. Wiltbank (*D. M. M. Collins* with him), for appellee.

May 27, 1891. GREEN, J. The learned Court below correctly charged the jury that if the plaintiff, or those with whom he was working, selected the buggy, he could not recover; that the only negligence alleged against the defendant was that the pinholes in the buggy were so enlarged as no longer to be fit to retain the pins or spikes, and if that was the condition of the buggy and the defendant had notice of it, or ought to have known it, and yet had any person employed whose duty it was to keep the buggy in good condition, he did his whole duty to his workmen and the plaintiff could not recover; that if the manner of loading the iron on the car contributed to the injury, there could be no recovery; that if the plaintiff, or those who were working with him, were negligent and their negligence contributed to the accident, there could be no recovery; that the plaintiff and those who were working with him were presumed to know how to operate the

buggy, and wherein it was, or might become, dangerous, and that they assumed all the dangers of that employment, and that the defendant was not responsible for any injury which was the result of a visible condition of the buggy; and that if the defect complained of was visible, it was the duty of the plaintiff and those working with him to know that it existed, and know the danger which was incident to that defect. Having given these perfectly correct and sound principles to the jury, he told them if they found that the defendant was negligent and the plaintiff was not negligent, then the question of damages would arise. He declined to instruct the jury to render a verdict for the defendant, in response to a request to that effect from the defendant's counsel.

A patient reading of the whole of the testimony convinces us that every one of the conditions of non-liability of the defendant, stated in the charge, was established by the undisputed testimony in the cause, and therefore that the defendant's request for a binding instruction should have been granted.

There is no testimony in the cause that the plaintiff and those working with him were required to use this particular buggy. There were between one and two hundred buggies about the works, and the parties loading the buggy were entirely at liberty to select one that was in good condition, but they voluntarily chose the one that was used. The plaintiff said he did not assist in loading the buggy, though it was testified by several men who did load that he did assist, but he also said that it was loaded two or three days previously, and that he had seen it before he moved it. In answer to a question he said: "The buggy was loaded on Saturday and stood there Sunday and Monday; I saw what was loaded on it." He repeated this at another stage of his examination. Both the plaintiff and his principal witness testified that the pinholes on the buggy were worn, and Klau said they were so much worn that they would not hold the pins intended for them. The absence of these pins, by means of which the iron on the buggy was held in place, constituted the sole basis of liability upon which the case was founded. It was established beyond all question that the buggy was loaded by fellow-workmen of the plaintiff, even if he did not assist, and of course, the master was not responsible for the negligence of the fellow-workmen resulting in the plaintiff's injury. As it was an undisputed fact that the pins were not in the buggy, the failure to put them in was the negligence of the fellow-workmen, unless the holes were so much worn that the pins could not be placed there. But in any event the workmen who loaded the buggy, and the plaintiff who assisted in working it, were bound to know that

the pins were absent, and if the absence of the pins was the cause of the accident, they were all chargeable with knowledge of the cause before the accident occurred. These pins were iron rods about an inch in diameter and twelve to eighteen inches in length, and they projected upwards from the top surface of the buggy. They necessarily formed so conspicuous a part of the appliance used for the movement of the iron, and their purpose of holding the load in place is so essential to the plaintiff's right of action that the omission to notice their absence was in itself negligence on the part of workmen loading or moving the buggy. The plaintiff makes his own want of care in this respect perfectly manifest. He was asked: Q. State whether you had ever actually helped to load the buggies. A. Yes, sir; I was obliged to assist with my colleague. Q. State whether you put the pins in the load when you loaded them. A. No, sir; it was my colleague's duty to do that. . . . Q. State whether they put pins in when they were loading those. A. They put them in and they took them out again. Q. State whether they always put them in. A. Not I. Q. Did your colleagues? A. Yes, sir. Q. State whether they sometimes did not use them and sometimes did. A. They were always used. Q. Do you say there never was a case where they loaded up the buggy without the pins being used? A. We always put pins in. Some were broken off. Q. State why, if you noticed that, you failed to notice that there were no pins in on this day. A. I didn't know it. Q. How was it that you noticed every other time that they used pins and you did not think to notice this day that they did not use them? A. I didn't care to notice, because that buggy was already loaded for two days. Q. But you were pushing the buggy? A. Yes, sir; we had to push them in order to put them on the transfer. Q. And you saw the load and the pieces making up that load? A. Yes, sir. Q. How could you help seeing that there were no pins in it? A. I didn't see any; therefore I can't say whether there was any. I don't know whether it was broken or not.

Under this testimony it matters nothing whether the plaintiff saw and knew of the defect in the buggy, and nevertheless used it, or whether he did not see what it was his plain duty to see. His employer was not there to know of the defect, and no officer or agent of the defendant having control, was present, or is shown to have had any knowledge of the defect complained of. It is not pretended, and certainly it is not proved, that the plaintiff, or any one else, gave notice to the defendant or to any of his agents in charge, of the existence of any defect in the buggy; the defect, if it was as alleged by the plaintiff, was the result of constant wearing away of the holes in the buggy,

of which all the workmen, including the plaintiff, who were using the buggies constantly, had knowledge or the means of knowledge, and there is no proof that the defendant had knowledge, and in such circumstances under all the authorities the workmen assume the risks and the master is not liable.

But beside all this the defendant did have in his employ at the works a person whose duty it was at all times to keep the buggies in repair. His name was Andrew Hopshell, and he testified on the trial. He said he was a machinist; that he had charge of repairing machinery in the work shop, and had been working there for twelve years; that whenever he discovered any machinery out of order, or was informed by any of the workmen to that effect, he always had the necessary repairs made at once; and that he had particular charge of the buggies and repaired them whenever they were out of order.

In *Pittsburgh & Connellsville R. R. Co. v. Seimyer* (92 Pa. 276), we held that where an employer had furnished his employes with tools and appliances which, though not the best possible to be obtained, may by ordinary care be used without danger, he has discharged his duty and is not responsible for accidents. This doctrine is precisely applicable to this case. There was no complaint against the buggy that was used except the absence of the pins. If they were absent because the plaintiff or his fellow workmen failed to put them in, of course it was the result of their own negligence. It being their duty to put them in they must necessarily know whether they could or could not put them in the holes, and if they used the machine without the pins they were by necessary consequence guilty of negligence whether the holes were too large or not. By the exercise of the most ordinary care they could have avoided any danger from such a source.

The learned Court correctly charged the jury that "if the defect complained of was visible, it was the duty of the plaintiff and those working with him to know that it existed, and know the danger which was incident to that defect." This is in exact accordance with the authorities, and should have been followed by a direction to render a verdict for the defendant, as this Court has declared should be done in repeated instances. Thus in *Sykes v. Packer* (99 Pa. 465), we said: "The defendant had as good an opportunity of seeing the condition of the tackle as any other employé had. He must be held to have known what was clearly visible to his sight. It was not necessary that he should be specifically informed of a fact so patent to him."

In *Brossman v. Lehigh Valley R. R. Co.* (113 Pa. 498), Mr. Justice TRUNKET, in delivering the opinion of this Court, said: "When an employé, after having the opportunity of becoming

acquainted with the risks of his situation, accepts them, he cannot complain if subsequently injured by such exposure. By contracting for the performance of hazardous duties, he assumes such risks as are incident to their discharge from causes open and obvious, the dangerous character of which causes he has had opportunity to ascertain. (Whart. on Neg. § 214.) This is the general rule. In *Ballou v. Railway Co.* (5 Amer. and Eng. Railroad Cases, 480), the deceased was killed by reason of a defect in the ladder of a freight car, and it was held that his representative could not recover. A well prepared note, reviewing the cases on the subject, upon the point which touches the case in hand (page 506), states the doctrine as follows: 'It seems clear if a person in the employment of a railroad company discovers that the appliances with which he is working are or have become through use unsafe, and continues without any special order of the company, and without making any complaint, to use the said appliances, that he will be held to have either run the risk of being injured, or to have been guilty of contributory negligence; and hence, in case of injury to him occasioned by such defect, the company will not be liable. And this is true even though the defect be such a one as under ordinary circumstances the company would be bound to repair.'

We affirmed the Court below in the foregoing case in giving a binding instruction to the jury in favor of the defendant, although the danger arose from a bridge over the railroad being too low to permit a man to stand erect on the top of the car, and although the accident occurred on a dark and rainy night when the approach, towards the bridge, of the train upon which the deceased was riding would not disclose the bridge, simply because the deceased had the means of knowing the danger but failed to use them.

In the present case, however, the plaintiff could not fail to see the absence of the pins, but according to the best aspect of his own testimony he simply failed to use his eyes in discovering the defect. He says he did not notice the pins; he did not see any, though he says the pins were always used; he did not use his opportunity, though their absence as a support to the load being so unusual an occurrence ought certainly to have attracted his attention. Surely the defendant, who was not present, either in person or by any agent or officer, could not be expected to know the condition of the load, and could not be required to take precautions against the negligent loading and use of the buggy by his workmen.

The case of *Railroad v. Huber* (128 Pa. 63), has no analogy to this. There the deceased was not shown to have had any previous knowledge of the brake which caused his death. He had no opportunity to know of the defect which caused

it to slip, and he could only discover it in the act of using it; but the moment he used it, it gave way and threw him on the track. In the present case, if it be conceded that the plaintiff had a right to assume that the buggy was not defective, the absence of the pins, which was the real cause of the iron falling off, was such a manifest and conspicuous fact that he was bound to notice it, and his failing to notice it was due entirely to his own want of care. But in any aspect of the case, the negligence which resulted in the absence of the pins was the negligence of the plaintiff's fellow workmen, and for that the master is not responsible.

The assignment of error is sustained.

Judgment reversed.

R. H. N.

Jan. '91, 257.

April 10, 1891.

Blight v. Camden and Atlantic R. R. Co.

Negligence—Contributory negligence—"Stop, look, and listen"—Foot passengers struck by passing train—Negligence per se.

A. and a companion were walking along a country road in a very severe thunder shower, the clouds being especially black and heavy. Both had umbrellas which they were holding close down and towards the wind. On approaching a railroad track it was testified that they looked along the track but saw and heard nothing. In attempting to cross the track, A. was struck and instantly killed. In an action by his administrator against the company:

Held, that as the evidence clearly showed that the deceased endeavored to cross the track immediately in front of an approaching train, whether the umbrella and the rain prevented his seeing it or not, the plaintiff was not entitled to recover.

Appeal of Charles P. Blight, administrator of George Leightseisel, deceased, from the judgment of the Common Pleas No. 3, of Philadelphia County, in an action brought by him to the use of the parents and sister of the decedent against the Camden and Atlantic Railroad Company to recover damages for the death of Leightseisel.

On the trial, it appeared that on August 5, 1888, about five o'clock in the afternoon, George Leightseisel, with a companion, Charles Schadt, was walking towards the west, along a public highway leading to the station of the Camden and Atlantic Railroad Company, at Chiselhurst, New Jersey, for the purpose of taking a train for Camden. This station, which is merely an open shed, is situate at the intersection of the road above referred to with the railroad, and is on the opposite side of the track from that from which the decedent was approaching. The

public road runs east and west, the railroad tracks run north and south. About one hundred and fifty yards south of this crossing the tracks run through a deep cut, beyond which a further view of the railroad is cut off by a curve. The crossing was unprotected by a gate or flagman. A severe storm had been gathering in the northwest for a long time, and before Leightheisel and his friend reached the station it broke, with lightning and thunder, a high wind and torrents of rain. When within about three yards of the track the two men stopped, looked, and listened, but, through the darkness and intensity of the storm, they could not see or hear any train. After having stopped and satisfied himself that no train was approaching, deccent started to cross the track, upon which he was caught and killed by a train of defendant company.

Charles Schad, a witness for plaintiff, testified: "We walked along the public road together until we got to where the ground commences to raise before you get on the track. At this point, about three yards from the track, we stopped to see whether any train was coming. Leightheisel was right alongside of me. We looked down the track towards Atlantic City. We could not see any train nor hear any whistle blow or bell rung. The rain came down in torrents. It thundered and lightened and the wind blew from the northwest. A person exposed to that storm at the time the accident occurred could not see very far, for it was blinding. I do not believe you could see over ten yards. There is a deep hollow in the track about 150 yards south of Chiselhurst Station. Standing where we did in the public road you could not see if the train was in the cut. The track is not straight. The train was an extra express, running at the rate of sixty miles an hour."

George W. Steinmeyer testified "he was sitting in the open station at that time. The clouds were very black and it rained very hard. I could not see the mill on the right of the track, south of the station (about seventy-five yards). No bell was rung or whistle blown. The first I knew of the train was when it rushed by at the rate at least of sixty miles an hour."

Charles Fry testified: "I was in the open station at the time. No whistle or bell. I first saw the train when it flashed by. The rain came down in torrents, with wind and thunder and lightning. Train never stopped."

George Steinmeyer, Sr., testified: "I was in the station. The train did not blow any whistle or ring any bell. It was raining very hard."

The Court entered a nonsuit, which the Court in banc refused to take off. Plaintiff thereupon appealed, assigning for error this action of the Court.

Charles P. Blight and S. Morris Wain, for appellant.

Edwin J. Sellers (David W. Sellers with him), for appellee.

May 27, 1891. GREEN, J. This is another instance in which a person stepped upon a railroad track in front of an approaching locomotive and was instantly struck and killed. A companion of the deceased was with him at the time and succeeded in getting across the track in time to avoid a collision. He testified that when they were approaching the track they "stopped to see whether any train was coming. Leightheisel was right alongside of me. We looked down towards Atlantic City; we could not see any train. We did not hear any whistle blown or bell rung. I then started and ran across the track; the first I saw or heard of the train was when it startled me as it rushed by just after I got over the track, and as it startled me I slipped and fell. . . . I started and ran across the track. I started to run after we looked for the train about two yards from the track. I did not see any engine. When I started to run Leightheisel was right alongside of me." It was raining violently at the time of the accident and both the men had umbrellas. Fry, a witness for the plaintiff, said he first saw the men about three hundred yards up the road, and last saw them about thirty yards from the track. Steinmeyer, another witness for the plaintiff, said he could see about two or three squares up the road from the station, and there was evidence that there was a cut through which the road passed about one hundred and fifty yards from the station. The men were crossing the track on a public road close by the station. There was nothing to prevent the men from seeing the train, if they really looked for it, from the point at which Schad, the plaintiff's principal witness, said they looked towards Atlantic City. Steinmeyer said he could see up the road two or three squares, and towards Waterford about two squares, where there was an embankment. Fry said there were about three hundred yards in a square. The accident occurred about 5 o'clock on an afternoon in August. The clouds were heavy and dark and the rain fell in torrents. In these circumstances the men undertook to cross the track and one of them was immediately struck and killed. Whether the umbrellas and the rain really interfered with their vision and caused the survivor to say he did not see the train, it is an absolute certainty that they attempted to cross the track immediately in front of an approaching locomotive and the fatal result necessarily and instantly followed.

The undisputed facts, fully shown by the plaintiff's testimony, bring the case directly within the ruling of several of our decisions. In *Carroll v.*

Pa. R. R. Co. (12 WEEKLY Notes, 348), the plaintiff testified more precisely and much more fully to his looking in different directions, and listening for approaching trains, and seeing and hearing none he stepped upon the track and was struck. Nevertheless we said "the injury received by the plaintiff was attributable solely to his own gross carelessness. It is in vain for a man to say that he looked and listened, if in despite of what his eyes and ears must have told him, he walked directly in front of a moving locomotive."

We have applied the same doctrine in the cases of *Moore v. Railroad* (108 Pa. 349); *Pa. R. R. Co. v. Bell*, (122 Id. 58); and *Marland v. Railroad* (123 Id. 487). They are conclusive of the present case.

Judgment affirmed.

R. H. N.

Jan. '91, 89.

March 3, 1891.

Miller v. Kloop.

Tender—Application of amount found to be due by a decree of Court in payment of judgment.

Where a decree of Court provides that no responsibility should thereby be created as to the defendant, that the decree should be enforceable only against the land, but it appears that the defendant afterward, in relief of the land, went into the Common Pleas and obtained a stay of execution, claiming that the plaintiff had funds in his hands, derived from the land in dispute, more than sufficient to pay the decree, she cannot refuse to accept the tender of the decree in payment *pro tanto* of the amount found to be due and in the hands of the plaintiff.

Having had the benefit of the stay of proceedings to determine the rents and profits in the hands of the plaintiff, she cannot be permitted, when her claim is adjusted, to repudiate the mode of settlement she herself proposed, and upon the faith of which the stay was granted.

Appeal of Charles H. Miller and Elvira L., his wife, in right of the said wife, from the decree of the Common Pleas of Berks County, staying their *vend. ex.* upon a judgment recovered by them against Henry H. Miller, in an action of trespass for *mesne* profits.

The earlier facts in this case are reported in *Miller's Appeal* (119 Pa. 620 and 21 WEEKLY NOTES, 311). The injunction prayed for, as set forth in *Miller's Appeal*, having been dissolved, Henry H. Miller, the plaintiff in the judgment, issued execution on his judgment, and under said proceedings bought the interest of Elvira L. Miller in a certain tract of land of 183 acres, and took possession thereof. She afterward brought an action of ejectment against Henry H. Miller and recovered possession of said

tract of land; she also recovered a judgment against him for *mesne* profits amounting to \$2653.55.

Under this judgment for *mesne* profits, Henry H. Miller's real estate was levied upon. He thereupon presented his petition to the Court, setting forth that he had tendered full payment of this judgment, that a part of the payment tendered consisted of the decree for \$1391.20 entered in his favor in *Miller's Appeal* (*supra*), and asking the Court to stay the execution.

The Court (ERMENROUT, P. J.) granted the prayer of this petition, and stayed the writ; whereupon plaintiffs took this appeal, assigning for error this action of the Court.

Isaac Hiester and A. G. Green (with them D. E. Schroeder), for appellants.

Jefferson Snyder and Richmond L. Jones (with them George F. Baer), for appellees.

April 6, 1891. CLARK, J. We cannot see what right in law or equity the appellants have to maintain their writ of *vend. ex.* against the appellees, upon completion of the tender according to the order of the Common Pleas, made June 2, 1890. It is true that by the terms of the decree of this Court, entered April 16, 1888, it was provided that the effect thereof should not be to create any personal responsibility as to Elvira L. Miller; that the decree should be enforceable only against the land. But it appears that Elvira L. Miller afterwards, in relief of the land, went into the Common Pleas and obtained a stay of execution, claiming practically that the decree was satisfied; that Henry Miller had moneys in his hands, realized from the rents, issues, and profits of the lands in dispute, sufficient and more than sufficient to pay the decree. Her claim was then not only unliquidated; it was actually in litigation; but the stay of execution was nevertheless ordered, and the same has since been continued until the true amount of her claim could be legally ascertained. This was afterwards done, and judgment was entered for \$2653.55. And now the defendant complains of the Court for doing what she herself prayed the Court might be done. The order was made practically upon the petition of both parties in interest, and it is difficult to see how either can complain.

The execution was stayed in order that the rents, issues, and profits might be ascertained and applied in payment of the decree; and now, having had the benefit of a stay of proceedings, for this particular purpose, she will not be permitted, when her claim is adjusted, to repudiate the mode of settlement she herself proposed, and upon the faith of which the stay was granted.

We are of opinion that the Court was right in

making the order of June 2, 1890, and the same is affirmed. The appeal is dismissed at the cost of the appellants. H. S. P. N.

[See next case.]

July '90, 219.

March 2, 1891.

Lash v. Spayd.

Estoppel—Ejectment—Recital in bill in equity between same parties—Evidence.

In an action of ejectment to recover possession of certain real estate, the defendant is not estopped by a recital in a bill in equity filed by her against the plaintiff in the ejectment suit, when the title to the land in question was not brought in issue by the bill.

It is error in such a case to reject the defendant's offer to prove her title and the *bona fides* of the transaction through which she acquired title, and to hold that she was precluded from asserting her title by reason of the recitals in her bill.

Appeal of Jonathan Spayd and Elvira L. Miller, defendants, from the judgment of the Common Pleas of Berks County, in an action of ejectment brought by Isaac R. Lash, who was substituted as the vendee of Henry H. Miller, against Jonathan Spayd, who was the vendee of Elvira L. Miller, to recover possession of certain real estate in said county. Upon the petition of Elvira L. Miller, she was substituted as a party defendant in the Court below.

The facts of the case are fully set forth in the preceding case and in Miller's Appeal (119 Pa. 620, and 21 WEEKLY NOTES, 311).

On the trial, before ERMENROUT, P. J., defendant made the following offers of testimony:—

Mr. Hiester. The defendant, Elvira L. Miller, offers to show that in the spring of 1871, her husband Charles H. Miller was indebted to her in an amount exceeding \$2500, which she had loaned him from her separate estate derived from her father, under his promise to repay an additional amount of \$2000 to other parties who were pressing him for payment; that being unable to raise money upon his property, because of uncertainty of title, to pay these debts, he conveyed by formal deeds to his wife Elvira all his interest under his father's will, including the property in question, in consideration of the cancellation of the debts which he owed her, and of her furnishing him \$2000 additional to pay all his other creditors, so far as he knew himself to be indebted, which money was used for that purpose; that the conveyance to his wife Elvira was made under advice of counsel and the consideration, though therein stated as \$1.00, was, as above recited, and amounted to upwards of

\$4500, which was believed by all concerned to be and which was full and adequate, and more than any one else could be found to pay; that the bond to Klopp, on which Charles's brother Henry was surety, had been given under an arrangement between his brother and himself by which it was to be paid out of Charles's moneys in the hands of his brother Henry, as executor of his father's estate, which both at that time considered amply sufficient for the purpose, and that Charles had no idea that he would ever be called upon to pay this debt; that the deed was not voluntary, nor intended to hinder or delay or defraud any creditors of Charles H. Miller; that the said deeds were formally recorded, and Henry was informed of them, and recognized and acquiesced in their legality by offering to sell to the said Elvira L. Miller his half interest in the same property, in order that she might possess the whole, and that negotiations were had between them for that purpose; and that Henry agreed to sell the interest at the rate of \$125 per acre to the said Elvira, but afterwards demanded \$1000 additional, on which account the negotiations fell through; that when the Klopp bond was sued out in 1872, Henry paid the same, and caused it to be marked satisfied, but afterwards, being apprehensive that the moneys of his brother in his hands would not be sufficient to reimburse him, applied to the Court to have the satisfaction stricken off, and himself subrogated against his brother Charles; that on this occasion, for the first time, he questioned the conveyance from Charles to Elvira his wife, and then proceeded to sell the property on the Klopp judgment, and bought it in at sheriff's sale, which is his title in this case.

The purpose of this offer is to show a title in the defendant, Elvira L. Miller, and that the deeds to her were not voluntary or fraudulent, nor to delay creditors, but were executed in good faith for a full consideration paid by her from her separate estate.

Mr. Snyder. Will the defendant state whether this evidence is offered for the purpose of showing that this title is absolute in Elvira Miller, or whether she holds as trustee?

Mr. Hiester. It is an absolute title.

Mr. Jones. Plaintiff's object because, first, that it appearing in evidence that at the time of the execution of this assignment to Elvira L. Miller by her husband, through Christian L. Bechtel, of all his interest derived from the estate of his deceased father, which counsel stated was all the property he had in the world, the said Charles H. Miller was largely indebted, and that the consideration for this assignment to his wife was \$1.00, it is fraudulent upon its face as denuding him of his entire estate; second, that at a former stage of these proceedings, the execution issued

upon the judgment held by the plaintiff was stayed at the instance of Elvira L. Miller, the defendant, upon her filing her bill in equity, wherein she set forth that her husband had conveyed or assigned the premises in suit, being included in the property derived from his father's estate, to her in trust for the use of her husband and his family, and to prevent the squandering of the estate by the husband; that being set forth as the consideration for the assignment of the premises; third, that in said bill an account was prayed for of matters growing out of the real estate devised to them, Henry H. Miller and Charles H. Miller, jointly, by the will of their father, Henry Miller, deceased; that a proper decree be entered for the balance which may be found due the said Charles H. Miller, after deducting the Klopp judgment, which is thereby admitted to be a charge upon the premises in suit; and that the said Elvira L. Miller is thereby estopped from setting up in this trial any title inconsistent with that set forth in said bill in equity, unless it be some title subsequently acquired; fourth, that any evidence of conversation or negotiations between Henry Miller and the defendants about the sale of Henry's interest to the defendants is irrelevant; and the evidence is generally incompetent, irrelevant, and inadmissible.

Objections sustained. Exception. (First assignment of error.)

Mr. Hiester. Defendants renew the offer after striking out the portion as to what Henry H. Miller offered to sell his land for, but retaining the fact that he recognized her title. The details merely are stricken out, and we say that those negotiations were had in the course of the year following the making of the deeds.

Mr. Snyder. Plaintiffs renew their objections.

THE COURT. The ruling remains the same. Exception. (Second assignment of error.)

Mr. Hiester. Defendants offer in evidence the record of a suit in ejectment in the Court of Common Pleas of Berks County, No. 133, May Term, 1883, between Charles H. Miller and Elvira his wife, in right of the said Elvira, as plaintiffs, and Reuben Klopp and Henry H. Miller as defendants, for the same premises in controversy in this suit; with a verdict and judgment thereon in favor of the plaintiffs in that suit, being the defendants in this suit; and the defendants offer further to show that said trial was had upon the same matters in controversy in this suit, to wit, the validity of the conveyance by Charles H. Miller to Elvira his wife. This is offered as persuasive evidence for the jury in this suit.

Mr. Jones. Plaintiffs object that whilst a former verdict in ejectment may be offered as persuasive evidence, it must be in connection with

other evidence of title; that standing alone, such evidence is totally insufficient and inadmissible.

Objection sustained. Exception. (Third assignment of error.)

Mr. Hiester. Defendants renew the offer last above made as conclusive evidence of the title of the defendants to the premises in controversy in this suit, and of the fact that the deeds of Charles H. Miller to Christian L. Bechtel, dated April 5, 1871, were not in fraud of creditors.

Plaintiffs object that most of this last offer is embraced in the former offer and has already been ruled upon by the Court as inadmissible, and also that the whole offer is incompetent, irrelevant, and inadmissible. Objection sustained. Exception. (Fourth assignment of error.)

Mr. Hiester. The defendants offer in evidence the record of suit in equity, No. 230 equity docket, in Court of Common Pleas of Berks County, between Elvira L. Miller, as assignee of Charles H. Miller v. Henry H. Miller, wherein it was so proceeded that a decree was made, finding that the said Elvira L. Miller, assignee of Charles H. Miller, was indebted to Henry H. Miller in the sum of \$1391.20, payable out of the interest of said Charles H. Miller in his father's estate, so assigned to Elvira L. Miller; that the said Henry H. Miller thereupon recognized the fact that the sheriff's deed to him conveyed to him no title to the property in question, by entering a judgment against the said property for the said sum of \$1391.20, causing the said property to be levied on in order to collect the said judgment from the said property as the estate of the said Elvira L. Miller. The purpose of the offer is to show an election by the said Henry H. Miller, to acquiesce in the title of Elvira L. Miller, and an estoppel against the assertion of the former title which he had acquired at sheriff's sale.

Mr. Jones. Objected to by plaintiffs that the record offered has already been admitted in evidence in the plaintiff's case, and that the subsequent matters of execution or method resorted to by the plaintiff's vendor to enforce the payment of money due him under a decree of the Supreme Court are immaterial, irrelevant, and inadmissible.

THE COURT. The record is already in evidence for the purpose expressed in plaintiffs' offer in this cause, and, therefore, in evidence. The offer is rather as to the alleged effect than anything else. It occurs to the Court that the point desired by the defendants had better be raised by an instruction as to the effect of the record; but, if the offer is insisted upon for this purpose expressed, we say that it does not come up to the allegation of the offer; and, therefore, for such purposes, inadmissible. Exception. (Fifth assignment of error.)

The plaintiff requested the Court to instruct the jury to find for the plaintiff for the premises described in the writ. *Answer.* This point is affirmed. (Sixth assignment of error.)

Defendants submitted, *inter alia*, the following point:—

(1) The plaintiff, Henry H. Miller, and his vendor, Isaac R. Lash, claiming to be owner of the premises in controversy, by sheriff's deed, are estopped from asserting their claim in this action by the levy of an execution in favor of the said Henry H. Miller, upon the same property as the property of the defendants; and the verdict should be for the defendants. *Answer.* This point is refused. (Seventh assignment of error.)

Verdict for plaintiff and judgment thereon; whereupon defendants took this appeal, assigning for error the action of the Court in overruling the above offers of testimony, and the answers to the foregoing points.

Isaac Hiestor and A. G. Green (with them *D. E. Schroeder*), for appellants.

Jefferson Snyder and Richmond L. Jones (with them *George F. Baer*), for appellee.

April 6, 1891. CLARK, J. For the purposes of this case we must assume that the facts embraced in the defendants' offers are true, or rather, that the offers would have been justified by the proofs. We must assume, therefore, that the deed of April 5, 1871, from Charles H. Miller and Elvira his wife, through Bechtel, as a trustee, to the said Elvira L. Miller, although upon a merely nominal consideration, was a transaction in good faith, founded upon a full consideration paid at, or prior to, the execution thereof; that the consideration advanced was taken out of her separate estate by Elvira L. Miller, and was used in relief of her husband, and that this was an adequate and full price for the land. That at the time of this conveyance, Charles H. Miller and his wife were under the belief that Henry H. Miller, who was the executor of Henry Miller, deceased, had funds in his hands, belonging to Charles, sufficient to pay the Klopp judgment, in relief of his obligation as surety, according to their agreement to that effect, and that there was no purpose, in the mind of Charles or of his wife, to hinder, delay, or defraud Henry H. Miller, to whom the judgment had been assigned, or any other creditor of Charles H. Miller.

Assuming these facts, and that the defendants were not in any way precluded from asserting them, the plaintiff had no case, for the legal title to the land in dispute was in Elvira, before the entry of the Klopp judgment, through which the plaintiff claims title.

The plaintiff's contention, however, is that the defendant, Elvira L. Miller, through whom

Spayd claims, estopped herself from asserting these facts in support of her title; that in the seventh clause of the bill in equity, filed December 16, 1876, she set forth her title under the deed of April 5, 1871, as upon a voluntary conveyance, and that she cannot now assert, to his prejudice, that the deed was in fact founded in an adequate consideration fully paid.

Henry H. Miller and Charles H. Miller were the sons of Henry Miller, deceased, and were the devisees jointly of the real and personal estate of their father. Charles alleges that the belief and understanding was, when Henry became surety on the Klopp bond, that there would be enough money in Henry's hands, belonging to him, to pay the Klopp debt. Judgment was afterwards entered, however, by Klopp, and Henry paid it off, obtaining a decree of subrogation to the rights of Klopp. Execution was thereupon issued, with a view to levying upon Charles's interest in the land, when Charles and his wife Elvira joined in a bill against Henry, for an account, and a stay of proceedings on the judgment in the meantime. It was in the recitals of this bill, that the alleged estoppel is supposed to arise. In the seventh clause of the bill the complainant says:—

Seventh. That in the spring of 1871, Charles H. Miller was found to be indebted to different parties to an amount exceeding \$4000 of which over \$2000 was owing to his wife Elvira, for debts paid and money advanced for him, and \$2000 or thereabouts to other persons; for the payment of this latter sum \$2000 was borrowed from Michael Haak, and applied to the indebtedness of Charles H. Miller, not including the Klopp bond, which was expected to be paid by Henry H. Miller, out of Charles's share of the estate; that to secure the amount loaned by Michael Haak, a judgment bond was executed in his favor for said sum of \$2000, duly entered to No. 363, March T. 1876, in the Court of Common Pleas for Berks County on the 6th day of April, 1871. That subsequent to the entry of said bond in order to prevent the said Charles H. Miller from wasting his estate by contracting additional debts, and to secure the same for the benefit of himself and family, it was arranged that his entire interest in his father's estate should be transferred to his wife Elvira, and in consideration of the premises, the said Charles H. Miller conveyed the same through a trustee to his wife Elvira, as appears by deeds duly recorded in the recorder's office for Berks County.

The title to the land was not in any way brought in issue by this bill; it was a bill for an account, merely. The accounting resulted in a balance of \$1391.20 against Charles, exclusive of the Klopp judgment. It appeared during the

investigation that in the payment of the legacies charged on the land, not only was the personal estate wholly exhausted, but that Henry had paid out of his own pocket a considerable sum, and as by the will of their father both Henry and Charles, as joint devisees, were bound for the payment thereof, Henry was subrogated to the rights of the legatees, as against Charles's interest in the land held by his wife, for Charles's share of the deficiency. What was said in the opinion filed with reference to the title, was wholly unnecessary in arriving at the result reached by the decree; it was a matter of no consequence whatever whether Elvira L. Miller held the land upon a merely voluntary conveyance, or upon a conveyance for full value paid, for the lien of the legacies antedated the deed and entitled Henry to the balance upon the account, as against any conveyance Charles might have made. The title of the land was not brought in issue by the bill or by the pleadings; what was said on that subject was, doubtless, upon the assumption that the conveyance which was made upon a merely nominal consideration, was voluntary; it was intended merely to illustrate the want of equity in Elvira as a purchaser of the land to complain that she was held for the amount of the decree. There was no adjudication upon the title of the land; the thing adjudicated was the account, and in the adjudication of the account the title to the land was in no way involved. What reference was made to the title was merely incidental; it was, as we have said, unimportant for the purposes of that case whether the deed was voluntary or for value, for in any event the land owned by Charles, and which he conveyed to his wife, were bound by the prior lien of the legacy, to which Henry had been subrogated.

What ground is there then for an estoppel? If it be true that Elvira L. Miller was a *bona fide* purchaser for value of the premises in dispute, what statement in the seventh section of the bill will preclude her from showing the fact? She does not there state that she held the land by voluntary conveyance; she states, in substance, what she now offers to prove, that her husband was indebted to her in the sum of \$2000 or \$2500, money advanced from her separate estate, in the payment of his debts; that \$2000 more was afterwards borrowed or furnished for the same purpose, for which latter sum a judgment was entered and that subsequently in order to prevent the said Charles H. Miller from wasting his estate by contracting additional debts, and to secure the same for the benefit of himself and family, it was arranged that his entire interest in his father's estate, should be transferred to his wife Elvira, and *in consideration of the premises* the conveyance was made. Whether it was the design and

intent of the parties to secure the land for the benefit of himself and family, indirectly, through the *bona fide* purchase of the land by the wife or otherwise, is a matter to be determined upon the proofs.

We think the offers contained in the first, second, and third assignments of error should have been received; whether the transaction alleged therein was in good faith, and upon a full consideration or not, was for the jury; we can see no ground for an estoppel. The offers contained in the fourth and fifth assignments were not admissible for the purpose stated, and the sixth assignment is without merit. The seventh was ruled upon the testimony received, and it is unnecessary to consider it.

The judgment is reversed, and a *venire facias de novo* awarded.

[See preceding case.]

H. S. P. N.

Oct. '90, 12 & 17.

November 8, 1890.

Commonwealth v. Doughty et al.

Criminal law—Conspiracy—Evidence—Charge of Court—Assignments of error.

In a prosecution for conspiracy the defendants requested the Court to charge that as three of the defendants had been theretofore found guilty on "charges same as in this case" there could not be a further verdict against them. In the general charge the Court referred to the former trial and verdict of guilty, saying: "Three of these parties are parties to this suit, but there are several others included here. . . . This suit embraces most, if not all, of the charges made in the former suit, and I believe embraces some not in that."

Held, that this reference was rendered necessary by the instruction prayed for.

In an indictment for conspiracy to extort money by beginning suits for penalties and prosecutions for criminal offences and obtaining from the persons proceeded against money to settle the cases, it is not error to charge that participation in the division of money received in settlement of a case is strong evidence of guilt.

During the course of a trial for conspiracy, a defendant in an entirely different case was called for sentence and while before the Court made statements very damaging to one of the defendants in the conspiracy case; in the course of his trial the latter was examined as a witness and completely denied the said statements:

Held, that this incident was an accident, for which neither the Court nor the prosecution was responsible; that it was legally cured by permitting the defendant to deny the statements, and that it formed no ground for arresting the judgment.

Stenographer's notes of the testimony of defendants in a former trial are admissible as evidence of admissions on their part.

On a trial of seven persons for conspiracy, three of them filed a plea of *autrefois convict*, which on demurrer

was overruled by the Court. One of the remaining defendants having appealed:

Held, that he had no standing to complain of this action.

Where an indictment would lie under either of two sections of the Crimes' Act, the Court may impose the sentence authorized by either section.

Where a defendant is convicted generally on an indictment containing several counts he may be sentenced on each count separately.

Where no request has been made of the Court to instruct the jury to find on each count of an indictment separately, the omission of such instruction is not error.

Appeals of David Doughty, D. R. Callen, and William Maneese, defendants, from the judgment and sentence of the Quarter Sessions of Allegheny County, in a prosecution for conspiracy, brought by the Commonwealth against them and certain other defendants.

The charge of the Commonwealth, as embodied in a bill of particulars furnished by the district attorney, was that the appellants, with Reddy McCall, James Doyle, J. D. Bander, and John Dougherty, conspired to extort, and did extort, from certain citizens of Allegheny County, divers sums of money by causing them to be accused of various offences against the liquor laws and of keeping disorderly houses, and taken before some of the defendants, who were aldermen; that the prosecutions and suits for penalties thus begun would then be settled on the payment of a sum of money, which would be divided among the defendants and their confederates. The bill of particulars contained reference to twenty-four such cases before the defendant Maneese (among which was one against Maggie Raymond, referred to in the opinion of the Supreme Court), and ten before the defendant Callen; charges of assisting in the settlements and participating in the money received were made against defendant Doughty. Defendants Bauder, Doyle, and Dougherty filed a plea of *autrefois convict*, and referred as part thereof to the record of a cause, No. 752, of September Sessions, 1889. The Commonwealth demurred, and the Court sustained the demurrer, saying: "The record referred to shows only a verdict of guilty, and no sentence or judgment thereon; it does not, therefore, sustain the plea of *autrefois convict*, and the demurrer is sustained. But to give the defendants the benefit of this ruling, the plea is ordered to be filed with this ruling thereon."

On the trial, before WHITE, J., Maggie Raymond was examined as a witness for the Commonwealth. After her testimony had been received, a motion was made by counsel for Doughty to strike it out "as not embraced in the bill of particulars." Motion overruled; exception. (First, eighth, and ninth assignments of error.)

The Commonwealth offered to show "that the case of the Commonwealth against Peter Butterhoff, being a criminal information for the offence of selling liquor without license, made by one Lowrey J. Bender before Alderman M. F. Cassidy, on June 3, 1889, was settled before said alderman by the withdrawing of the information and the paying of \$15 for costs by the prosecutor; that Doughty, one of the defendants, interested himself and was concerned in the said settlement, and that it was through his intervention that the said case was allowed to be settled by the alderman. This to be followed by proof that J. D. Bauder, James A. Doyle, and John A. Dougherty, three of the said defendants, were concerned in the settlement of the said case, and that Bender was in the employ and acted for the said J. D. Bauder in the said settlement; and that the said Doughty received money for the settlement of the said case, which he appropriated to his own use, and that he made the said settlement in pursuance of the conspiracy alleged in this indictment." Objected to; objection overruled, and testimony admitted. (Second assignment of error.)

The Commonwealth offered the stenographer's notes of the testimony of Bander, Doyle, and Dougherty, on the former trial, as evidence of admissions on their part of the existence of a conspiracy. Objected to; objection overruled. (Seventh assignment of error.)

In charging the jury, the Court said:—

"Now these defendants are charged with conspiracy; there are seven, I believe, of the defendants in this case. Three of them, Bauder, Doyle, and Dougherty, were tried with three others some two weeks or so ago, and all of those six were found guilty. They were those that were concerned in the Bauder agency; Bauder was the head of it and the others were employés acting under Bauder. Three of those parties are parties to this suit, but there are several others included here. One of them McCall and the three aldermen. This suit embraces most, if not all, of the charges made in the former suit, and I believe it embraces some not in that. That was a charge of conspiracy, and this is a charge of conspiracy, but different parties were in the former case, not the same parties now that were on trial then. Three of the former ones are parties now, three of them are not. Then we have four other parties now charged with a conspiracy.

"The conspiracy charged is substantially this: That the defendants confederated or conspired for the purpose of instituting civil suits for penalties and prosecutions for criminal offences, not for the purpose of bringing offenders to justice, but solely for the purpose of personal gain, making money out of these prosecutions by way of compromising them, or settling them contrary to law; that is substantially the charge.

"Now as to three of these defendants, Bauder, Doyle, and Dougherty, I presume that the jury will have no difficulty in finding a verdict. They were convicted in the former case, but that verdict is not conclusive against them here. You will pass upon their guilt in this case upon the evidence before you. If you find them guilty, you will say so by your verdict.

"It is not at all likely that the Court will sentence parties twice for the same offence. The important question in this case is, are these three aldermen guilty, or any one or two of them?

"I say that that Act has been used in this city, a great many suits brought on it, and money squeezed out of parties on the ground that they were selling on Sunday, when, if they were guilty at all, they were guilty of selling without license, having no license. I do not think it applies to parties that have no license, but it has been used in that way, and has been used undoubtedly for improper purposes, simply to squeeze out of them the penalty of fifty dollars, and let them go on selling without license, conniving at them. Wherever a case of that kind is before a magistrate, and suit for fifty dollars, and the party brought in on a warrant, it is for selling without the license presumably, and the magistrate who will settle the fifty dollar case and drop the other is guilty of a great wrong. And that is one main charge in this conspiracy that the criminal prosecutions were used for the purpose of extorting out of these poor creatures, many of them, the fifty dollars penalty, because in the criminal prosecutions the prosecutor would get nothing and the magistrate would have no right to try it. A magistrate has no right to try any criminal case, or no right to receive evidence for the defendant in any criminal case; all he has to do is to inquire whether there is sufficient ground to hold that party over to answer in court for the offence. But the main charge is, in many of these cases, that the criminal prosecution was held over these parties to compel them to pay the fine of fifty dollars for selling on Sunday and then let it go.

"The evidence on the part of the Commonwealth points to several illegal acts of some of the defendants, at least, in the furtherance of this unlawful purpose, charged as a conspiracy. They may be classed under five heads, each of which is plainly unlawful, namely: First, settling a civil suit for the penalty of fifty dollars, under the Act of 1855, for less than fifty dollars. Neither the prosecutor nor the magistrate has any right whatever to settle a suit of that kind for less than fifty dollars. Second, settling the civil suit for the penalty, and dropping or abandoning the criminal prosecution for selling without a license—plainly, palpably wrong, and illegal. Third, settling or dropping the criminal prosecution

because of money or costs received. Fourth, compelling parties not guilty to pay costs, to stop the prosecution; that is extortion. Fifth, commencing prosecutions for some criminal offence for the purpose of frightening suspected parties into paying money or costs to avoid a law suit. That is a manifest perversion of law and the processes of law.

"If two or more of the defendants were engaged in carrying out all or any one of these offences I have mentioned, they were engaged in an unlawful business, and if acting in consort, were conspirators. It is not necessary that each conspirator should personally know all the other conspirators, or should have had any consultation, or concerted action with all the others. If three or more are in a conspiracy to carry on an unlawful business, and another knowingly unites with one of them in furtherance of the unlawful acts, within the purpose of the conspiracy, he thereby becomes a conspirator, a co-conspirator, although he may not know of others being in the conspiracy.

"Now let us look at the duties of aldermen.

"So also where the civil suit is settled for less than the penalty of fifty dollars, and the magistrate who knowingly permits such settlement of cases before him is a party to the wrongful, illegal act. If an alderman or magistrate acts honestly and in good faith, but commits a wrong, either through a mistake as to his duty, or a mistake as to the law, he is not to be held criminally responsible. But if by reason of the frequency of prosecutions, and other circumstances, he has good reason to believe that the prosecutions are instituted for improper purposes, and the prosecutor is simply seeking personal gain, he should not only refuse to aid the prosecutor in his unlawful purpose but should resolutely refuse and expose him. And if the circumstances are such that the jury may reasonably find that the magistrate knew or believed that the prosecutor was acting corruptly and illegally, and he permits or connives at such acts, he is as criminally guilty as the prosecutor." (Third assignment of error.)

The defendants requested the Court to charge, *inter alia*, as follows:—

(2) As it appears from the record of this Court, at No. 752, September Sessions, 1889, given in evidence, that on October 22, 1889, the defendants, Bauder, Doyle, and Dougherty, were, on charges same as in this case, tried by jury and found guilty, and that no new trial or arrest of judgment was granted or applied for, and the case stands ready for judgment, the law does not authorize a further verdict against them here. *Refused.*

(3) Mere mistakes or errors of judgment by the magistrates on trial, Maneece, Dougherty, and

Callen, will not justify a verdict of guilty against them; to convict of crime there must be proof of criminal intent, and all presumptions are in favor of innocence. *Affirmed.*

(4) Counsel for David Doughty, one of the defendants in case on trial, respectfully requests the Court to charge the jury as to the fourth count in the indictment, that even if the settlement effected in the case of Peter Butterhoff was illegal, yet, if the jury believe that the said David Doughty acted throughout the entire transaction *without criminal intent*, and in *good faith*, as a friend of said Peter Butterhoff, they should acquit as to that count. *Answer.* I affirm that point, if the jury believed Doughty did not share in the money received from Butterhoff; you will remember that case, that seventy-five dollars were paid by Butterhoff to Alderman Doughty. Now, if it was a suit for the penalty, that was twenty-five dollars too much. They had no right to demand that in a civil suit for the penalty. If it was a criminal prosecution against him for selling without a license, then it was glaringly improper to settle it on the payment of seventy-five dollars, settling a case that ought to have been returned to court; and I say it was glaringly improper for any of the parties to get seventy-five dollars to settle the case that ought to have been returned to court—no difference before whom the information was made, Cassidy or anybody else. But the evidence is that Alderman Doughty went to Alderman Cassidy's office to get him to settle it, and it is for the jury to say. If he received nothing of the money, that act alone, gentlemen, would not be sufficient to convict him of this conspiracy, but you are to take it in connection with other evidence, and if he received any of that money, it would be very strong evidence against him. (Fourth assignment of error.)

Verdict, guilty. Counsel for Doughty moved in arrest of judgment, and assigned as a reason therefore that while "his trial in this case was going on the district attorney called for sentence for illegal liquor selling, one Mrs. Clifford, and in the course of her examination, she made serious charges against the said David Doughty, of efforts, to wit, of trying to extort money illegally from her for the settlement of a case pending before him, and that *this* charge was discussed, tried, and disposed of in the presence and hearing of the jury, then trying this judgment, to the manifest prejudice and injury of defendant." Motion overruled. (Fifth assignment of error.)

The Court thereupon sentenced Doughty to an imprisonment of one year, Maneese to six months, and Callen to three years; whereupon they took these appeals, Doughty assigning error as above noted, and (6) that the Court erred in giving undue prominence to the evidence against

him and in not presenting the evidence in his favor with equal fulness and emphasis.

The appellant Callen assigned for error, *inter alia*: (4) The Court erred in sustaining the demurrer of the Commonwealth to the plea of *autrefois convict* filed by the defendants Bauder, Doyle, and Doughty. (6) The Court erred in sentencing Callen to three years' imprisonment, the section of the Act under which he was indicted, viz., section 128, Act March 31, 1860, not authorizing imprisonment for over two years.

Appellant Maneese assigned for error, *inter alia*: (6) The Court erred in not instructing the jury to find on each count of the indictment separately or generally, and the finding of guilty was generally on all the four counts, which the evidence did not warrant.

William D. Moore (*Thomas M. Marshall, T. S. Parker, and R. S. Sill* with him), for appellant Doughty.

William D. Moore (*Thomas J. Keenan* with him), for appellant Maneese.

Thomas J. Keenan (*L. P. Stone* with him), for appellant Callen.

Clarence Burleigh (*R. H. Johnston*, district attorney, and *W. D. Porter* with him), for appellee.

January 5, 1891. PAXSON, C. J. This case presents a ragged record, but after a careful examination of it, we are not prepared to say the judgment of the Court below should be reversed. Several of the defendants have appealed, and have furnished us with separate paper-books; others of the defendants have not appealed, and their cases are not before us.

The first assignment of error appears to have been filed under the impression that Maggie Raymond, the witness referred to, was not included in the bill of particulars. An examination of the bill, as printed on page 46 of appellant's paper-book, shows that she was included. Error is not perceived in the admission of the evidence referred to in the second assignment. Indeed, this was practically abandoned upon the argument at bar. The most serious assignment is the third, which contains a lengthy extract from the charge of the Court below. There are some matters in this part of the charge which might well have been omitted, yet we cannot say there was positive error, or that the Court interfered with the province of the jury. The reference to the prior conviction of Bauder, Doyle, and Doughty appears to have been rendered necessary by the defendants' second point, which prayed for an instruction upon the effect of such prior conviction. Aside from this, there is no appeal by either of the three men referred to. The defendants' fourth point was affirmed, with a qualification that was justified by the facts in

the case. If Doughty acted in the settlement of the Peter Butterhoff case in entire good faith, merely to oblige a friend, and without a criminal intent, he ought not to have been convicted, and so the learned Judge instructed the jury. But, if Doughty received seventy-five dollars for procuring such settlement, the case presented an entirely different aspect. This matter was fairly submitted to the jury. The reason given in the fifth assignment for not arresting the judgment is without merit. The statement of Mrs. Clifford made in another case, in the presence of the jury, was an accident, for which neither the Court below, the district attorney, nor any one else was responsible. If any harm was done, it was legally cured by allowing Doughty to go upon the stand to contradict her, which he did very thoroughly. The sixth assignment alleges that the Court erred in giving undue prominence to the evidence against Doughty, and in not presenting the evidence in his favor with equal fulness and emphasis. An examination of the charge does not bear out the assignment. Considerable latitude and discretion must necessarily be left with the trial Judge, in commenting upon the evidence, and, unless it is unfair and misleading, we ought not to interfere. We cannot say this charge was so. The seventh assignment alleges error in admitting the stenographer's notes of the testimony on the former trial of Bauder *et al.*, at September Sessions, 1889. Three of the defendants in this case testified in that case, and the testimony was only admitted so far as it affected them. The Court below held that it was "admissible as admissions on their part so far as it tends to prove a conspiracy and their participation in it." Their admissions or declarations would be evidence against them to show their share in a conspiracy, and, if so, why not their testimony under oath? This assignment is not sustained. The eighth and ninth assignments have been sufficiently disposed of by what has been said about the first. The judgment against David Doughty is affirmed.

In the case of appellant D. R. Callen, who was convicted under the same indictment, there are two questions which are not covered by what has been said in Doughty's case. The fourth assignment alleges that the Court erred in sustaining the demurrer to the plea of *autrefois convict*, filed by Bauder, Doyle, and Dougherty. What defendant Callen has to do with this has not been made to appear. The defendants who put in this plea do not complain of this action of the Court, and Callen has no standing to do so. Complaint is made in the sixth assignment that the appellant was sentenced to three years' imprisonment, while the 128th section of the Act of March 31, 1860, authorizes imprisonment for only two years. It is begging the question to assume that this indictment was laid

under said 128th section; as before observed it contains four counts, in one of which it is averred that the defendant falsely and maliciously conspired to charge certain persons with a violation of the criminal laws. This offence is punishable by the 127th section of the Act of 1860, by three years' imprisonment. Even if we are mistaken in this, the defendants were convicted generally, *i. e.*, upon each count of the indictment, and might thus have been sentenced upon each count. They were sentenced generally upon the whole indictment for a term much less than might have been imposed. The appellant has no just cause of complaint. The judgment in this case is affirmed.

The case of appellant William Maneese, presents nothing which has not already been disposed of, except the sixth assignment, which alleges that the Court below erred in "not instructing the jury to find on each count of the indictment separately, or generally, and the finding of guilty was generally on all the four counts, which the evidence did not warrant." There is nothing in the record to show that the Court was asked for any such instruction, and its omission is not error.

The judgment is affirmed; it is now ordered that the respective appellants surrender themselves forthwith to the custody of the high sheriff of Allegheny for confinement according to the sentence of the Court below.

R. H. N.

Orphans' Court.

O. C. of Beaver Co.

Mixter's Estate.

Decedents' estates—Collateral inheritance tax—Legacies under \$250 liable for tax if decedent's estate exceeds that amount—Collateral inheritance tax not a tax within meaning of Constitution requiring uniformity in taxation—Act of May 6, 1887.

The exemption in the Act of May 6, 1887, that no estate valued at less than \$250 shall be subject to collateral inheritance tax, refers to the whole estate, and not to legacies, devises, or distributive shares carved therefrom.

Sur exception to Auditor's report.

Before the Auditor (Roger Cope, Esq.), appointed to make distribution of the estate of Margaret Mixter, deceased, O. H. Mathews, register of wills, claimed the collateral inheritance tax on the personality, the tax on the realty of the decedent having been paid. The Auditor rejected the claim, saying, *inter alia*, as follows:—

"Margaret Mixter, died December 29, 1889, having made her last will and testament, since her death duly probated, wherein she bequeathed to Isaiah Mixter \$100, Elizabeth Mixter \$50, and other bequests of different amounts, and devising a farm of 55 acres to Sarah M. Perry; the residue of the estate she bequeathed to Sarah M. Perry.

"No collateral inheritance tax has been paid on the personalty, and it is claimed on the part of the State that the tax should be paid on all legacies, none of which reach the value of \$250. This raises a question of interpretation of the Act of May 6, 1887.

"The word 'estate' found in the proviso of section 1, of the Act of April 7, 1826 (Purdon, 259), has been held to refer to that of the decedent and not to the one carved out of it (*Commonwealth v. Boyle*, 2 Del. Co. Rep. 335), and that the tax is payable out of the legacy (*Thomson's Estate*, 5 WEEKLY NOTES, 14). But it must be remembered that the proviso in said Act did not come in conflict with section 1 of Art. 9, of the Constitution of 1874, for the reason that that section did not execute itself in such a way as to interfere with laws already in existence at the time the Constitution of 1874 went into effect. (*Lehigh Iron Co. v. Lower Macungie Township*, 81 Pa. 482; *Coatesville Gas Co. v. Chester Co.*, 97 Id. 476.) But it imposes restrictions upon future legislation. (*Perkins v. Slack*, 86 Pa. 270; *Chase v. Harding*, 87 Id. 343.) The section of the Constitution above referred to provides, *inter alia*, that 'all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax.'

"That it was the intention of the Legislature that enacted the statute of May 6, 1887 (P. L. 79), that the tax should be deducted from the general or specific legacy, and not from the residuary estate, is clearly shown by section 5 of the said Act. If the word 'estate' used in the proviso of section 1 of said Act, refers to the decedent's estate and not to the one carved out of it, then a collateral legatee who is willed \$100 out of an estate of \$300 would be taxed \$5, while such a legatee who is willed a like amount out of an estate of \$240 would pay no tax. This would certainly be in conflict with section 1 of Art. 9, of the Constitution of 1874.

"We are forced to conclude that a construction of said Act which would permit the tax claimed by the State upon any of the personalty but the residuary legacy, would not be in accord with the intention of the Legislature and would render the Act void. (*Commonwealth v. Kerchner*, 24 WEEKLY NOTES, 260.)"

To this report the register of wills excepted.

Alfred S. Moore and Winfield S. Moore, for exceptant.

The "collateral inheritance tax" is a bonus exacted from the collateral kindred and others, as the condition on which they may be admitted to take the estate left by a decedent. The estate does not belong to them, except as a right to it is conferred by the State.

Strode v. Commonwealth, 52 Pa. 181, 182.

2 Black. Comm., 10-13.

It is called a tax or duty, but has little, if any, analogy to a tax in the usual acceptation of the term.

Clymer v. Commonwealth, 52 Pa. 185, 186.

Scott on Intestate Law, 2 ed. p. 144.

The word *estate* in the Act of May 6, 1887, has reference to that of the decedent and not to the one carved out of it. The proviso in the first section of the Act of 1887, is the same as the proviso in the Act of April 7, 1826.

Commonwealth v. Boyle, 2 Del. Co. Rep. 335.

W. H. S. Thomson and J. R. Martin, contra.

May 4, 1891. WICKHAM, P. J. The Collateral Inheritance Act of May 6, 1887, provides that "no estate which may be valued at a less sum than two hundred and fifty dollars, shall be subject to the duty or tax."

This exempting clause refers to the whole estate and not to legacies, devises, or distributive shares carved therefrom.

The objection that such a construction of the Act would cause it to offend against section 1, Article 9 of the Constitution, providing that "all taxes shall be uniform," etc., is untenable. Collateral inheritance tax, so called, is not a tax in the ordinary sense of the word, or the meaning of the Constitution. It is rather in the nature of a taking or retention of a part of that which the State, if it saw proper, might claim and keep *in toto*. (*Strode v. Commonwealth*, 52 Pa. 181.)

He who is allowed to take for nothing a portion of a dead man's estate, shall not be heard to complain simply because he is not given it all.

And now, to wit: May 4, 1891, the exception filed by the register of wills is sustained, and the report referred back to the Auditor, to correct the distribution in accordance with this opinion.

[*Cf. Commonwealth v. Kerchner*, 24 WEEKLY NOTES, 260; *Quinn's Estate*, 8 Id. 312.]

Apri', 1891.

Hecht's Estate.

Decedent's estate—Husband and wife—Effect of divorce on right of survivorship.

After divorce a husband and wife do not inherit from a deceased child as joint-tenants, but each takes a share as a parent without any right of survivorship.

I. died intestate, unmarried, and without issue, leaving a father and mother, who had been divorced in the State of Arkansas many years before I.'s death. Shortly after I. died, her father died, leaving a policy of insurance on his life for the benefit of I. and another daughter, E. I.'s interest in the policy was claimed by her mother, on the ground that she took by survivorship from the father:

Held, that the right of survivorship between the parents was extinguished by the divorce, and that the fund must be divided between the administrator of the deceased father and the mother.

Sur exceptions to adjudication.

The facts as they appeared at the adjudication were substantially as follows: Ida Hecht, the decedent, died on May 12, 1886, of full age, unmarried, intestate, and without issue, leaving her surviving a father, Levi Hecht, and a mother, Elizabeth Smith, formerly Elizabeth Hecht, who had been divorced from said Levi Hecht many years before decedent's death, and married James C. Smith; and one sister, Ella Hecht, a minor, whose guardian is Elizabeth Davis. Letters of administration on the estate of the decedent were taken out by the said Levi Hecht, and his account was filed and adjudicated by the Orphans' Court on the first Monday of June, 1890, but pending confirmation of said account, on June 16, 1890, said Levi Hecht died. The account was subsequently confirmed absolutely, and on July 16, 1890, letters of administration d. b. n. on the estate of Ida Hecht were granted to David Goodbread. Levi Hecht was domiciled in Arkansas at the time of his death, in which State his will was proved, and letters of ancillary administration on his estate were granted to W. Egbert Mitchell by the register of wills of this county.

The subject of controversy in this case was a policy of insurance on the life of the said Levi Hecht, taken out for the equal benefit of his two daughters, Ida Hecht, the decedent, and Ella Hecht. It was claimed on behalf of Elizabeth Smith, the mother, that she was entitled as the surviving parent to the entire interest of the decedent Ida.

The Auditing Judge (HANNA, P. J.) held that as the parents of the decedent had been divorced prior to her death, the right of survivorship was extinguished by the divorce, and the claimant could not inherit from her former husband, and was therefore only entitled to one-half of the interest of the decedent in the said policy on the life of her father.

To this finding exceptions were filed on behalf of Elizabeth Smith.

Joseph S. Goodbread, for exceptant.

Samuel Wagner, contra.

May 2, 1891. FERGUSON, J. The decedent died intestate, unmarried, and without issue, leaving a father and mother, who had been

divorced for a number of years before her death. In fact, the mother had married again.

The father of the decedent died shortly after she did, and the fund for distribution is the proceeds of a policy of insurance in her favor on his life. The question raised by these exceptions is, whether the mother, by the right of survivorship, is entitled to the whole fund.

It has been held in a number of cases in this State, that under our Intestate Act of April 8, 1833, the interest of husband and wife in property derived from a deceased child is joint in its nature, and that, owing to their legal unity, they were seised of the same by entireties, and not *per my et per tout*; and therefore in case the property was not reduced to possession before the death of either of them, the whole went to the survivor. (*Frankenfield v. Gruver*, 7 Pa. 448; *Weir's Estate*, 13 WEEKLY NOTES, 518; *Gillan's Executors v. Dixon*, 65 Pa. 395.)

In this case the property was not reduced to possession in the lifetime of the father, because, as stated, the fund is the proceeds of a policy of insurance on his life, which, of course, could only become due and payable after his death; so that, if there was nothing else in this case, the mother, as survivor, would clearly be entitled to the whole.

The common law treats husband and wife as a single entity, her legal existence during marriage being suspended or merged in his; therefore "husband and wife cannot take by moieties, but are seised of the entirety" (2 Bl. Com. 182); and "this resulted from their relation as husband and wife. (*Gillan's Executors v. Dixon et al.*, *supra*.)

But at the time of the death of their daughter this husband and wife were divorced. It follows that the relation of husband and wife having been destroyed, all the rights and duties growing out of that relation fell also. They were as effectually separated as if they had never been joined. All property or other rights incident to the marriage were at an end. Neither, in case of the death of the other, could claim anything from the estate, either under the intestate laws, by dower, curtesy, or otherwise. How much less, then, could either claim the right of survivorship, when the very foundation of that right rests upon the unity or oneness of the two persons? (*Schouler's Domestic Relations*, section 221; 1 *Bishop on Married Women*, 248 and 249; 2 *Bishop on Marriage and Divorce*, section 706. See also Act of March 13, 1815, *Purdon*, 615, pl. 15.)

The exceptions are dismissed.

E. F. H.

WEEKLY NOTES OF CASES.

VOL. XXVIII.] FRIDAY, JULY 3, 1891. [No. 11.

Supreme Court.

July '90, 100 and 101.

February 3, 1891.

Woods v. Irwin.
Irwin's Estate.

Judgments—Rules to open judgments—Power of the Court over—Jurisdiction—Right of executor or administrator to confess judgment—When creditors may intervene—Statute of Limitations—When applicable as a means of defence after judgment confessed.

The discretion of Courts to open judgments is very extensive, but it must rest on a foundation of competent evidence. It is therefore irregular for the Court to open a judgment on the petition and answer alone, without any evidence, unless by consent.

A judgment confessed by a debtor, or by his executor or administrator, can only be attacked by creditors or other strangers for fraud or collusion; and the mere fact that the debt is barred by the Statute of Limitations is not such a fraud, in law, as to give creditors any standing.

Neither a debtor, even though insolvent, nor his executor or administrator, is bound to interpose the defence of the Statute of Limitations (or the Statute of Frauds), and may confess judgment for a claim so barred, even though creditors are defeated thereby.

Where judgment is so confessed the Court has no jurisdiction to open the judgment upon the petition of other creditors, wherein there is no allegation of fraud or collusion.

The plea of the Statute of Limitations though no longer an object of animadversion, and regarded as a statute of repose and protection, is not an object of favor with the Court, and while a judgment may be opened on that ground alone, it is in the discretion of the Court, and not binding upon it to open it.

MITCHELL, J. The statute, unaided by any equitable conditions or circumstances, cannot be regarded as other than a dishonest defence, for which alone a judgment should never be opened.

This is especially the case where the defendant has had his day in Court, and where in a suit in the usual course the defendant comes in and confesses judgment, he cannot be heard afterwards to say that the debt was barred by the statute.

Appeals of J. W. Irwin and Milton Stewart, trustee, plaintiffs, from the judgment of the Common Pleas of Montgomery County, in an action of case brought by Hannah Woods to the use of J. W. Irwin and Milton Stewart, trustee, against N. Adeline Irwin, executrix of the last will and testament of Ninian Irwin, deceased, to recover the value of certain bonds belonging to the said

Hannah Woods, and converted to his own use by the said Ninian Irwin in his lifetime; and also from the decree of the Orphans' Court of Montgomery County, dismissing his exceptions to the report of the Auditor making distribution of the estate of Ninian Irwin, deceased. The two appeals were heard together.

Ninian Irwin died on May 11, 1877. In 1874 and 1875 he borrowed from Mrs. Hannah Woods fifteen bonds of the Danville, Hazleton & Wilkesbarre R. R. Co. of \$1000 each. After his death, when Mrs. Woods demanded the return of her bonds, it was first discovered from papers in the possession of his widow and sole executrix, N. Adeline Irwin, from letters addressed to him, receipts for the bonds and memoranda in his handwriting, that he had disposed of \$10,000 of the bonds to the Baltimore, Philadelphia & New York R. R. Co., in consideration of a "bonus" to himself of a \$500 bond of that company. The date of this conversion was October 15, 1874. The corporation to which he gave them was speculative, and proved entirely irresponsible. The remaining \$5000 of bonds he had also converted. He loaned these to George S. Selden, his attorney, who proved to be insolvent.

Mrs. Woods presented her claim to counsel for N. Adeline Irwin, the executrix, shortly after the decedent's death, and she discovered the misappropriation of her bonds. Payment of this claim was persistently demanded from the executrix and suit threatened, and at her request suit was withheld to save expense to the estate, the claim being admitted to be just and not subject to defence.

The executrix filed two accounts, the first on February 5, 1881, the second on September 2, 1886. An Auditor (J. Wright Apple, Esq.) was appointed to distribute the balance shown by the first account, and at the audit, appearance was entered for Milton Stewart and J. W. Irwin, the holders of the Woods claim. They offered in evidence the receipts of decedent to Hannah Woods for these railroad bonds, and made claim thereon for \$7500 and interest. The claim was received without objection on the part of any of the other creditors, and copies of the receipts were spread upon the Auditor's notes. Counsel for the present appellees appeared at that audit. After repeated meetings, it was agreed by counsel for all the creditors that the fund then in hand should be awarded to J. Morton Albertson, one of the present appellees, the only lien creditor at decedent's death, and the Auditor so reported. Subsequently George N. Corson brought suit and obtained judgment against the executrix upon a note held by him. Corson and Albertson are the appellees in this case.

When the executrix filed her second account an

Auditor (Jacob V. Gotwalts, Esq.) was again appointed. In the meantime, on October 12, 1886, Hannah Woods, to the use of J. W. Irwin and Milton Stewart, trustee, brought suit in the Common Pleas against N. Adeline Irwin, executrix, on the claim evidenced by the receipts for the railroad bonds, and after full investigation as to the amount due her counsel, to avoid expense and vain litigation, on November 14, 1886, joined in an entry of judgment by agreement for \$15,525, the bonds being then worth par and interest due from 1874. On December 28, 1886, this judgment was offered in evidence before the Auditor, and the appellees then objected to it on the ground that it was obtained for a debt barred by the Statute of Limitations, and that said judgment was not good as against the creditors of decedent. The Auditor held that the judgment of the Common Pleas was conclusive upon him, and suspended further action until the appellees could present a petition to have the judgment opened.

On August 1, 1887, appellees presented a petition to the Common Pleas alleging that they were creditors of decedent and that the confession of judgment by the attorneys of the parties to said suit was done for the purpose of preventing the petitioners from pleading the Statute of Limitations or other defence against the claim, and that the claim "was barred by the statute, and therefore the institution of said suit, confession of judgment therein, and the presentation of the same before the Auditor, is a fraud upon your petitioners," etc., and praying the Court to open the judgment and to award an issue to determine, first, whether the amount claimed in said suit was not at the time of issuing the summons thereon barred by the Statute of Limitations; secondly, whether at the time of institution of said suit the plaintiffs therein had any legal claim against the estate of said testator.

A rule was granted to show cause why the judgment should not be opened and an issue awarded as prayed for.

An answer was filed: (1) Denying jurisdiction to act upon the petition; (2) averring that the judgment was obtained after suit brought for a just and legal claim then existing and not barred by the statute; (3) denying all allegations of fraud; (4) demanding proof of all other matters alleged.

The matter was argued without submitting any evidence to sustain the petition, and on January 7, 1888, the Court, YERKES, P. J., of Bucks County, sitting at special Court, SWARTZ, P. J., having been of counsel in the case, opened the judgment saying, *inter alia*, in his opinion, "It is no longer a matter of dispute, that a judgment by confession should be opened to admit the plea of the Statute of Limitations, and for that purpose alone," allowing the petitioners to appear and make defence to the suit, and ordered that an

issue be framed upon the declaration filed in the suit, with pleas of *non assumpt infra sex annos* and payment with leave, etc.

An issue was framed as directed by the Court. At the trial thereof appellants offered to prove, among other matters, from papers found in possession of decedent and containing indorsements in his handwriting, that one W. O. Leslie proposed to Irwin that he borrow of Hannah Woods the bonds in question, and to pay him a consideration therefor; and a written statement by decedent that he had borrowed the bonds and disposed of them to Leslie; and, further, that Hannah Woods had no knowledge that the bonds had been disposed of by decedent until after his death, together with the fact of the presentation of the claim before the former Auditor, the suit brought and judgment therein, etc.

The Court held that as the only question at issue was the Statute of Limitations, the evidence offered was inadmissible to prove an assumption within six years, and rejected the offer, and directed the jury to find for the defendants generally.

Whereupon the plaintiffs appealed, assigning for error, the action of the Court in opening the judgment, in rejecting their evidence, and in directing the jury to find for the defendants.

The audit was subsequently renewed, and the Auditor, relying upon the fact that the judgment had been opened and issue found against appellants, decided against them and decreed all the fund for distribution to appellees.

To this report of the Auditor the claimants under the Woods judgment excepted, and their exceptions were dismissed by the Court, WEAND, J. Whereupon the claimants appealed, assigning for error this action of the Court.

Montgomery Evans, for appellants.

In the petition to open the judgment, there is no allegation of fraud or collusion on the part of the parties to the suit. The petitioners do not charge fraud directly or indirectly, but only by inference that the judgment was confessed to prevent the plea of the Statute of Limitations. To avoid a decree on the ground of fraud, it must be distinctly and positively averred; not left to be inferred from circumstances.

Groff v. Groff, 14 S. & R. 181.

In re Turnpike Co., 97 Pa. 260.

Hostetter v. Pittsburgh, 107 Id. 419.

There was no evidence before the Court to sustain the petition. The allegations of the petition from which fraud was to be inferred were denied by the answer. Absolute good faith on the part of the respondents, and an existing legally valid claim were positively averred. An allegation of fraud in obtaining a judgment must be clearly supported by evidence.

Horton v. Weaver, 39 Leg. Int. 99.

If a debt be honest or supported by a moral

consideration, though not enforceable at law, a judgment therefor is valid. Creditors can attack a judgment collaterally for collusion only.

Keen v. Kleckner, 42 Pa. 529.
Brown's Appeal, 86 Id. 524.
Meckley's Appeal, 102 Id. 536.
Clark v. Douglass, 62 Id. 408.
Appeal of Bank of Titusville, 85 Id. 528; 96 Id. 460.
Thompson's Appeal, 57 Id. 175.
Dougherty's Estate, 9 W. & S. 189.
Sheetz v. Hanbest, 81 Pa. 100.
Lennig's Appeal, 93 Id. 301.
1 Troutbat & Haly's Prac., § 803 et seq.
Drexel's Appeal, 6 Pa. 272.
Gallup v. Reynolds, 8 Watts, 424.

An administrator or executor is not bound to plead the Statute of Limitations against a debt which he believes to be justly due.

Ritter's Appeal, 23 Pa. 95.
Fritz v. Thomas, 1 Wharton, 66.
Kennedy's Appeal, 4 Pa. 149.
Smith v. Porter, 1 Binney, 209.

It was error for the Court to refuse to admit the evidence offered, as it was a question for the jury upon this evidence when the Statute of Limitations began to run, and if it had been tolled.

Moses v. Taylor, 11 Central Rep. 724.
Marr v. Kubel, 3 Id. 274.
Hughes v. Bank, 110 Pa. 428.
Bricker v. Lightner, 40 Id. 199.
Morgan v. Tener, 83 Id. 305.
Wickersham v. Lee, Id. 416.
Irwin's Estate, 25 WEEKLY NOTES, 442.
Reber's Appeal, 23 Id. 427.
Lex's Appeal, 97 Pa. 289.
Hemphill v. McClimans, 24 Id. 367.

George W. Rogers and Charles Hunsicker, for appellees, cited—

Earley's Appeal, 90 Pa. 321.
Wernet's Appeal, 91 Id. 319.
Herman v. Rinker, 105 Id. 121.
Soisson v. Rosar, 18 WEEKLY NOTES, 4.
Ellinger's Appeal, 114 Pa. 505.
Kittera's Estate, 17 Id. 416.
Lewis v. Rogers, 16 Id. 18.
McKibbin v. Martin, 64 Id. 352.
1 Story Equity Jur., chap. 7.
Yorks's Appeal, 17 WEEKLY NOTES, 17 and 33.

WOODS V. IRWIN.

April 6, 1891. MITCHELL, J. The action of the Court below in opening the judgment was irregular, inasmuch as it appears to have been done without evidence. There was a petition setting out certain facts, on which petitioners asked to have the judgment opened, to which the plaintiff filed an answer, denying some of the facts alleged, and demanding proof of the others. No depositions appear to have been taken, nor any other evidence presented, so far as the record discloses, and the arguments seem to concede that the Court acted on the petition and answer alone. It may be that this was done by general consent, but if so, the fact does not appear on the record. We notice the matter so as to avoid any implication of approval of such

a course, unless by consent. The discretion of courts to open judgments is very extensive but it must rest on a foundation of competent evidence.

But a much deeper objection is that the Court was without jurisdiction in the proceeding. There was no one before it asking for its action who had any standing. Neither plaintiff nor defendant desired the judgment opened, and the Court had no right to do it on motion of a stranger, not alleging fraud or collusion. True, the petitioners were creditors of the decedent's estate, and the judgment tended to diminish the fund for their payment. But this of itself gave them no right to interfere. It has long been settled that a judgment can only be attacked by creditors or other strangers for fraud or collusion, and as already said neither is alleged in the present case. The fact of there being a fund in the Orphans' Court which will be affected by the present judgment does not alter the general rule. Mere diminution of the fund gives no standing in that Court more than in any other. See Fidelity Company's Appeal, Law's Estate, opinion filed at present term. [Next case.]

The learned counsel for the appellees, seeing the pinch of the case upon this point, have argued that it was a fraud in law for the executrix to confess the judgment. But this contention is not tenable. A debt barred by the Statute of Limitations is still a debt though the remedy upon it be suspended or gone. Its force as an existing obligation, even though only moral, is such that a promise to pay is binding without other consideration. And the debtor may make such promise without regard to its effect upon other parties even though creditors. In Clark v. Douglass (62 Pa. 408), this Court through SHARSWOOD, J., said that it was now fortunately well settled that creditors have no right to impeach a judgment on any other ground than collusion, and in Meckley's Appeal (102 Pa. 542), it was held that a judgment honestly confessed to a wife by an insolvent was good against creditors. If not for more than was due, it was not fraudulent either in fact or in law though there had been no agreement for interest on the money advanced by the wife, and such interest had been included in the judgment. In Keen v. Kleckner (42 Pa. 529), it was expressly held that a debtor, even though insolvent, was not bound to interpose the defence of the Statute of Limitations (or the Statute of Frauds) and might confess judgment for a claim so barred, if the claim were honest, even though other creditors were defeated thereby. See, also, Brown's Appeal (86 Pa. 524), and the analogous case of the defence of usury in Titusville Bank's Appeal (96 Id. 460).

These cases establish beyond controversy that if Ninian Irwin, the debtor, had been alive

in 1886 he could have confessed this judgment, and no creditor could have impeached it as a fraud in law. It is equally well settled that his executrix stands so far in his shoes that, if satisfied the claim is honest, she is not bound to plead the Statute of Limitations. As there was no other defence, it follows that her confession of judgment was a prudent and proper course. She was doing no more than the testator might lawfully have done had he been alive. The debt was a moral obligation which either the debtor, or his executrix acting in his place after his death, could convert into a legal one, and creditors have no more standing to complain in the one case than in the other.

It is true that in *Lewis v. Rogers* (16 Pa. 21), GIBSON, C. J., says, "Nor will I say that if he (the debtor) were to refuse to move for the benefit of his creditors, they would not be permitted to move in his name," but he was speaking of fraud, as the next sentence shows. "An insolvent man is not suffered to give away his property by means of a judgment which, though proper at first, has become a security for less than the amount of it," and his remark referred more to the form of the creditor's proceeding than to his right, *i. e.*, an attack on the judgment directly in the debtor's name, and not collaterally in his own. So also, Justice SHARSWOOD's remarks in *Clark v. Douglass* (62 Pa. 408, 415-6), that the creditors of an insolvent could, even against a judgment, set up anything that the debtor could, had reference to fraud, as is apparent from the context, and from the facts of the case he had in hand. Even as *dicta* these remarks were not intended to trench in any way on the settled rule, expressly reiterated in both those cases, that creditors can only interfere for fraud or collusion against them.

This result is not at all affected by the fact that the creditors in the Orphans' Court will have the fund diminished by the judgment. There is nothing in the doctrine of Yorks' Appeal (110 Pa. 69), which is relevant. The right of the executrix to plead the Statute of Limitations in the Orphans' Court was established in that case. She has that right there and here. Creditors have no such right here, and she is not bound to assert hers for their benefit. As already shown, the debtor himself might confess judgment, no matter how much it diminishes the creditor's chance of payment, and his representative stands in this respect in his place.

As these views upon the status of the petitioners are decisive of the case, it is perhaps not necessary to consider the ruling of the Court below on the question of opening the judgment to let in the defence of the Statute of Limitations, but it may be well to do so briefly, to avoid misconstruction. The learned Judge, in

saying that it is no longer matter of dispute that a judgment should be opened for that purpose alone, went a step beyond any of the cases. The most advanced case that we have been referred to, does not decide that the Court *should*, but only that it *may* do so. The plea of the statute, though no longer an object of animadversion, is not yet the object of favor. As a matter of public policy, recognizing that in the ordinary course of business life just debts are pursued with diligence and that witnesses die and papers are lost, the statute is one of repose and protection. But speaking for myself, I cannot regard the statute, unaided by any equitable conditions or circumstances, as other than a dishonest defence, for which alone a judgment should never be opened. But however that may be, as a matter of discretion with the Court in each case as it arises, no case certainly has been brought to our attention in which a judgment has been opened for this purpose only for a defendant who has had his day in Court. The cases specially relied on by the Court below and by appellees, *Herman v. Rinker* (106 Pa. 121); *Sossong v. Rosar* (112 Id. 197), and *Ellinger's Appeal* (114 Id. 505), were judgments entered on warrants of attorney, fourteen, ten, and eleven years old respectively, and in all of them there were other circumstances besides the mere lapse of time set out as grounds of the application. But the action of the Court was based, as is very clearly set out by our brother GREEN in *Sossong v. Rosar*, on the fact that the defendant had had no hearing. If, on a suit in the usual course, the defendant comes in and confesses judgment, he could hardly be heard afterwards to say the debt was barred by the statute. He has made an acknowledgment of record that the debt is due and that he will pay it. As already shown, what the debtor might have done his executrix may do in his place, and even if she had thereafter asked for the opening of the judgment, it could not have been granted without some equitable grounds to aid it.

It is unnecessary to consider the offers of evidence at the trial.

Judgment reversed, order opening original judgment rescinded, and that judgment reinstated.

IRWIN'S ESTATE.

April 6, 1891. MITCHELL, J. The reversal of the judgment in *Woods v. Irwin*, July Term, 1890, No. 100, filed herewith, requires the reversal of this also. Appellants' judgment in the Common Pleas being reinstated, must take its share of the fund in the Orphans' Court.

Decree reversed, and procedendo awarded.
[See next case.]

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January 29, 1891.

Law's Estate.

Decedents' estates—Deceased executor's account as filed by his executor—Who may contest—Creditors of deceased executor no standing to contest—Competency of witnesses—Act of May 23, 1887—Husband and wife—Interested parties—Declarations admissible in preparing account of deceased executor.

Only legatees, distributees, and creditors of a decedent have any standing to contest the account of the executor or administrator.

Creditors of a deceased executor, alleged to be insolvent, have no standing to contest his account of his testator's estate, as filed by his executor since his death, the allegation being that the deceased executor never received the sums stated in the debit side of the account.

The mere fact that a person is collaterally affected by the decree does not entitle him to become a party to a judicial proceeding or to a hearing. He can afterward attack the decree for fraud or collusion.

Appeal of the Fidelity Insurance, Trust, and Safe Deposit Company, trustee of Annie Connor, from the decree of the Orphans' Court of Philadelphia County, dismissing appellant's exceptions to the adjudication upon the first and final account of Philip H. Law, executor of Sallie H. Law, deceased, as stated by his executor, David E. Dallam.

Sallie H. Law died October 1, 1886, leaving her residuary estate to her three children, Philip H. Law, Mrs. Murdock, and Mrs. David E. Dallam, and appointing her son, Philip H. Law, her executor. The latter died in May, 1888, insolvent, having filed no inventory or account of his mother's estate, and leaving a will in which David E. Dallam was named as executor. Philip H. Law left his accounts in a state of great confusion and uncertainty, and his executor, Mr. Dallam, made up his account as executor of Mrs. Law's estate, charging Philip H. Law with the amount of the estate, \$63,122.38, according to the best information obtainable, and crediting him with all payments which he had made as far as could be discovered, leaving a balance of \$12,490.63, to be equally divided between Mrs. Dallam and Mrs. Murdock.

At the audit of this account, before PENROSE, J., Philip H. Law's creditors, among whom was the appellant, claimed that inasmuch as any balance found by the adjudication to be in Philip H. Law's hands would give to the two distributees a claim against his estate, they as creditors of the insolvent were also indirectly interested in the adjudication, though having no direct claim in any capacity in Sallie H. Law's estate. Philip H. Law's creditors insisted upon proof being produced that Mr. Law actually received the \$63,122.38 with which he was charged, on the

ground that their dividend from his insolvent estate would be diminished if any balance except \$44,924.49 of ear-marked securities should be charged against Mr. Law as belonging to Sallie H. Law's estate.

The Auditing Judge was of the opinion that an executor need not prove the debit side of an account stated by him, even if personally interested and the right of creditors thereby affected, but nevertheless called upon Mr. Dallam to explain the method by which he had made up the debit side of his account.

Mr. Dallam, whose competency was objected to by counsel for the creditors of Mr. Law, then stated, in explanation of the account, that though he had not got the amount of the debit side of the account from any inventory filed by Philip H. Law or any books or memoranda, he had heard Sallie H. Law assert in the presence of Philip H. Law, who did not dissent, that in the inventory of John Kelty Law's estate, filed by her and Philip H. Law twenty-two years prior, the estate was estimated at \$62,171.34; that Sallie H. Law in her will stated the whole of it had been transferred to her; and that she often asserted in Philip H. Law's presence, who did not dissent, that her estate was in the possession of Philip H. Law as her agent.

Mr. Dallam stated further that Mr. Law prior to his death admitted to him that the estate of Sallie H. Law was worth between \$54,000 and \$55,000, and that the share of each of the three residuary legatees would be about \$18,000, and offered in evidence the affidavit made by Philip H. Law before the register of wills when he applied for letters testamentary upon the estate of Sallie H. Law, which placed the value of the estate between "\$40,000 and \$50,000." This was the extent of the evidence offered to support the account.

The creditors of Mr. Law objected to the admissibility of declarations made by Sallie H. Law as to the value of her estate in the presence of one who subsequently became her executor, and further objected to the admissibility and materiality of the affidavit made before the register of wills.

All these objections were overruled, and Mr. Dallam was then allowed to correct his account by substituting for the existing debits a debit of \$54,000, the amount Philip H. Law was alleged to have admitted to have received, and leaving a balance of \$4932.55 alleged to be still due to Mrs. Dallam and Mrs. Murdock, for which no securities can be found. This account, as corrected, was confirmed. Whereupon the creditors of Philip H. Law filed the following exceptions:—

The Auditing Judge erred—

(1) In holding that the testimony of David

E. Dallam was admissible to prove the debit side of the account.

(2) In holding that David E. Dallam was a competent witness to sustain the charges against the estate of Philip H. Law, notwithstanding that the wife of Mr. Dallam was directly interested in the establishment of such a charge.

(3) In admitting in evidence the declarations of Sallie H. Law, made before her death.

(4) In admitting in evidence the affidavit made by Mr. Law in his application for letters testamentary in which he states that the estate of Sallie H. Law amounts to between forty and fifty thousand dollars.

(5) In admitting in evidence the statements of Mr. Law to Mr. Dallam with reference to the value of Sallie H. Law's estate.

(6) In finding that the evidence was sufficient to prove the debt of \$54,000 in the account.

(7) In finding a balance due to the estate of Sallie H. Law by Philip H. Law, her executor, of \$4,932.55.

(8) In finding that the deficiency of \$4,932.55 is provable as a debt against the estate of Philip H. Law.

These exceptions were dismissed, and the adjudication confirmed by the Court in banc, PENROSE, J., filing the following opinion:—

"It is by no means clear that the exceptants have any status in this proceeding. They are not interested in the estate of decedent, either as legatees, distributees, or creditors. Nor are they even assignees of legatees or distributees. And it is well settled in a proceeding for distribution in the Orphans' Court no one can claim but through the decedent as creditor, legatee, or next of kin. (McBride's Appeal, 72 Pa. 480; Braman's Appeal, 89 Id. 78; Appeal of Winton, 111 Id. 387.)

"The present proceeding is to settle the account of a deceased executor, filed by his executor, and is simply to ascertain the amount due the estate by the deceased executor at the time of his death. Claims by creditors of the decedent cannot be adjudicated and awarded, the reason being any balance found due by the deceased executor, unless ear-marked, is but a debt due from his individual estate, and must be awarded to an administrator d. b. n. of the original decedent, upon the filing and settlement of whose account the claims of creditors will be heard and disposed of.

"The exceptants are creditors of the deceased executor; and while it may be conceded that creditors of the decedent, and legatees or next of kin, may be allowed to intervene on the grounds of interest, and that it is necessary and proper for their protection, it is difficult to comprehend upon what principle separate creditors of the executor can likewise be permitted to intervene.

"The former have a right to inquire into the management and disposition of the estate by the deceased executor, and to have the amount due by him and payable to the administrator d. b. n. properly and accurately ascertained. But creditors of the deceased executor have no corresponding right. They are not interested in the amount to be awarded to the administrator d. b. n. That is for the payment of debts, legacies, or distributive shares of the estate of the original decedent, with which they have no concern.

"But it is contended that, as the estate of the deceased executor is insolvent, the administrator d. b. n. occupies the position of an unpreferred creditor, and other creditors of the executor have also the right, for the protection of their own interests, to demand that the deceased executor should not be found indebted to his decedent's estate in a larger amount than shown to have been actually received by him, after the deduction of proper allowances.

"We, however, cannot accede to the correctness of this view. It presupposes the insolvency of the deceased executor, and this cannot be determined until the settlement of his estate nor prior to the filing and settlement by his executor of the account which in his lifetime he should have filed. *Non constat*, the deceased executor will be found solvent. If so, all his creditors, including the administrator d. b. n., will be paid in full; and the delay and embarrassment caused by the objections and inquiries interjected into a statement and settlement of the account of the deceased executor by parties having no interest in the inquiry will be shown to be futile and needless.

"The practice thus sought to be introduced is without precedent, can only be productive of mischief and delay, and should not be recognized. For these reasons the claim of the exceptants might well have been disregarded.

"It seems, however, that the objection to their right to be heard, while made, was not insisted upon; and the result of the examination into the correctness of the account is the question now presented, namely, whether the executor of the deceased executor, his wife being the administratrix d. b. n. of the original testator and interested in her estate, is competent to state the account of his deceased executor from declarations made to him by his testator in his lifetime, and declarations made by the original testatrix to her son, the deceased executor, in the presence of the so-called accountant. It was earnestly argued that he is incompetent, because an incompetent witness, and therefore cannot bind the estate of his testator, by reason of the interest of his wife in the estate of the original testator, of which she is administratrix, as before stated, and to whom any indebtedness

of the deceased executor to that estate must be awarded.

"While it cannot be doubted that the so-called accountant, the present executor, would not be a competent witness in support of a claim by his wife as a creditor against the estate either of the original testatrix or of the deceased executor (*Bitner v. Boone*, 128 Pa. 567; *Daisz's Appeal*, Id. 572), yet that is not the question now before us; and the position of the accountant is wholly misconceived. [He is not to be considered as a witness, and his competency as such is not involved."] (Part of tenth assignment of error.)

"On the other hand, as the executor of his testator, he is performing a duty in stating the account which not alone the law casts upon him, but which can be required of him by the parties interested, and no other person can perform unless he avers his utter lack of information and ability for its performance. (*Whitehead's Estate*, 3 WEEKLY NOTES, 475; *Stewart's Estate*, Id. 476; S. C., 6 Id. 434; *Bowman v. Executors of Herr*, 1 P. & W. 282; Act of March 29, 1832, P. D. 1283, pl. 37.)

"It is therefore incumbent upon him to state the account of his testator from all the material in his possession, and the facts within his own knowledge; and it would be strange if he were not permitted to charge his testator with the amount of the assets received by him from statements and declarations made by him. These, of course, would not be evidence to discharge the deceased executor, nor preclude the parties interested from surcharging him with other assets received; but they are sufficient to charge him as debtor to the estate.

"In this case the declarations and admissions of the deceased executor, and the declarations of his mother, made to him in the presence of the so-called accountant, furnish the best evidence upon which to frame his account; and, if rejected, the parties interested in the estate of the original testatrix are remediless.

"But we think they properly formed the basis of the account, and irrespective of the fact that the wife of the accountant so-called is interested in the sum eventually found due to an estate in which she is also interested. It is not to be overlooked that the account is not that of the executor personally, but of his deceased executor, and all the former is required in the first instance to do is to prove the correctness of the payments made by his deceased executor by means of vouchers or oral testimony. [The amount with which the deceased executor is charged is presumed to be correct. The onus of disproving its correctness or adding a surcharge being upon those who allege errors or claim to surcharge. This is everyday practice.

And it is utterly unknown that an accountant is required to prove the correctness of the debit side of his account until it has first been attacked. Thus it is with the present account. It is to be treated as if filed by the deceased executor in his lifetime, whereby he admits his liability for the amount stated therein."] (Ninth assignment of error.)

"But we are willing to concede the case would be different had the present executor alleged his inability to prepare the account, and the Court, under the provisions of the Act of Assembly, appointed an Auditor to settle the account. If that practice had been adopted, and if the executor had been called as a witness on behalf of his wife, he would be incompetent to testify as to declarations of his testator, or acts tending to show his liability in order to enable the Auditor to state the account.

"But in a distribution of the Orphans' Court each creditor or claimant is independent of every other, and therefore, while himself incompetent to prove his own claim, yet he may call an adverse interested party who is competent, because he is a witness against his interest; or may call as a witness in his behalf another claimant, who, although interested, has no interest in the claim in whose support he may be called to testify. And upon the same principle both the executor and his wife would be competent witnesses on behalf of the creditor or other claimant against the estate of this testatrix before the Auditor, if disinterested in that particular claim, and could testify as to the admissions and declarations of the deceased executor, even though the effect would be to create a fund in which they may ultimately be interested. And for the reason that in sustaining a claim against the original testatrix, in which they had no interest, they would be testifying to their prejudice—that is, thereby reducing the fund in which they were interested.

"This may also be said to be in accord with settled and familiar practice, and, moreover, with the express provisions of the Act of May 23, 1887 (Purd. 2199, pl. 15).

"We therefore conclude that [the executor is not to be considered as a witness competent or incompetent on the ground of interest, but in stating the account as performing an official act and duty imposed upon him by law."] (Part of tenth assignment of error.)

"Little more need be added. As was said with reference to the Act of 1869 and supplemental statutes, we think the Act of 1887 was intended 'to be liberally construed in favor of competency, but not so as to embrace actions or persons expressly excepted.' (*TRUNKEV, J.*, in *Hess v. Gourley*, 89 Pa. 195.)

"And furthermore, the executor has no direct

interest in the controversy, and it is immaterial to him whether the sum found due by his testator be great or small. Should the estate of his deceased executor prove solvent, no one will have reason to complain, as before suggested; but if, as appears to be the case, it result in insolvency, the possibility of an interest in the executor is too remote to disqualify him. (Scully v. Mason, 43 Pa. 99; Hatch v. Bartle, 45 Id. 166.)

["The declarations of testatrix to the deceased executor, his affidavit before the register as to the probable value of the estate, together with his admissions to the present executor, were properly admitted in evidence."] (Thirteenth assignment of error.)

"The exceptions are dismissed, and adjudication confirmed."

Whereupon the Fidelity Insurance, Trust and Safe Deposit Company, trustee of Annie Connor, took this appeal, assigning as error (1-8) the dismissal of the above exceptions, (9, 10 and 13) the portions of the above opinion inclosed in brackets, and—

(11) The Court below erred in holding that: "The insolvency of the deceased executor cannot be determined until the settlement of his estate, nor prior to the filing and settlement by his executor of the account which in his lifetime he should have filed. *Non constat* the deceased executor will be found solvent," notwithstanding that the Auditing Judge has found as a fact that Philip H. Law died insolvent, and notwithstanding also that Philip H. Law's insolvency had already been judicially determined upon the adjudication of the account of D. E. Dallam, executor of Philip H. Law.

(12) The Court below erred in holding that: "The executor has no direct interest in the controversy, and it is immaterial to him whether the sum found due by his testator is great or small," notwithstanding that the wife of the executor is entitled, as administratrix d. b. n., to the whole of the sum so found due, and as residuary legatee is entitled to one-half of it absolutely.

(14) The entry of the decree.

Henry La Barre Jayne (Arthur Biddle and George W. Biddle with him), for the appellant.

The debit side of a decedent's account, as stated by his executor, is an admission against his decedent's interest, and therefore governed by the same principles of law as other admissions made by an executor. An admission by an executor of a debt in which he is not personally interested, and which upon reasonable grounds and without objections he believes to be due, is *prima facie* evidence of the validity of the claim. But the admission by an executor of a debt in which he is personally interested, or which he cannot upon reasonable grounds believe to be true, is not *prima facie* evidence of the validity

of the claim. It must be established by independent evidence.

Ritter's Appeal, 23 Pa. 95.
Lehn v. Lehn, 9 S. & R. 58.
Woerner's Am. Adm., § 398.

Even where the admission of an executor is sufficient to charge the estate of the decedent with a simple liability, it is not sufficient to charge it with a *devastavit*.

Woerner's Am. Adm., § 534.
Orr's Appeal, 7 WEEKLY NOTES, 126.
Pots v. Smith, 3 Rawle, 361.
Milligan's Appeal, 97 Pa. 527.
Dougherty's Estate, 38 Leg. Int. 214.

The ordinary power of an executor to make an admission binding upon his decedent's estate ceases when that estate is insolvent.

Kittera's Estate, 17 Pa. 423.
James's Appeal, 89 Id. 56.
Michael's Estate, 5 Pa. C. C. Rep. 321.
Woerner's Am. Adm., § 405.

The only evidence, independently of the admission of the executor, is the testimony of an incompetent witness to inadmissible declarations, and an affidavit which is both inadmissible and insufficient.

The executor of an insolvent and deceased executor is not competent as a witness to prove the debit side of the account stated by him in the deceased executor's behalf, when his wife is entitled to one half of whatever balance is found due from the deceased executor to the estate of which he was executor.

Mylin's Appeal, 7 Watts, 64.
Woerner's Am. Adm., § 398.

Declarations made by the original testatrix, before her death in the presence of the deceased executor, are not admissible to charge the deceased executor with the value she placed upon her estate.

Woerner's Am. Adm., § 381.
Williams on Ex'rs, 6 Am. Ed., p. 1970.
Greenleaf on Evid., 14 Ed., § 199, 200.
Sandford v. Decamp, 8 Watts, 542.
Colt v. Selden, 5 Id. 525.

The affidavit was inadmissible.

Williams on Ex'rs., *supra*.

Frank P. Prichard (with him George Peirce), for the executor, and M. Hampton Todd, for the residuary legatees, appellees.

Appellant has no standing in the estate of Sallie H. Law, deceased, having no direct interest in the estate, and its indirect interest in the adjudication being adverse to the estate. It has no right entitling it to a hearing in the Court below, or to take the present appeal.

In an adjudication of the account of an executor the debit side is merely a statement of what he admits he has received, and it is not necessary to prove it.

The fact that an executor's wife is interested in the estate does not render him incompetent as a witness for the other legatees, if they wish to establish by him the condition of the estate.

March 9, 1891. *PER CURIAM*. The able and ingenious argument of the learned counsel for the appellants has failed to satisfy us that this decree should be reversed. His main difficulty is that the clients whom he represents are neither legatees, distributees, nor creditors of Sallie H. Law's estate, the account of whose executor was before the Court below. That they have no standing, therefore, to contest the account is a principle so well settled that a discussion of the authorities is unnecessary. It is sufficient to refer to McBride's Appeal (72 Pa. 480); Braman's Appeal (89 Id. 78); Winton's Appeal (111 Id. 389); High's Estate (136 Id. 222). It may be, as contended by the appellants, that they will be collaterally affected by the decree in this estate, but there is no rule of law which entitles a person to be heard in or become a party to a judicial proceeding for such a reason. Nor are the appellants wholly without remedy. As they are not parties to the distribution of Sallie H. Law's estate, they may not be bound by the decree therein, provided they can show hereafter that said decree was procured by fraud or collusion. And slight evidence might perhaps be sufficient, in view of the administrator's position, to shift the burden of proof. We express no opinion upon the merits of the case.

The decree is affirmed, and the appeal dismissed at the cost of the appellant.

A. R. H.

[See preceding case.]

Common Pleas.

C. P. No. 4. June 10, 1891.
Peirce et al. v. Hubbard et al.

Devise—Rule in Shelley's Case—Life estate.

A. devised to his daughter certain realty, and when sold the amount of the sale, "that is the rights of C. [the daughter], I desire to be converted in mortgages, ground-rents, real estate, the interest to be regularly paid to her, free from the control of her husband; and in case of her death without issue or issues of her children then reversible to my right consanguineous heirs."

Held, that the daughter took a life estate only.

The Rule in Shelley's Case analyzed.

Sur rule for new trial.

Ejectment. On the trial it appeared that both parties claimed through one Joseph Martin du Colombier, a native of St. Domingo, who died in Philadelphia in 1846, leaving a will containing, *inter alia*, the following clauses:—

III. . . . I bequeath to my daughter, Caroline McKays (Thomas), in trust for her sole and separate benefit during her lifetime, not liable to the debts or engagements of her husband, Thomas McKays, reversible after her death to her children, if any surviving, or issue of such children, and in case of no children or issue of children to return to my relations and lawful heirs the below mentioned property, that's a house, store, and ground, Fourth St., 272.

IV. . . . My store in Market St., No. 129 [the premises in suit], is in debt for a loan to the N. L. bank of \$2300 from the 3d of December, 1844, to be paid in five payments every three months. The annuity payable to my wife [charged on premises] quarterly, see above. Taxes, repairs paid, the surplus of the rent to be divided in three equal portions, one to Prosper Martin, Sr., one to Joseph M. Fourestier, one to Caroline McKay. I wish this property should not be disposed of during the lease to Tingley & Burton & Co. See the postscriptum.

Postscriptum: And when sold the third of the amount of the sale, that is the rights of Caroline McKay, I desire it to be invested in mortgages, ground-rents, real estates, the interest to be regularly paid to her, Caroline McKay, free from control, liabilities and debts of her husband, her receipts notwithstanding her coverture to be good and valid. And in case of her death, without issue or issues, of her children, then reversible to my right consanguineous heirs.

The heirs of the testator at his death were his son, Prosper Martin, Sr., his daughter, Mrs. Caroline McKee, and of his grandson, Joseph M. Fourestier, a son of a deceased daughter of the testator.

Prosper Martin, Sr., died in 1851, leaving two children, Prosper D. Martin and Mrs. Josephine D. Dallett, to whom descended his third of the premises.

Fourestier died in 1880, and the third of the premises in suit, of which he died seised, passed by his will and a deed of the plaintiffs' testatrix to Prosper D. Martin and Mrs. Dallett.

Mrs. McKee died November 9, 1889, having had issue, a daughter, who predeceased her mother, leaving no issue. By her will, Mrs. McKee, after some specific bequests, devised the residue of her estate to Elijah Dallett and George Peirce, Esq., the plaintiffs, upon certain trusts, so that whatever estate Mrs. McKee had in the premises at the time of her death, passed to these trustees.

The writ and return of service having been given in evidence the plaintiff closed. The defence offered no testimony, and ARNOLD, J., directed a verdict for the defendants.

Henry Budd, for the rule.

Two views may be taken of Mr. Martin's will: (1) That both the will and postscriptum are efficient and create a limitation of the Market Street store. (2) That the postscriptum was intended to operate only upon a contingency.

(1) The body of the will gives a fee to Mrs. McKee. The matters in this postscriptum requiring attention are—

(a) The provision for a remainder on the death of Mrs. McKee without "issue or issues of her

children." This considered by itself would give an estate tail. "Issue" is primarily a word of limitation, and there is here nothing in the instrument showing that a definite failure of issue was intended.

Haldeman v. Haldeman, 40 Pa. 29.

Lawrence v. Lawrence, 105 Id. 335.

Carroll v. Burns, 108 Id. 386.

Reinoehl v. Shirk, 119 Id. 108.

Cochran v. Cochran, 127 Id. 486.

(b) The devise over "reversible to my consanguineal heirs." This may either enlarge the estate tail or it may not. Take the latter alternative first. We then have at the death of the testator an estate tail in one-third of the store in Mrs. McKee, with a vested remainder in fee therein in Mrs. McKee, Mr. Martin, Sr., and Mr. Fouestier. The effect of this is that the plaintiffs are entitled to recover one-third of the fee of this third in which the estate tail was created, *i. e.*, one-ninth of the store; but further, Mr. Fouestier died before Mrs. McKee, and his share of the remainder passed to Mrs. McKee and the heirs of her brother, consequently Mrs. McKee died seised of the fee of one-sixth of the store, and this the plaintiffs may recover. Take now the former alternative, it is worthy of note that the devise in art. 3 of the will, which is not nearly so strong as that in art. 4, was held by the Supreme Court in McKee v. McKinley (33 Pa. 92) to give a fee; and while a part of the opinion in that case has been criticised, yet the part which, granting a tail to have been given by the first limitation, holds the tail to have been enlarged to a fee, by the subsequent limitation, has not been attacked. Now whatever doubt may be cast on McKee v. McKinley as to the creation of an estate tail does not affect this case, for in the clause now before the Court the testator has used technical terms of limitation, and there is nothing to show that the words are to be taken as words of purchase. Our position is, therefore, that the devise over to "my consanguineal heirs" gave to Mrs. McKee a fee.

If the body of persons described in the will constitute *in fact* the heirs of the life-tenant and represent only a *line of descent* and not specifically designated persons, the devise for life becomes the stock of descent and by analogy to the Rule in Shelley's Case takes the inheritance.

Yarnall's Appeal, 70 Pa. 335.

Here the persons designated as remaindermen in fee are the same who would take as heirs to Mrs. McKee, were a fee given her in the first place, and they are mentioned as a class, a line of descent, not as individuals or by name. This becomes plainer when force is given to the word "consanguineal." What persons does the "con" connect? Manifestly the testator and Mrs. McKee. "Heirs" by itself would have sufficiently designated a descent from the testa-

tor. The designation of that class was held sufficient in McKee v. McKinley to give the first taker a fee, and here it is strengthened by the use of a word which, if it mean anything, must mean the testator's heirs of the same blood as that of the first taker, and these of necessity must be the same persons as the right heirs of the first taker; hence there is a limitation over in fee to the heirs of the first taker after an estate-tail, hence a fee in the first taker.

The cases in which the devise over is held to create an estate by purchase and not to be a limitation are when the word "children" has been used.

Guthrie's Appeal, 37 Pa. 9.

Daley v. Koons, 90 Id. 246.

Oyster v. Oyster, 100 Id. 538.

Affolter v. May, 115 Id. 54.

Mast & Morris's Appeal, 2 WEEKLY NOTES, 404.

Where the devise over has been to persons *nominatim*.

Hill v. Hill 74 Pa. 173.

Hope v. Rusha, 88 Id. 127.

Bassett v. Hawk, 118 Id. 94.

Where there has been a devise over to persons *in esse*.

Taylor v. Taylor, 63 Pa. 481.

When the will has annexed to the estate in remainder qualifications other than those attached by the common law, as in Robins v. Quinliven (79 Pa. 333), the effect of which case has been, it is to be noted, restricted by Carroll v. Burns (*supra*). See also as bearing on the question of limitation:—

Crisswell's Appeal, 41 Pa. 288.

Price v. Taylor, 28 Id. 95.

Huber's Appeal, 80 Id. 356.

Barnett's Appeal, 104 Id. 342.

The last reported case upon this subject, Shalters v. Ladd (28 WEEKLY NOTES, 33), is distinguishable from this case, as in that case there was a clause by which the testator explained the meaning of the devising clause, and this explanation weighed with the Court. See the opinion of CLARK, J., on page 36.

(2) The will is also susceptible of another interpretation, to wit: The postscriptum depends for its operation upon a contingency which has not yet occurred and which by its terms is limited to occur in the lifetime of Mrs. McKee. This is supported by the following considerations:—

(a) The provision contained in the postscriptum is to take effect on the sale of the store, and the sale has never taken place; prior to such sale there is no devise in trust of the realty, there is no restriction as to the enjoyment of the fee and no reduction of the estate devised, before that time. The rents are given to Mrs. McKee directly; the devise to her is by the same words as the devises to the other devisees.

(b) The postscriptum cannot be complied with except by a sale in the lifetime of Mrs. McKee;

for how else can there be paid to her the interest free from control, etc.?

(c) The real object of the testator was to protect his daughter's property from marital control. He recognized the fact that the devisees might sell the store and Mrs. McKee's realty be thus converted into personalty. As the law stood at the date of the will, the husband could then make that personalty his own by reduction to possession; but he could not so deal with realty. The testator, therefore, wished to guard his daughter against this increased power and control which, on a sale, would accrue to the husband, and therefore provided against the possible consequences of a sale. The occasion for such protection has not however arisen. Mrs. McKee survived her husband and no sale has been made; there is nothing therefore to bring the postscriptum into operation and the fee given by the body of the will remains unaffected.

It may further be suggested that as the postscriptum only disposes of the proceeds of the sale, it is a limitation of personalty, a conversion having been worked by the sale, and therefore the words which would create an estate tail in realty give an absolute estate in personalty and the limitation over is void.

Nathan H. Sharpless, contra.

By the clause in the will proper Mrs. McKee would take a life estate only. By the postscriptum down to the word "children" without more an estate tail might be implied, but taking the whole together there is an executory devise over to the consanguineous heirs existing at the termination of Caroline McKee's estate for life "without issue or issues of her children" then living.

There is no expression in the devise to indicate that the words "issue," etc., are used as words of limitation. Quite the reverse, as is shown by (1) the inchoate trust for Caroline McKee for life only; (2) the devise over upon her death "without issue or issues of her children;" (3) the word "then." All these circumstances seem to fix absolutely that the failure of issue referred to is at the death of the first taker.

The authorities are very clear that Mrs. McKee took an estate for life only.

Curtis v. Longstreth, 44 Pa. 297.

Fetrow's Estate, 58 Id. 424.

Daley v. Koons, 90 Id. 246.

Hackney v. Tracy, 26 WEEKLY NOTES, 464.

Reiff's Appeal, 124 Pa. 145.

Shallers v. Ladd, 28 WEEKLY NOTES, 33.

McKee v. McKinley (33 Pa. 92) is repudiated as authority by STRONG, J., in Guthrie's Appeal (37 Pa. at pp. 16 and 22; and see also the remarks of WOODWARD, J., on p. 23 of the same case). C. A. V.

June 28, 1891. ARNOLD, J. Perhaps there is no rule of law more just and reasonable than

the Rule in Shelley's Case, when it is confined to cases in which the facts are the same as in that case; and yet there is no rule which has done more injustice and received more condemnation, because of the injury it has accomplished in the majority of the cases in which it has been applied. So great was the antipathy to it in some States that it has been abolished out and out in those States, while in others it has been restricted so that it does not apply to devises and gifts. Massachusetts led off in 1791, and was followed by New Jersey, New York, Ohio, and many other of the great States of the Union, which are enumerated by Mr. Gross in his brochure on the Rule in Shelley's Case in Pennsylvania, published in 1877 by order of the State Senate. A determined effort was made to abolish or restrict it in this State at that time, and occasional efforts have been made since, but without success, an inertia, misalled conservatism, to the discredit of that good word, having prevented such a wise measure of justice from being imbedded in our law.

When applied to facts like those in Shelley's Case, it is a wise and sensible rule, because it carries out the intention of the parties, as an analysis of those facts will show. Shelley held land in special tail, which he desired to convert into a tail male, and he resorted to the device prevalent in his day, of suffering a common recovery to be had. But, before the recovery was suffered, he had a deed prepared to lead the use of the recovery, which was to Shelley for the term of his life, and after his decease to the use of a Mr. Caril and others for twenty-four years, and after the said twenty-four years ended, then to the use of the heirs male of Shelley, and so on in tail male. It was in the course of the report of that case that it was said, in the argument of counsel, "it is a rule in law, when the ancestor by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately to his heirs in fee or in tail, that always in such cases the heirs are words of limitation of the estate and not words of purchase." This does not appear to have been a request for an enunciation of new law, but simply a citation of previous decisions in the year books, as appears by the report in 1 Coke, on page 204. Indeed, an estate to a man and his heirs is the definition of a fee simple; while an estate to a man and the heirs of his body or issue is an estate tail. The words for life, sometimes used, are merely descriptive of the only personal enjoyment the first taker can have in the land, except the later developed the right of alienation or devise of a fee simple, which is its chief incident at this day, and the right to convert the estate tail into a fee simple, with all the incidents thereof.

The use of words to carry a fee by a deed of bargain and sale, should be dispensed with by statute, as it has been in many of the States, and is sometimes by construction or reference to other deeds by the Supreme Court of this State, as may be seen in the cases of *Freyvogel v. Hughes* (56 Pa. 228, A. D. 1868), and *Lemon v. Graham* (131 Id. 447, A. D. 1890), in both of which the County Courts were reversed for adhering too closely to the strict rule of law. In a grant to a corporation, words indicating a grant in fee are not indispensable, although it is usual to add the words successors or assigns; but there is no necessity to add them (*Wilkes-Barre v. The Wyoming Historical Society*, 134 Pa. 616, A. D. 1890), and yet a corporation may die or be dissolved. However, there is ancient authority for all these decisions to be found in 4 Cruise, Title 32, Ch. 22, secs. 6-9. Every deed should convey the whole estate of the grantor, unless there are words in the grant which show that a less estate was intended to be conveyed. If such were the law we would hear fewer complaints of the wrongs done by the Rule in *Shelley's Case*.

When applied to conveyances in which the purchaser is buying an estate in fee simple, or a deed in which the donor intended to give such an estate, the rule works no injustice. On the contrary, it carries out the intention of the parties; but when it is applied to wills and deeds, in which the intention was to devise or give a life estate only, it becomes the means of defeating the intention and depriving remaindermen of their estate. Chief Justice GIBSON said in *Hileman v. Bouslaugh* (13 Pa. 344, A. D. 1850), that the rule subverts a particular intention in, perhaps, every instance, and cited *Roe v. Bedford* (4 Maule & Selwyn, 362), to show that it is proof against even an express declaration that the heirs should take as purchasers. He also said, that "it is significant, that in the eighty-two cases comprised in the analytical tables of Mr. Hayes (on Dispositions of Real Estate, in the 7th volume of the Law Library), Shelley's alone, was on a deed. . . . Since then, the present is the only one in England or America, except *Baughman v. Baughman* (2 Yeates, 410, A. D. 1798), which has come before the Court on a conveyance." And yet both those cases, as well as *Auman v. Auman* (21 Pa. 343, A. D. 1853); *Tyler v. Moore* (42 Id. 374, A. D. 1862); *Huss v. Stephens* (51 Id. 282, A. D. 1865), and *Mergenthaler's Appeal*, 15 WEEKLY NOTES, 441, affirming *Schweikert's Estate* (16 Phila. 194), which I have found, were cases of gifts or settlements by parents on their children, by deed instead of by will.

The use of the word gift in the argument in *Shelley's Case* (for it nowhere appears in the judgment) has raised up a brood of cases, in

which it has been decided that if a devise of a remainder be to persons standing in the relation of heirs, general or special, of the tenant for life, the law presumes them to take as heirs, unless it unequivocally appears that individuals other than persons who are to take simply as heirs, are intended. But so rigid were the Courts at one time that unequivocal words were disregarded, declarations of intention were not heeded; now, however, a contrary rule governs and the intention is given effect. Many of the old cases have been overruled by name, others have gone down in the general wreck, without leaving a vestige behind, while others stand as monuments or guides to point out danger. The principle underlying the overruled cases is an instance of what Lord DENMAN, Chief Justice of the Queen's Bench, in the famous case against Daniel O'Connell, and others, in 11th Clark & Fennelly's Reports, on page 372, called law taken for granted: "I am tempted to take this opportunity of observing that a large portion of that legal opinion which has passed current for law, falls within the description of 'law taken for granted.' If a statistical table of legal propositions should be drawn out, and the first column headed 'Law by Statute,' and the second 'Law by Decision,' a third column, under the heading 'Law taken for Granted,' would comprise as much matter as both the others combined. But when, in pursuit of truth, we are obliged to investigate the grounds of the law, it is plain, and has often been proved by recent experience, that the mere statement and restatement of a doctrine—the mere repetition of the *cantilena* of lawyers—cannot make it law, unless it can be traced to some competent authority, and if it be irreconcilable to some clear legal principle." But the storm ran its course, and in due time the law of this State was placed by the Supreme Court on such firm ground, that, so far at least as judicial decision can save the wills of testators from the misuse of the Rule in *Shelley's Case*, they may die in a reasonable hope that their wills will be respected and carried out according to their intention. Further relief must be accomplished by the Legislature, and there is reason to believe that in due time it will be given.

Perhaps, to the ordinary reader, nothing is plainer than that when a testator or donor gives a farm to his son for life, and after his death the remainder is to go to the son's heirs, the testator or donor intended just what he said—that his son should have a life estate only, and that the remainder was intended for the son's children, inaptly called heirs. Yet such is the rigor of the rule of law that, as Mr. Justice SHARSWOOD said in *Doebler's Appeal* (64 Pa. 9, A. D. 1870), it is unbending; it acts inexorably, and it is not competent for a testator to prevent the legal

consequence by any declaration, no matter how plain, of a contrary intention. But words explanatory of his intention, that the issue shall take by purchase will be allowed to control a devise which would otherwise be a fee. (*Shalters v. Ladd*, 28 WEEKLY NOTES, 33, A. D. 1891). This is a new departure and indicates an avenue of escape from the harsh consequences of the rule of law.

When, however, a testator uses other words than heirs or issue, or uses those words in connection with others in such manner as to show that he meant that the remainder shall vest by way of purchase and not by descent, then the rule does not apply, and the first taker has only an estate for life; as, for instance, if he couples the word heirs or issue with children in such manner as to indicate that the remaindermen should take as children, and not as heirs or issue. This was decided in *Guthrie's Appeal* (37 Pa. 9, A. D. 1860); *Chew's Appeal* (in same book, page 23); *Sheets's Estate* (52 Pa. 257, A. D. 1866); *Urich v. Merkel* (81 Id. 332, A. D. 1876); *Urich's Appeal* (86 Id. 386, A. D. 1878); *Livezey's Appeal* (106 Id. 201, A. D. 1884), and other cases.

The controversy in the present case is in an action of ejectment for one-third part of the store property No. 129 Market Street, which was formerly owned by Joseph Martin Duclombier, who died in 1846, after having written his own will, which is, as usual when people write their own wills, fertile with law suits. He devised (!) to his wife "four hundred dollars, payable one hundred dollars quarterly (during) her lifetime & specifically charge this annuity on the rent of my house and store, Market Street, 129, . . . the annuity p'ble to my wife quarterly, see above. Taxes, repairs paid, the surplus of the rent to be divided in three equal portions, one to Prosper Martin, Senior, one to Joseph M. Fourestier, one to Caroline McKey. I wish this property should not be disposed of during the lease to Tingley & Burton & Co. See the Post Scriptum," which is as follows:—

"Store in Market Street. Post-Scriptum. And when sold, the third of the amount of the sale, that is, the rights of Caroline McKey, I desire is to be invested in mortgages, ground rents, real estates, the interest to be regularly paid to her, Caroline McKey, free from controul, liabilities and debts of her husband, her receipts, notwithstanding her coverture, to be good and valid. And in case of her death without issue or issues of her children, then reversible to my right consanguineal heirs."

Prosper Martin, Sr., was a son of the testator; Mr. Fourestier was a grandson, and Mrs. McKey was his daughter. Mrs. McKey died November 9th, 1889, without issue living at her death,

although she had a daughter who died before her. By her will, Mrs. McKey devised the residue of her estate to plaintiffs upon certain trusts. The property No. 129 (now No. 325) Market Street has not been sold, and the defendants were the tenants of Prosper Martin's heirs and Joseph M. Fourestier's devisees.

The plaintiffs claim that Mrs. McKey took an estate tail in one-third of the property under her father's will, while the defendants contend that she took a life estate only. The jury was told that she took a life estate, and a verdict for the defendants was directed.

If she took an estate tail (the devise having taken effect before the Act of April 27, 1855, and never having been barred), the plaintiffs are not entitled to recover, as estates tail are not the subject of devises. The plaintiffs are devisees and not tenants in tail. There has not been twenty-one years' treatment of the estate as a fee simple by the donee and those claiming under her, by grant in form of a conveyance or by judicial sale. Here the treatment is of less than two years' duration, and is by will; so that the Act of May 21, 1874 (P. L. 221), lends no aid to the plaintiffs.

But she did not have an estate tail. All she had was an estate for life with remainder to her issue and their children, if she left any. Her estate was a separate use trust, now no longer necessary. Had she left children or their issue, they would have taken the remainder as purchasers, but as she left no children or issue, the remainder "reverted" to the "right consanguineal heirs" of the testator, and the plaintiffs are not of that class of persons.

No support can be derived from the case of *McKee v. McKinley* (33 Pa. 92, A. D. 1859), in which Mrs. McKee was held to be possessed of a fee in other property under another clause of the same will. There she executed a deed to bar the entail, and sold the property. The case was presented *ex parte*, and was conducted as a matter of conveyancing. It was decided at the time when the Rule in Shelley's Case was sweeping away inheritances with the fury of a tempest, and it was repudiated (along with *Williams v. Leech*, 28 Pa. 89, and *Nagle's Appeal*, 33 Id. 89), as "not sustainable on authority," in *Guthrie's Appeal* (37 Id. 9, on page 22).

This contention failing, the plaintiffs claim a share—one-third or one-sixth, it is difficult to understand which—through Mrs. McKee, as one of the consanguineal heirs of the testator. It is an old rule, in fact a maxim of the law, that no man can have heirs while he lives, and I suppose it is also true that no man can be heir to himself, or heir through himself of another, although I do not know that the proposition has passed into a maxim, or that the point was ever made and de-

cided. Of course, in matters of personal estate, a fund derivative through a person, but not recoverable until his death, goes to his personal representatives for distribution among his legatees by will or distributees under the intestate law—as, for instance, the amount recovered on a life insurance policy—but that is because the deceased person was an absolute owner. That the law is different in cases of bequests of personal property from those of devises of real estate, in regulating the devolution thereof, is shown in *Sheets's Estate* (52 Pa., on page 268). In bequests of personal estate for life, with remainder to issue, the remaindermen take as purchasers, and such a remainder does not enlarge the estate for life.

In no aspect of the case are the plaintiffs entitled to recover, and therefore the rule for a new trial will be discharged.

Rule discharged.

THAYER, P. J., absent.

C. P. No. 4.

June 9, 1891.

In re Daniel.

Practice—Distribution of business—Rule of Court No. 3—Trustee—A proceeding to remove a trustee and a bill to compel the same trustee to account should properly be heard in the same Court.

The Revs. I. L. Nicholson and Robert Ritchie filed a petition setting forth that they and the Rev. Charles S. Daniel were trustees of St. Chrysostom's Mission, under a certain deed, which provided, *inter alia*, that the Rev. Charles S. Daniel and a trustee, to be appointed by the Rev. Robert Ritchie, who should be a priest of the Protestant Episcopal Church, "should continue to be trustees until their death, resignation, or canonical removal from the diocese respectively;" that the Rev. I. L. Nicholson was appointed such trustee by the Rev. Robert Ritchie; that the Rev. Charles S. Daniel was the incumbent or missionary of the St. Chrysostom's Mission; that the intent was that the missionary for the time being in charge of the mission should always be a trustee; that the Rev. Charles S. Daniel, after a trial before the Ecclesiastical Court of the Diocese of Pennsylvania, had been deposed from the priesthood by the bishop of the diocese, and was no longer missionary in charge of St. Chrysostom's; and prayed a decree dismissing him from the trusteeship of the mission.

An answer was filed setting up, *inter alia*, that the respondent was still canonically resident in the diocese; that the offices of the trustee and of the missionary were distinct; and that the petitioners had already filed in the Court of Com-

mon Pleas No. 2 a bill demanding an account from the respondent as trustee of the mission. The case coming on for argument—

Henry Budd, for respondent, called the Court's attention to the bill pending in Common Pleas No. 2, and suggested, while prepared to argue the question before Common Pleas No. 4, that the more orderly proceeding would be to have the whole case settled on one argument, the avowed object of both proceedings being to protect the same trust.

George Tucker Bispham (*William Henry Lex* with him), contra.

The proceedings are entirely different: one is to compel an account, the other is to remove; when the bill was filed Mr. Daniel had not been deposed.

ARNOLD, J. The case seems plainly within that part of Rule 3 which declares that "Whenever there shall be pending in different Courts of Common Pleas . . . any actions or proceedings at law or in equity which it would be convenient for the administration of justice to have tried or determined by the same Court, the Court in which the action or proceeding last brought shall be pending may, upon notice of either party before trial, order the said action or proceeding last brought to be transferred . . . to the Court in which said prior action or proceeding shall be pending," etc. If a motion be made to transfer this cause to Common Pleas No. 2 we will grant it.

WILLSON, J., concurred.

Motion accordingly. Motion granted.

Orphans' Court.

February 17, 1891.

Arrott's Estate.

Decedent's estate—Will—Construction of—Conversion—Power of sale over real estate—Petition by purchaser to pay purchase-money to executors—Word "capital"—Meaning of.

A devise and bequest of all residuary estate, real and personal, to executors in trust to receive, collect, secure, and obtain and reduce into possession all the capital, principal, moneys, or interest by the testator invested, etc., with direction to pay the annual income to testator's wife, *held* to operate as a conversion of the real estate, and to give the executors power to sell the same and receive the purchase-money.

Sur petition to pay purchase-money of real estate to executors.

The petition of James S. Cochran, of the firm of Cochran & Bro., recited that William Arrott died September 11, 1886, leaving a will which was duly proved, wherein he appointed William Wood and William Henry Arrott, his executors. The decedent left surviving him, a widow, an adult son and a minor daughter, and died seised of certain real estate. By his will he devised this real estate to the executors to be sold; they entered into an agreement to sell the same at private sale; the price was believed to be a full and proper one; the purchasers were desirous of carrying out the agreement, but are advised the executors had not full power of sale under the decedent's will, and that decedent's adult son and the guardian of his minor daughter are willing to join in the execution of a deed to the purchasers.

The executors, the decedent's adult son, and the guardian of his minor daughter, united in the petition, which prayed that the purchasers be authorized to pay the consideration money for the sale of the said real estate into the hands of the executors upon the execution of a deed of conveyance of the premises under the terms of the agreement.

The petition was referred to Henry K. Fox, Esq., as Examiner and Master, who treated said petition as an application under the Act of February 24, 1834 (Purd. Dig. 535, pl. 136), and who found that the permit of sale contained in the will recited in the opinion, *infra*, referred only to personal estate, and that the words in the will, *capital, principal, moneys, or interest*, were used in a restricted sense, and could apply solely to personal property; and that the real estate devised to the executors under the residuary clause of the will not being covered by the mandate of the trusts found elsewhere therein, the testator must be held to have died intestate as to that portion of his property. Finally, the Master held, that the petition was not the subject of the exercise of an order of the Court for leave to pay purchase-money under the Act of 1834, above cited, and recommended that the petition be dismissed.

Thereupon the petitioners filed exceptions to the Master's report, alleging, *inter alia*, that the Master erred in finding that the executors had no power to sell the decedent's real estate, and in recommending that the petition should be dismissed.

Edward P. Allinson (S. Davis Page and Boies Penrose with him) for exceptants.

No counsel appeared *contra*.

March 28, 1891. ASHMAN, J. The residuary clause of the testator's will was as follows: "All the rest, residue, and remainder of my

estate, real, personal, or mixed, of whatsoever nature and wherever situated, I will, give, devise, and bequeath to my executors hereinafter named, to have and to hold the same to them, their heirs and assigns, forever, in trust nevertheless . . . that they will receive, collect, secure, and obtain and reduce into possession all the capital, principal, moneys, or interest by me invested or held, or employed in any manufacturing enterprises, operations, or business, in partnership or on joint account, or upon my own individual account, by public or private sale, or by settlement or compromise, as to them may seem best, as soon as possible after my decease, but in such manner as not to cripple or injure the said several manufacturing enterprises, operations, or business, and that they will invest all the money so collected, secured, obtained, and reduced into their possession, in such securities and investments yielding an annual income, interest, or return, as may, in their discretion, seem best and safest, and upon the further trust that they will collect the annual income, yearly return and periodical interest or dividends arising from the said fund in their hands . . . and pay the whole of the said income, after deducting their proper costs . . . into the hands of my dear wife, Agnes Arrott, for and during the whole term of her natural life, to and for her sole and separate use . . . and upon the death of my dear wife that they will divide the whole of the said trust fund . . . and pay one of the parts or portions to each of my said children," etc. The Master decided that under this clause the executors had no power to sell the real estate, and that the petition for confirmation of sale should be dismissed. He thus held, in effect, that although the testator intended a disposition of his entire estate, he died intestate of the realty, and, although he intended to give to his wife the income of the whole estate, he left her, as to the realty, only the interest she would acquire under the intestate laws. The Master reached this conclusion through his belief that the direction to reduce into possession, by public or private sale, all the capital, principal, moneys, or interest, could apply only to personality.

The primary inquiry, we think, is not what is the precise meaning of the word capital, but what was the meaning which the testator intended to assign to it. The Master has reversed this process, and has attempted to bound the testator's intention by confining it within the literal definition of one or two of his words. That such a rule is not possible universally in the interpretation of wills is manifest from the frequency with which it is transgressed; so strictly technical a word as heirs being sometimes held to mean children, and so purely pop-

ular a word as children being sometimes read heirs. But the word capital, if it can be said to have any scientific import at all, certainly includes every species of property which may be employed in business, or may be the subject of ownership. In *Society v. Commissioners* (28 Barb. 320) it was held to be "that fund upon which a corporation transacts its business, and which would be liable to its creditors." In *New Haven v. City Bank* (31 Conn. 106) the capital of a bank, it was said, embraces all its property, real and personal. Bouvier defines it as "the actual estate, whether in money or property, which is owned by an individual or a corporation," and the same meaning is given in *Anderson's Dictionary of the Law*, 1889, p. 148. It is hardly worth while to multiply authorities. The words estate or property alone are sufficient to carry real estate. (*Mayor of Hamilton v. Hodson*, 6 Moo. P. C. 76; *Hawksworth v. Hawksworth*, 27 Beav. 1.) So a gift of "whatever I may die possessed of." (*Pitman v. Stevens*, 15 East, 505; *Wilce v. Wilce*, 5 M. & P. 682, 7 Bing. 664; *Thomas v. Phelps*, 4 Russ. 348.) So the capital of a corporation was held to include all of its property of whatever kind and wherever located. (*Pacific Hotel Co. v. Lieb*, 83 Ills. 602; *Railroad Co. v. Weber*, 96 Id. 443.) And that the word principal may represent indifferently either real or personal estate, or, as here, a fund comprising the proceeds of sale of both estates, see remarks of *STRONG, J.*, in *Sheets's Estate* (2 P. F. S. 267). As if to remove all doubt as to his purpose, the testator has brought within the trust not only all the capital which he had invested in manufacturing enterprises, or on joint account with others, but all which he had invested upon his individual account; and he could not easily have selected broader language with which to compass his whole estate.

So far, therefore, as the word capital is to be taken, either in its popular or its legal acceptation, there is nothing from which to infer that the testator intended by its use to restrict it to his personal estate. It was said that the direction in the immediate context to "receive, collect, secure, and reduce into possession," implied such a restriction. But this reduction into possession was to be by means of a public or private sale; and so collocated, the clause is almost exactly parallel with the testamentary direction in *Hamilton v. Buckmaster* (3 L. R. Eq. 323), where the testator ordered his executors "to sell his personal estate and to collect and get in all money due and owing to him and all other his estate." The Vice-Chancellor said there was no doubt that the executor had power to sell the real estate.

What then was the intention which prompted the scheme of this will? It was to give the widow the income of the whole estate for life, and thereafter the principal in equal shares to the children. To this end the capital was to be reduced into possession by public or private sale, and the proceeds were to be moulded into a fund yielding an annual interest. The legal title to the capital was conveyed to the executors by words which not only fixed the quantum of the estate, but described its constituent parts: "All the rest, residue, and remainder of my estate, real, personal, and mixed, of whatever nature and wherever situated, I will, give, devise, and bequeath to my executors, their heirs and assigns." The word devise is of itself so controlling in its effect that where it appears in a gift, although the trusts declared are only applicable to personality, the real estate will pass. (*Doe d. Burkitt v. Chapman*, 1 H. Bl. 223; *Dannage v. White*, 1 J. & W. 583; *Stokes v. Salomons*, 9 Ha. 75; *Lloyd v. Lloyd*, 7 Eq. 458; *Longley v. Longley*, 13 Id. 133.) Under any other construction of this trust, we shall have the incongruity of a gift of the real estate to the trustees, with no uses declared, and therefore an intestacy. We think it clear that the testator devised the real estate for the same purpose that he gave the personal; that the two might be blended into a common fund for the benefit of his widow. The direction to raise that fund was too positive to be evaded; it bore within itself, whether they were expressed or were left to be implied, all needful powers for carrying it into effect; and it worked a conversion of the land, because it was as money and not as land that the testator intended his estate should be enjoyed by his beneficiaries. The cases of *Morrow v. Brenizer* (2 R. 185), *Roland v. Miller* (4 Out. 50), and *Going v. Emery* (16 Pick., Mass., 111), establish this point. Finally, the duty to raise the fund and to apply its income was the only element of the trust which saved it from being executed at the moment of its creation; the trust for separate use having fallen because the testator could not impose such a trust upon a gift to his widow.

The exceptions are sustained, and leave is granted to pay the purchase-money.

C. K. Z.

[*Cf. Jacobs's Estate*, 27 WEEKLY NOTES, 365, where the words, "The remainder and residue of my money I give and bequeath," etc., were held to include and carry real estate.]

WEEKLY NOTES OF CASES.

VOL. XXVIII.] FRIDAY, JULY 10, 1891. [No. 12.]

Supreme Court.

July '90, 186.

March 17, 1891.

Everett v. Niagara Insurance Co.

Insurance—Stipulation as to time within which suit must be brought—Construction of—Practice.

A stipulation in a policy of fire insurance that no action upon it should be sustained unless "commenced within twelve months next after the fire shall have occurred" is a valid contract, and will be enforced. Such agreements, however, being in derogation of the common law, will be strictly construed.

In an action upon a policy containing a provision similar to the above, it appeared that the fire occurred on January 6, 1887, and suit was begun by præcipe filed December 27, 1887. On January 30, 1888, a rule was granted to show cause why the return of the sheriff should not be set aside, and this rule was made absolute on December 28, 1888. On January 11, 1889, a judgment of *non pros.* was entered under the rules of Court in default of a narr. being filed within a year. On January 25, 1889, a præcipe for an alias summons was filed and an alias summons was issued. On a point of law reserved, the lower Court held that the judgment of *non pros.* was improperly entered, as the defendant having appeared *de bene esse* only, and the service having been set aside, was not in court, and had no standing to order a *non pros.*, and that, therefore, the judgment of *non pros.* not being a termination of the original, the alias summons, issued more than a year after the prior one, was merely a continuation of the original suit begun in 1887, and that the contract limitation did not apply. On appeal:

Held, that the alias was based upon and supported by the prior writ, and the contract limitation did not apply to the period between the issuing of the original and alias writs.

Hocking v. Ins. Co., 130 Pa. 170, and Riddlesbarger v. Ins. Co., 7 Wallace, 386, distinguished.

Appeal of the Niagara Insurance Company, defendant, from the judgment of the Common Pleas of Clinton County.

The facts are substantially as follows: The Niagara Insurance Co. on September 3, 1886, issued a policy of insurance upon the stock of goods belonging to J. F. Everett, the policy containing, *inter alia*, the following stipulation:—

9. It is hereby expressly provided that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any Court of law or equity until after full compliance by the assured with all the foregoing requirements; nor unless such suit or action shall be commenced within twelve months next after the fire shall have

occurred; and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim. And it is further covenanted by the parties hereto that no officer, agent or representative of this company shall be held to have waived any of the terms and conditions of this policy, unless such waiver shall be indorsed hereon in writing.

On January 6, 1887, Everett's store was destroyed by fire, and he subsequently brought suit upon the policy, and at the trial, before BARNETT, P. J., of the 41st Judicial District, specially presiding, proved his loss. The facts appear in the charge of the Court, which was as follows:—

"This case will turn finally on the question of law to be determined by the Court. If the plaintiffs, under the evidence in the case, are entitled to recover at all, it is agreed that they are entitled to a verdict for \$1384.18. We, therefore, instruct a verdict to be rendered for that amount, subject to the question of law reserved by the Court growing out of the following facts: The fire occurred on the 6th day of January, 1887, and suit was brought to No. 140, January Term, 1888, by præcipe filed December 27, 1887. On the 30th of January, 1888, a rule was granted to show cause why the return of the sheriff as to the summons should not be set aside. On the 28th of December this rule was made absolute; on the 11th of January, 1889, a judgment of *non pros.* was entered under the rules of Court in default of no declaration having been filed within a year from the first day of the term to which the action was brought. On the 25th of January, 1889, præcipe for alias summons filed. Under this statement of facts shown by the record and not controverted, the question of law is reserved, whether the plaintiff can now recover a verdict, notwithstanding the judgment of *non pros.* being entered in favor of the defendant. Under this reservation of the question of law to be determined finally by the Court and subject to the decision of the Court in this action, you render a verdict in favor of the plaintiff for \$1384.18."

A verdict was accordingly rendered for the plaintiff for \$1384.18.

Subsequently, after argument on the reserved point, the Court filed the following opinion:—

"In this case the verdict of the jury was in favor of the plaintiff. But a question of law was reserved by the Court in the following form, to wit: The fire occurred on the 6th of January, 1887. Suit was brought to No. 140, January Term, 1888, by præcipe filed December 27, 1887. On the 30th of January, 1888, rule granted to show cause why the return of the sheriff as to the service of the summons should not be set aside. On the 28th of December, 1888, this rule was made absolute. On the 11th of January, 1889,

judgment of *non pros.* was entered under the rules of Court in default of a declaration having been filed within a year from the first day of the term to which the action is brought. On the 25th of January, 1889, precept for alias summons filed. Under this statement of facts shown by the record and not controverted, the question of law is reserved by the Court, whether the plaintiff can now recover a judgment, notwithstanding the judgment of *non pros.*, and if not, then judgment to be rendered in favor of the defendant, notwithstanding the verdict.

"There is one other fact which does not appear in the above statement, because either it was not brought to the attention of the Court at the time, or, if so, was overlooked; that the appearance for the defendant in No. 140, January Term, 1888, was not absolute but only *de bene esse* at the time when judgment of *non pros.* was entered. It was contended by the defendant that the entry of the judgment of *non pros.* was a final termination of said suit to No. 140, January Term, 1888, and therefore No. 37, February Term, 1889, is not a continuation of the original action by an alias summons, but is in reality itself a new and independent suit; and there can be no recovery therein by the plaintiff, both by reason of the said judgment of *non pros.* and because the limit of time within which suit must be brought under the terms of the contract had expired.

"But the fact that there was not, at any time, an absolute appearance for the defendant in No. 140, January Term, 1888, quite takes away the force of the defendant's argument. Thus, in *Blair v. Weaver* (11 S. & R. 85) it is said: 'The attorney, though there be an appearance *de bene esse*, may move to set aside the writ or service, for his appearance *de bene esse* was, provided there was a good writ and good service.' And in *Skidmore v. Bradford* (4 Pa., on page 300) it is said, 'It is a familiar principle, that actual appearance is a waiver of defects in the process or service of it; and without a full appearance, the debtor had not a right to open his lips at the return of the writ.' (See also *Bolard v. Mason*, 66 Pa. 138.)

"In this case the service of the summons was set aside on the 28th of December, 1888. The defendant was then out of Court, and the entry of the judgment of *non pros.* made on the 11th of January, 1889, was unauthorized and without full legal effect, and has since, upon application, been stricken off by the Court. (See *Craig v. Barclay*, 48 Pa. 202; *Ashton v. Bell*, 19 WEEKLY NOTES, 38.)

"If the entry of the judgment of *non pros.* was not a final termination of No. 140, January Term, 1888, then the alias summons to No. 37, February Term, 1889, is the continuation of a suit brought within the limited time; and that

judgment being now also stricken from the record, the plaintiff is entitled to judgment on the verdict in his favor.

"And now, 27th of May, 1890, judgment on the reserved question of law is hereby given in favor of the plaintiff, and the prothonotary is directed, upon payment of the jury fee, to enter judgment in favor of the plaintiff on the verdict of the jury."

Defendant appealed, assigning as error (1) the entry of judgment for plaintiff on the reserved point, and (2) not entering judgment for defendant.

C. S. McCormick, for appellant.

Seymour D. Ball, for appellee.

May 18, 1891. MITCHELL, J. The only question raised by the assignments of error is the correctness of the judgment entered for plaintiff on the verdict, instead of being entered for defendant on the reserved point. The point was imperfectly reserved, as the vital fact was omitted, to wit, the limitation in the policy as to the time of bringing suit. But as this omission was manifestly a mere oversight, and both parties as well as the Court have treated that fact as established in the case, we proceed to consider it.

The policy stipulated that no action upon it should be sustained unless commenced within twelve months next after the fire should have occurred. Such contracts are valid (*Hocking v. Ins. Co.*, 130 Pa. 170), and will be enforced even in case of accidental failure to comply, through mistake in the policy, or in a previous suit. (*Ins. Co. v. Barr*, 94 Pa. 345; *Ins. Co. v. Brown*, 128 Id. 386; *Hocking v. Ins. Co.*, *supra*.) The present case, therefore, depends upon two questions, first, whether this is an alias based upon and supported by the prior writ, and secondly, if so, whether the contract limitation applies to the period between the issue of the original and the alias.

The present writ is an alias summons in form, and was duly issued as such. But calling it an alias will not make it one in effect, if in fact the original was dead at the time this issued. The service of the original was set aside, but the writ itself remained, and beyond question kept the action alive at least until the entry of the nonsuit. Appellant argues, however, that as the nonsuit was on the record when the alias issued, even though it was subsequently struck off, the original writ was *functus officio* for all purposes at that time, and the status of the so-called alias must be determined as of that date. This argument would be of great force if the nonsuit had been taken off by the Court for any ground subsequently arising, though even then, as there were no third parties whose interests would be affected, the Court might probably have ordered it struck

off *nunc pro tunc* as of the date of its entry. But the Court struck off the nonsuit because it was entered without authority, and therefore never was of any force. The special ground assigned in the opinion of the learned Judge below, is that the service having been set aside, and the defendant having appeared *de bene esse* only, he was not in Court, and had no standing to take any such step in the cause. The entry of the nonsuit was, therefore, no more than any unauthorized entry on the record by a stranger. This view of the extent of an appearance *de bene esse* is sustained by the general understanding and practice of the profession, and by the authorities as far as they appear to have passed upon the subject. (Blair v. Weaver, 11 S. & R. 84; Winrow v. Raymond, 4 Pa. 501; Skidmore v. Bradford, Id. 296, 300; Bolard v. Mason, 66 Id. 138.) But there is also another view which leads to the same result. The rule of the Court below, under which the nonsuit was entered, while not expressly so limited, appears to contemplate cases where the defendant is within the jurisdiction of the Court, either by service or by general appearance. Otherwise as the Court is without power to proceed in the case, there would appear to be no occasion for compelling the plaintiff to go through the useless form of filing a declaration. This appears to be the natural construction of the rule, and that such was the view of the learned Judge below, who entered the final judgment, we may fairly infer from his citation of Ashton v. Bell (19 WEEKLY NOTES, 38), where a similar rule was so construed by the Court of Common Pleas No. 3, of Philadelphia. On both grounds, therefore, we are of opinion that the Court below was right in treating the nonsuit thus entered without authority under the rule of Court, as of no effect, thus leaving the present writ as an alias in fact as well as in name.

This brings us to the second contention of appellant, that even as an alias, this writ was too late, being issued more than twelve months after the original, and as the parties had by their contract fixed their own period of limitation, it should be applied to the alias as well as to the original. This, however, is too stringent a construction of the agreement against the plaintiff. Such agreements are lawful, as already said, but they are in derogation of the general law of the Commonwealth, and to be available the stipulation should be clear. Here it is that the action "shall be commenced within twelve months." There is no provision for anything beyond the commencement. Thereafter it is to take the regular course, according to the general law. The present plaintiff has brought himself strictly within his agreement. He began his action within the time specially agreed, and he kept it alive by the means and within the time allowed

him by the law. It was no fault of his that the first writ was ineffectual to bring the defendant into Court, but his misfortune did not go beyond the failure of the service. If that were sufficient to end his action, then the defendant by avoiding service for twelve months could defeat him altogether. It is not reasonable to suppose that the agreement contemplated any such result. The cases of Hocking v. Ins. Co. (130 Pa. 170), and Riddlesbarger v. Insurance Co. (7 Wall. 386), are widely distinguishable. In them the first action had come to an absolute end, and that which the plaintiffs had commenced after the stipulated period had expired, was a new and distinct action. It was said in the former that it was a hard case for the plaintiff, but he was clearly within the prohibition of his contract. Here the plaintiff is clearly not within the prohibition, but has preserved all of his rights.

Judgment affirmed.

W. M. S., Jr.

[See next case.]

July '90, 157.

March 17, 1891.

Everett v. London and Lancashire Fire Insurance Company.

Insurance—Proofs of loss—Waiver of conditions of policy by implication—Stipulations as to time within which suit must be brought and as to over-insurance—Independent testimony as to value of goods.

It is the duty of the insured not of the insurers to prepare proofs of loss, and where proofs are prepared by alleged agents of the company, the latter is not bound by the acts of such parties without express authority shown to be in such agents.

The retention of proofs of loss by an insurance company, without objection, is evidence of the acceptance of them by the company.

Where proofs of loss are furnished a company containing a schedule of the different companies insuring, the amounts of their policies, and the proportionate payment due from each on the basis of an adjusted loss, and no objection is made by a company on account of over-insurance, there is evidence of a waiver by estoppel of a condition against over-insurance, for silence in this regard might lead the insured to a disadvantageous settlement with the other companies.

To constitute a waiver by implication of a condition as to the time within which a suit must be brought, the acts constituting such waiver must be done during the running of the period of limitation, not after it has expired and the rights of the parties have become fixed.

Where the policy provides a specific method of obtaining the value of the goods, no independent testimony as to their value can be given.

Where the contention is that the receipt and reten-

tion of the proofs of loss, without objection, was an acquiescence by the company as to the amount, any independent testimony as to the value of the goods is irrelevant.

Appeal of the London and Lancashire Fire Insurance Company of Liverpool, defendant, from the judgment of the Common Pleas of Clinton County.

The facts are substantially as follows: On September 3, 1886, the defendant company issued a policy of insurance upon the stock of goods belonging to J. F. Everett, said policy containing, *inter alia*, the following stipulations:—

Sec. 1. If the insured shall have or shall hereafter make any other insurance on the property hereby insured or any part thereof without the consent of the company written thereon, . . . then and in every such case the policy shall be void.

Sec. 2. If any difference shall arise with respect to the amount of any claim, for loss and damage by fire, and no fraud suspected, such difference shall be submitted to arbitrators, indifferently chosen, whose award or that of the umpire shall be conclusive.

Sec. 14. It is furthermore hereby expressed, provided, and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any Court of law or chancery until after an award shall have been obtained fixing the amount of such claim in the manner above provided, nor unless such suit or action shall have been commenced within three months next after the loss shall occur, and should any such suit or action be commenced against the company after the expiration of the aforesaid three months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any Statute of Limitations to the contrary notwithstanding.

On January 6, 1887, Everett's store was destroyed by fire, and subsequently D. F. Good, who represented the Insurance Company of North America, and Edward Clough, who represented the Union Company, undertook to adjust, and after some dispute Everett made a proposition to accept \$5000 as a basis of settlement, the amount to be paid *pro rata* by the various insurance companies. Notice of this was sent to defendant company as follows:—

SCHEDULE "A" STATEMENT OF ASSURED.

Stock purchased from W. C. Andrews, Aug. 27, 1886	\$3,708 00
Purchases as per invoices since	\$13,942 45
Less discounts for cash	681 67
	13,260 78
Total	\$16,968 78
DEDUCT.	
For sales, cash estimated from deposits	\$4762 16
For sales, credit from ledger	1431 70
Personal acct.	787 73
For cash in State Bank, proceeds of sales	804 62
Cash paid on acct. of purchases, proceeds of sales	1219 34
Store expenses, etc.	439 52
	\$9444 97
Less 15 per cent. profit	1231 96
	\$8,213 01
Total claim	\$8,755 77

APPORTIONMENT.

Manuf. and Merchants Ins. Co.	Insures \$1500	Pays \$832 35
London and Lancashire	" 1500	" 832 35
Niagara Ins. Co. of N. Y.	" 2000	" 1176 48
Union Ins. Co. of Phila.	" 1250	" 735 29
Washington F. and M. Ins. Co.	" 1250	" 735 29
Ins. Co. of North America	" 1000	" 568 24
Total	\$8500	\$5000 00

It nowhere appeared that either Good or Clough had any authority to act for the defendant company.

The defendant company some time after the fire wrote to their agent that to avoid litigation the company would settle under certain conditions; they expressly denied any liability however, and there was no evidence that the contents of these letters were made known to plaintiff; they seem to have been written some eight months after the fire.

On December 27, 1887, almost a year after the fire occurred, an action was commenced in the Common Pleas of Clinton County to recover the amount of the policy. After the sheriff made return of the writ, the defendant appeared, D. B. E., and procured a rule to show cause why the return of the service made by the sheriff should not be set aside. Depositions were taken and the rule to show cause duly argued. The Court on December 28, 1888, made the rule absolute. The writ was returnable January 3, 1888. On January 11, 1889, in pursuance of a rule of Court, defendant's counsel procured a judgment of *non pros.* to be entered. On January 25, 1889, plaintiff's counsel issued what is called an alias summons, which was docketed to No. 37, February Term, 1889, and on February 2, 1889, filed his narr. or statement in that cause. The cause then proceeded to issue, and on March 4, 1890, a jury was called and duly sworn to try the cause.

Mary Sherlock, a witness on behalf of plaintiff, was asked as to the value of the goods in plaintiff's store.

Defendant's counsel objected to the evidence showing or tending to show the value of the goods in the store at the time of the fire or the loss sustained by the assured, because the policy provides the method by which the amount and the value of the property destroyed is to be arrived at, and makes that method conclusive. Objection overruled. Exception. (Eighth assignment of error.)

The Court (BARNETT, P. J., of the 41st judicial district) charged the jury as follows:—

"J. F. Everett, the legal plaintiff in this case, was at one time a merchant doing business in this city. He had a stock of dry goods, upon which he effected a total insurance of some \$8500, distributed among six different companies. During the continuance of the life of those poli-

cies a fire occurred and those goods were destroyed, and this suit is now brought against the defendant company, the London and Lancashire Insurance Company, of Liverpool, England, for the purpose of recovering from it the proportionate share of the loss sustained. The plaintiff has given in evidence the policy, shown when the fire occurred, called some witnesses to show the probable value of the goods, and that the representatives of the defendant company met for the purpose of adjusting the loss, [and that they agreed upon what should be the total loss and the proportionate share of each of these companies, what they should pay;] and if this was all that was in this case the plaintiff would be entitled to your verdict, and would be entitled to recover from this defendant the amount of its proportionate share of the \$5000, less the \$186.52, and some costs that were paid upon the attachment execution. But the defence in this case is that the policy of insurance upon which this action is based contains certain clauses which will prevent a recovery by the plaintiff. One clause is, that if other and additional insurance was effected upon those goods without the consent of the company issuing this policy that would avoid the policy, that it would be a bar to the plaintiff's right to recover. They did consent, however, that additional insurance, not to exceed \$3000, should be effected upon the goods of the plaintiff, they having insured to the extent of \$1500. Having permitted additional insurance of \$3000, they agreed that the goods might be insured to the amount of \$4500. But, in point of fact, these goods were insured to the amount of \$8500, this being largely in excess of the amount which this company agreed to insure and permit to be insured. If there was nothing else in this case which would avoid this policy, the excess of insurance would render this policy void, and the plaintiff could not recover. There is another clause contained in this policy of insurance which provides that no suit shall be sustained unless after an award of arbitrators fixes the amount of the loss; but so far as this clause in the policy is concerned, we are of the opinion that there is no need of a tribunal to settle a dispute where no dispute exists. It seems that in this case the plaintiff claimed the full amount of his insurance, the sum of \$8500, but when the adjusters of the several companies met, he was unable to satisfy them that he had sustained that amount of loss by any actual proof which he could furnish, and [he agreed that he would accept \$5000 as the amount of his loss, and the adjusters seem to have agreed that his loss should be adjusted at that amount, and they proportioned the several shares among the respective companies upon that basis. If this was the agreement between the parties,

if the plaintiff proposed to accept \$5000, and the adjusters agreed that that was the amount of damage sustained in proportion to the loss, then there was no dispute between these parties, and there was no need for a tribunal to settle this dispute, and, therefore, there was no necessity for having an award of arbitrators to dispose of and fix that which the parties themselves had agreed and fixed among themselves. So that, in the opinion of the Court, that clause of the policy does not stand in the way of the plaintiff's right to recover.] The policy of insurance contains also another clause to the effect that no suit shall be sustained against the company either in any Court of law or equity after the expiration of three months after the fire. No suit was brought within the three months. The fire occurred on the 6th of January, and this suit was brought on the 27th of December, I believe, which is more than three months after the fire occurred. And if there were nothing else in this case, that would be a complete bar to the plaintiff's right to recover, and it would be our duty to say to you, as a matter of law, that your verdict must be for the defendant; if the terms of the policy are allowed to stand as they are, and the rights of these parties are to be determined by the terms of the contract as they remain and are expressed in the policy of insurance, then the plaintiff in this case has no right to recover, and your verdict should be for the defendant. But, the plaintiff says that the defendant company waived these conditions in the policy. A waiver is any act on the part of the defendant which is inconsistent with the intention upon their part to require a compliance with the provisions and conditions of the policy. [So far as the excess of insurance is concerned there may not be very great difficulty in this case for the jury to find that there was a waiver of that condition when the representatives of these different companies met for the purpose of adjusting this loss. The agent of this company was aware that insurance had been made to exceed the \$4500. It appeared to the adjusters then that the whole amount of the insurance and the whole amount of the claim was much higher, that it was \$8500. Having knowledge of this excess of insurance and the company did not act, it showed that notwithstanding this clause in the policy relating to the excess of insurance, and that they would be willing to pay their amount, the jury might from that infer that there was a waiver of this condition of the policy.] On the other hand, with regard to the other condition of the policy, there is more difficulty. That condition is that after the expiration of three months from the date of the fire no suits shall be maintained against this defendant. This suit was not brought until long after the expiration of three months given to the

plaintiff to recover. But the plaintiff alleges that there was a waiver of this condition in the policy; that the evidence that they rely upon to establish this waiver before the jury is the agreement, as they allege the adjustment was made by the representatives of these different companies, very shortly after the fire, for the purpose of adjusting the terms of the loss; but that meeting was before the three months had expired. They further rely upon the letters which were written sometime subsequent to this fire. [These letters are written after the limit had expired, being some four or five months after the expiration of the three months. The defendant company had written its agent to pay the amount of this insurance. The defendant company, knowing that the limit had already expired, but not standing upon its rights, as it might have done under the policy, but agreeing, although denying its liability, still saying, although we are not liable to pay, yet because we chose we will not insist upon our not being liable, but settle upon a certain basis.] If they did that with full knowledge that the limit had already expired, the jury might find from that act of the defendant that there was a waiver of this clause in the policy, and if they do so find they might render a verdict in favor of the plaintiff. The evidence is not very satisfactory in regard to the time in which this letter was written. Mr. O'Connor says that they were written between two and three months after the fire. That would be before the limit of three months within which the suit was to be brought had expired. Mr. Corss says that he saw these letters, and they were in his possession much longer, considerably longer than three months after the fire. He does not give us the date of those letters, but simply says that they seemed to be pretty freshly written. Now, it is for the jury to determine at what time those letters were written, whether they were written before or after the three months after the fire, and whether from this evidence you feel satisfied that this defendant company did not intend to require a full compliance with the conditions in its policy, and although saying that they were not legally bound to pay, yet they waived that liability and settle upon the basis of \$5,000. That is the only question really for the jury to determine under the evidence in this case, the question as to whether or not there was a waiver of those two conditions in the policy; the waiver as to the excess of insurance over and above what was permitted by the defendant company and the waiver of the limit within which suit must be brought. These questions of fact are for the jury to determine, and that is the first question, the question of waiver, for you to determine, before you can find a verdict in favor of the plaintiff.

And we say to you that the burden of proof rests upon the plaintiff to satisfy your minds reasonably well by this evidence that there was such a waiver. Taking the policy as it stands, giving full effect to all the conditions in that policy, there is an absolute bar to the plaintiff's right to recover. But the plaintiff says that bar is taken away by the waiver of the company. The burden of proof, therefore, rests upon the plaintiff to satisfy you from the evidence in the case that there was such a waiver. [You have heard the arguments of the learned counsel on the one side and the other, and we submit all the evidence and arguments of counsel for you to determine, in the first place, this question of fact as to whether there was a waiver by this defendant company or whether there was not.] If there was no waiver, then the jury should find a verdict in favor of the defendant. If you are satisfied reasonably well that there was a waiver of these conditions, then the plaintiff would be entitled to your verdict. And then your next duty will be to assess the amount of damages which he is entitled to recover."

(Mr. Ball calls the Court's attention to the testimony of Mr. O'Connor and Mr. Corss in regard to the letters.)

"Well, gentlemen, the evidence of Mr. O'Connor with reference to the letters is that they were written between two and three months after the fire. The evidence of Mr. Corss is that he saw those letters much more than three months after the fire, and that he thinks the dates of them were comparatively fresh and must have been written but shortly before that. Therefore, the jury must determine when the letters were written and from that fact come to the conclusion whether there was a waiver or not.

"We submit the evidence in this case to you to determine whether or not there was a waiver on the part of the defendant company. If there was not, then you find in favor of the defendant. If you find there was such a waiver, then the plaintiff is entitled to your verdict and you render a verdict in favor of the plaintiff. The plaintiff will send out a calculation along with you and you can review it, and if you find in favor of the plaintiff, find such an amount as he is entitled to recover under all the evidence in the case. We submit the questions in the case to you under the evidence, reserving, however, for the Court, this question of law—no matter if your verdict should be in favor of the plaintiff—we reserve this question of law arising out of the following facts:—

"The original summons was issued to No. 141, January Term, 1888, issued on the 27th of December, 1887. On April 21, 1888, a rule

was granted to show cause why service of the summons should not be set aside. December 28, 1888, the rule was made absolute, and on January 11, 1889, a judgment of *non pros.* was entered under the rules of Court for want of a declaration filed. Then the al. summons was issued to the term to which this suit was brought. It was issued on the 25th of January, 1889. Upon this statement of facts which appear from the record and evidence in the case and was not controverted on either side, we reserve this question of law, whether, notwithstanding the judgment of *non pros.* that was entered, there could be a recovery in this case in favor of the plaintiff.

"We submit the evidence to you, gentlemen, to render such a verdict as you believe to be right and proper under the evidence and the law as we have instructed you."

Verdict for the plaintiff for \$833.43. Subsequently after argument the Court, BARNETT, P. J., entered judgment for the plaintiff on the verdict.

Defendant appealed, specifying for error (1 and 2), the action of the Court in entering judgment in favor of plaintiff and not in favor of defendant (4, 5, 6, and 7), the portions of the charge in brackets, and (8), the ruling in the admission of evidence as above noted.

C. S. McCormick, for appellant.
Seymour D. Ball, for appellee.

May 8, 1891. MITCHELL, J. The first and second assignments of error raise the same question as to the effect of the entry of a judgment of *non pros.* under the rule of Court, and the subsequent action of the Court in striking it off, that was raised and decided in *Everett v. Niagara Ins. Co.*, opinion filed herewith, and for the reasons there given the assignments are not sustained.

This case, like that, comes to us as an alias summons, but it differs from that in the fact that the original on which the alias was based, was not issued within the stipulated period of limitation.

The defence was the violation of three separate conditions of the policy, first over-insurance, beyond the amount consented to by the defendant; secondly, failure to ascertain the amount of loss by arbitration before suit; and thirdly, failure to bring suit within the period limited.

The Court below instructed the jury that under the evidence the second condition did not apply, and the third and fourth assignments relate to this instruction. The language of the learned Judge can certainly not be sustained. "If this was the agreement," he says, "if plaintiff proposed to accept \$5000, and the adjusters agreed that was the amount of damages sustained . . .

there was no necessity for having an award of arbitrators to dispose of and fix that which the parties themselves had agreed and fixed among themselves. So that in the opinion of the Court that clause of the policy does not stand in the way of the plaintiff's right to recover." But the evidence fails to show that the adjusters had any authority to act for this defendant. Good, the only one examined, says distinctly that he did not represent the defendant, and as to Clough, the other adjuster, "I don't know that he represented them more than to write up the proofs of loss." Moreover, the papers prepared by the so-called adjusters were ordinary proofs of loss prepared for presentation to the companies, and by the testimony of Good, there was neither any agreement to pay nor any authority to make such agreement even for the companies the adjusters represented. It was the duty of the insured not of the insurers to prepare the proofs of loss, and without express authority shown, no action in preparing them would in any way bind the insurers. As to this defendant there was no evidence of any authority at all. There were six companies concerned in this loss, and the adjusters represented at least four of them, and this fact probably led the learned Judge into the error. It was in evidence, however, that a copy of the proofs of loss was received by this defendant and retained, so far as appears without objection. Such retention was evidence of acceptance by the company, and as the fact was uncontradicted, the direction of the learned Judge that the condition as to arbitration did not apply, might be sustained on this ground. As he well said there was no need of arbitration to fix that which the parties had fixed between themselves.

The fifth, sixth, and seventh assignments of error are to the submission to the jury of the question of waiver by the conduct of the company, of the conditions as to over insurance and as to time of bringing suit. In regard to the former the learned Judge said: "There may not be very great difficulty for the jury to find that there was a waiver of that condition when the representatives of these companies met for the purpose of adjusting the loss. The agent of this company was aware that insurance had been made to exceed the \$4500." Unfortunately for this instruction the evidence, as already noted, fails to show any agency or authority for this company in either of the adjusters. It did appear, however, that the proofs of loss received by defendant contained a schedule of the different companies insuring, the amounts of their policies, and the proportionate payment due from each on the basis of an adjusted loss of \$5000. On the face of this paper defendant was informed that the amount of insurance on the goods greatly exceeded the limit allowed by its policy. The

schedule was also notice that plaintiff was claiming only a proportion of his insurance from the other companies, in the expectation that defendant would also pay its quota. Silence as to the over-insurance, under such circumstances, might mislead the plaintiff into a settlement to his disadvantage with the other companies, and if it did so, would justify the jury in finding a waiver by estoppel. But the question was not submitted to the jury on this basis, and the ground on which it was submitted cannot be sustained for want of evidence.

In regard to the time of bringing suit the failure of the evidence of waiver is even more marked. The policy stipulated that no suit should be sustainable unless commenced within three months next after the loss, and the original writ in this action was not issued until eleven months after. By the terms of the policy it was too late, and the Judge correctly so instructed the jury. But he also instructed them that if the defendant, after the stipulated time had expired, had been willing to pay, although denying its liability, they might find a waiver. In this there were two serious errors. The acts to constitute a waiver by implication must be done during the running of the period of limitation, not after it has expired and the rights of the parties have become fixed. In *Beatty v. Ins. Co.* (66 Pa. 9) it was said by SHARSWOOD, J.: "To constitute a waiver there should be shown some official act or declaration by the company during the currency of the time dispensing with it; something from which the assured might reasonably infer that the underwriters did not mean to insist upon it. . . . After the thirty days had expired without any statement, nothing but the express agreement of the company could renew or revive the contract." (See also *Gould v. Ins. Co.*, 134 Pa. 570, and *Lantz v. Ins. Co.*, 27 WEEKLY NOTES, 276.) In *National Ins. Co. v. Brown* (128 Pa. 386) it was said by our brother McCOLLUM: "That it (the limitation against bringing suit) may be defeated by conduct which constitutes an estoppel or waiver . . . is not denied, but there must be evidence of conduct from which an intention to waive it can be fairly inferred, or of an act which ought in equity to estop the company from relying upon it." Applying this test to the present case the evidence submitted by the learned Judge to the jury was, first, the agreement of the adjusters, and secondly, certain letters written by the company to its agent in Lock Haven. As to the first, it is disposed of by the fact that no authority from this company to the adjusters was shown. As to the second, the letters were from the company giving instructions to its own agent. They expressly denied liability, but informed the agent that to avoid litigation the company would

settle under certain conditions. These letters were not addressed to the plaintiff, nor is there any evidence that their contents were made known to him, or that any action of his was based on them. There was no element of estoppel in them, even if they had been written during the three months of the limitation, and the weight of the evidence in the opinion of the Court below was that they were written after the limitation had expired. As evidence of intention to waive the limitation, they were only conditional, and there is no evidence the conditions were complied with, and they were only instructions to their own agent, clearly revocable at any time prior to being made known to and acted upon by the plaintiff. In any view, they were entirely insufficient to permit the jury to find a waiver from them.

The eighth assignment must also be sustained. The evidence of Mary Sherlock as to the value of the goods was inadmissible. If the receipt and retention of the proofs of loss without objection was to be regarded as an acquiescence and agreement as to the amount, then the testimony as to the value of the goods was irrelevant; and if not to be so regarded, then the policy provided a specific way in which the value could be settled before suit brought.

It seems to be doubtful if the plaintiff can present evidence to entitle him to go to the jury on the question of waiver of the time of bringing suit, but as one of the so-called adjusters, Clough, was not examined, it is not clear that plaintiff may not be able to close the gap by his testimony.

Judgment reversed, and venire de novo awarded.

W. M. S., Jr.

[See preceding case.]

Common Pleas.

C. P. No. 4.

June 1, 1891.

Gauler v. Solicitors' Loan and Trust Co.

Title insurance—Error in description of premises in policy—Liability of company—The fact that assured may have received a good title to other premises no defence—Affidavit of defence necessary in a suit on an insurance policy.

Per ARNOLD, J. It is no defence in an action on a title insurance policy that the title company did not draw the deed to the insured. Such companies have no right to do conveyancing, draw deeds, or write wills.

Rule for judgment for want of a sufficient affidavit of defence.

The plaintiff's statement averred that on April 6, 1889, the defendant company issued to him a policy of title insurance, insuring in the sum of \$260 the title to a certain ground-rent, described in the policy as a "Yearly ground-rent or sum of £5 in gold or silver Pennsylvania money, payable 1st January in every year, by Philip Newhouse, his heirs and assigns, out of and for a lot of ground on south side of Lombard Street, between Sixth and Seventh streets, in the 5th Ward, Philadelphia, containing in front 20 feet, and extending in depth 78 feet; the said lot being described, according to a recent survey thereof, at the distance of 178 feet $4\frac{1}{2}$ inches west of Sixth Street, and being No. 618 Lombard Street; as vested in the insured by deed of Amelia Copeland and Annie R. Copeland, dated March 30th, 1889, and recorded April 4th, 1889."

The policy contained the following provisions:—

1. No claim shall arise under this policy unless . . . (III) the assured shall have contracted to sell the insured estate and the title has been rejected because of a defect not excepted in the policy.

2. The company will at their own cost defend the insured in all actions . . . or proceedings founded upon a claim of title prior in date to this policy and not excepted therein.

The statement further averred that the plaintiff paid the Copelands \$466.67 for the ground-rent, this sum including arrears then due; that plaintiff brought suit against Newhouse for said arrears, which was so proceeded in that the premises above mentioned were exposed for sale on August 5, 1889, under a writ of vend. ex., and conveyed to Harry Koenig. Plaintiff afterwards agreed to sell the rent aforesaid to Frank J. Rowan, who refused to accept on the ground that the deed mentioned in the policy conveyed no title to any rent whatever issuing out of the premises therein described, of which plaintiff then notified the defendant. On March 7, 1890, a bill in equity was filed against plaintiff and Koenig, founded on a claim of title prior in date to the policy, and not excepted therein. Although defendant was notified, it denied all liability and remained inactive; while plaintiff, through a considerable amount of conveyancing and a second sheriff's sale, at last acquired a perfect title to the ground-rent mentioned in the policy.

The plaintiff claimed to recover the full amount of the policy, which would only be a partial compensation for the damages, costs, and expenses he had incurred.

The following affidavit of defence was filed:—

"The defendant, by Richard W. Clay, president of the said company, deposes and says:—

"That it has a just and true defence to the

plaintiff's claim in the above entitled suit of the following nature:—

"The plaintiff, by his agents on the thirteenth of March, 1889, applied to the defendant to insure the title to a yearly ground-rent, issuing out of a lot of ground situate on the south side of Lombard Street, and thereupon furnished to the said defendant a deed of conveyance (which had been prepared by the said plaintiff's agents) from Amelia Copeland and Annie R. Copeland, to him the said plaintiff, in which said deed of conveyance the ground-rent so desired to be insured was described as follows: All that certain yearly rent or sum of five pounds in gold or silver Pennsylvania money, payable first of January in every year by Philip Newhouse, his heirs and assigns, out of and for 'all that lot or piece of ground situate on the south side of Lombard Street in the city of Philadelphia, containing in front on Lombard Street twenty feet or thereabouts, and in length or depth seventy-eight feet, with a lot of Edward Hood on the east, by Lombard Street on the north, by lot of Robert Taylor on the west, and by lands of Baron Hurst & Company on the south.' At a subsequent time the plaintiff by his same agents, submitted to the defendant an official plan of survey alleged to be a plan of the premises out of which the rent so to be insured was issuing and payable, according to which plan the said lot was marked as being at the distance of 178 feet $4\frac{1}{2}$ inches west of Sixth Street, and being number 618 Lombard Street. The title to the said yearly rent was thereupon examined, and having been approved by the said defendant, its policy of title insurance was afterwards issued to the said plaintiff, in which policy the said rent and lot of ground was substantially described as above with the additional words 'the said lot being according to a recent survey thereof, at the distance of 178 feet $4\frac{1}{2}$ inches west of Sixth Street and being number 618 Lombard Street.'

"The ground-rent so insured by the defendant it appears issued out of premises now numbered 614 Lombard Street, instead of 618 Lombard Street. The plaintiff sued for arrears of the said rent so insured, and the sheriff levied on and sold the same, describing it as follows: 'All that certain lot or piece of ground with the messuage or tenement thereon erected, situate on the south side of Lombard Street (618) between Sixth and Seventh streets, in the Fifth Ward of the city of Philadelphia, containing in front on Lombard Street twenty feet or thereabouts, and in length or depth seventy-eight feet, bounded by a lot late of Edward Hood on the east, by Lombard Street on the north, by a lot late of Robert Taylor on the west, and by lands of

Baron Hurst & Company on the south, being the same premises which James Stewart by indenture dated January 1, 1793, and recorded in deed book D, No. 70, page 320, etc., granted and conveyed unto Philip Newhouse in fee, reserving therefrom and thereout a yearly ground rent or sum of five pounds gold or silver money of Pennsylvania.' At the time of the said levy and sale it appears that no arrears of the said insured rent were due, although it was so represented to the plaintiff by his said grantors previous to the said insurance of title. Afterwards, upon a bill in equity between the owners of said premises and the plaintiff in this case, being filed in the Court of Common Pleas No. 4, as of March Term, 1889, No. 391, the said sale was declared a nullity.

"The title to the rent, as conveyed to the said plaintiff, and as insured to him by the defendant, was a good and perfect title, and the plaintiff does not allege that he has suffered any loss or damage by reason of any defects in the title thereof. The defendant is not liable to him on its policy for any expenses, losses, or damages suffered by him because he caused the said described premises (designated in the levy as No. 618) to be levied on and sold by the sheriff, as aforesaid, for non-payment of arrears of the said rent, when at the time of bringing suit therefor no rent was due.

"And the defendant further says, that if it was the intention of the said plaintiff to acquire from his said grantors a yearly rent issuing out of premises situate No. 618 Lombard Street, in lieu of the rent and premises (properly No. 614 Lombard Street) as insured to him, and failed to acquire such rent, the losses and damages he has sustained in consequence of such failure should and ought to be charged and imputed to himself or his agents, and the defendant is not liable or to be blamed therefor.

"And further, the said defendant says that the addition of the distance and "No. 618" following the description of the rent and lot of ground in the above-mentioned policy of title insurance, was not material in determining the proper location and boundaries of the lot of ground out of which the rent so as aforesaid conveyed to the plaintiff and insured by defendant was issuing, and to which it was subject, because any action for the recovery of the said rent could not be had against any other lot of ground than the one out of which it was originally reserved and made payable, according to the original description and boundaries thereof, without regard to any given distance or its proper street number.

"Further, the defendant says that he had no knowledge that the plaintiff desired to acquire a

yearly ground-rent of five pounds issuing out of the lot of ground now numbered and known as No. 618 Lombard Street, as stated in the first paragraph of his statement, and was not informed of such desire until after the sheriff's sale. No ground-rent of five pounds was ever reserved payable out of said lot now known as No. 618 Lombard Street, but a rent of ten pounds, payable by George Terrill, was reserved out of a lot on the south side of Lombard Street, between Sixth and Seventh streets, in front forty feet, and depth seventy-eight feet, of which the lot now No. 618 Lombard Street appears to be a part.

"And the defendant suggests to the Court that the instrument sued on is not within the laws relating to affidavits of defence."

Robert H. Neilson (William D. Neilson with him), for the rule.

An affidavit of defence is requisite.

Hebb v. Ins. Co., 27 WEEKLY NOTES, 97.

The defendant was bound to use necessary skill in determining whether the deed presented to it vested a good title. The fault of plaintiff's agent cannot excuse the defendant for a liability deliberately undertaken. The affidavit admits that the same agent brought the survey which showed the property on which insurance was desired, and also admits that plaintiff did not get the title he wanted. There is no denial that plaintiff lost a sale and had a suit brought against him, which rendered the defendant liable under clauses 1 (III) and 2 of the policy, even if it were contended that the title was good. The defendant cannot thus evade its contract of insurance.

Richard S. Hunter, contra.

The insurance was of premises described in a certain deed handed to defendant by plaintiff. The title thus insured is good and valid, and no loss is alleged from any failure of title thereunder. The loss occurred by reason of the plaintiff bringing suit upon a ground-rent which was not in arrear.

Where the instrument sued upon must be supplemented by an averment *in pais*, the case is not within the law relating to affidavits of defence. In this case the plaintiff has admitted that his loss was \$125.93. The insurance policy is for a maximum sum, leaving the exact amount to be determined by a jury.

The deed was drawn and the conveyancing attended to by the plaintiff's agent, and the mistake made in this case arose through his misleading the company defendant. The mistake and the loss consequent thereon having come about through the negligence of the plaintiff's agent, the responsibility therefor, as between the plaintiff and the defendant, rests upon the former.

June 12, 1891. ARNOLD, J. Plaintiff was about to purchase a yearly ground-rent of £5, issuing out of a lot numbered 618 Lombard Street, from Amelia and Annie R. Copeland, by deed dated March 30, 1889, and the defendant insured the title against loss not exceeding \$260. The insurance was of a rent issuing out of a lot on the south side of Lombard Street, in the city of Philadelphia, 20 feet front by 78 feet deep, at the distance of 178 feet 4½ inches west of Sixth Street, and being No. 618 Lombard Street. The deed to the plaintiff from the Misses Copeland did not state how many feet the lot was from Sixth Street, nor did it state the street number of the lot, and in point of fact it conveyed a ground-rent of £5 issuing out of No. 614 Lombard Street. There was no specific ground-rent of £5 issuing out of No. 618 Lombard Street, but there was a rent of £10 issuing out of a lot forty feet in front, of which No. 618 Lombard Street was one-half. Plaintiff brought suit for arrears of rent, and caused the lot No. 618 Lombard Street to be sold at sheriff's sale, but the purchaser took no title, and a litigation ensued which resulted in a decree that the sheriff's sale was a nullity. Plaintiff also made a sale of his ground-rent, as issuing out of No. 618 Lombard Street, but his title was rejected by counsel. He was subjected to further litigation and consequent expense and the loss of a sale, whereupon he brought this suit.

The defence is twofold; first, the technical defence that actions on policies of insurance are not within the affidavit of defence law; and second, that as the conveyancing was done by the plaintiff's conveyancer, the insurance company is not liable.

The first objection is answered by a reference to *Hebb v. The Kittanning Ins. Co.* (138 Pa. 174, A. D. 1890), in which it was decided that judgment may be entered for want of an affidavit or sufficient affidavit of defence, in an action on an insurance policy.

The second objection overlooks the fact that the defendant company insured the title as attempted to be conveyed by the deed from the Copelands, and mentioned that deed in the policy. This defence is based on the notion that not only may title insurance companies do conveyancing, but that they must be employed to do it in order to hold them on their policies. This is a great mistake. They have no right whatever to do conveyancing, draw deeds, write wills, or the like. Their conduct in this respect is an usurpation on the Commonwealth. No Act of Assembly authorizes them to do any such acts, and in these days of corporate greed, it is well to remind them that the law under which they are allowed to insure titles, and to make

such contracts, agreements, policies, and other instruments as may be required therefor (Act of May 9, 1887, P. L. 159), authorizes them to make and perfect only such contracts as may be required to insure titles, and not to make or convey them. The argument that unless they are permitted to draw deeds and convey titles, they will have none to insure, is as specious as would be an argument that a fire insurance company should be allowed to make contracts to build houses in order to insure them. The consequence of the usurpation is not only the diversion of their legitimate business from lawyers and conveyancers, but the best school of the students of law, the law of real estate, is being destroyed. Knowledge of the foundation of the law and accuracy and precision in the use of law language is becoming obsolete. It is bad enough that such usurpations are tolerated, but it is much worse to see the denial of them set up as a defence on a policy of insurance, which the company is authorized to issue, and on which, as in this case, it is clearly liable.

On the question of damages, as this is a case of total loss of title, there is but one measure to be applied, and that is the value of the property lost. This is not a case of defective title, or an incumbrance requiring removal, in which the plaintiff would be entitled to recover the costs and expenses incurred in curing the defect or removing the incumbrance. The deed of assignment of the ground-rent shows that the plaintiff paid \$266.66 for it, and the policy covers any loss not exceeding \$260, for which amount judgment will be given.

Whether the plaintiff has a good title to a rent of £5 issuing out of No. 614 Lombard Street, or not, is unimportant. What the plaintiff wanted, and what the defendant insured, was a rent of like amount issuing out of No. 618 Lombard Street. He was compelled to pay a larger sum than the insurance to get a good title to that rent, and thus he is entitled to the insurance money. If the defendant had made a proper examination of the title and obtained a certificate of no defence from the tenant of No. 618, this loss would not have happened. As it is the loss was caused by its own neglect.

Rule absolute.

THAYER, P. J., and WILLSON, J., absent.

A. R. H.

Orphans' Court.

Hirst's Estate.

March 17, 1891.

Conversion of trust property—Price Act, scope and application of—Procedure under—Inheritance by whole and by half blood—Whatever a person under disability can be compelled to do, he or his representative may do voluntarily with like effect.

Sur exceptions to adjudication of the account of Adele H. Barger, trustee for Stephen C. Hirst under the will of William L. Hirst, deceased.

At the audit, before HANNA, P. J., the following facts appeared: William L. Hirst and wife, by deed dated October 16, 1875, conveyed a lot of ground on Chestnut Street east of Sixteenth Street, in the city of Philadelphia, reserving a yearly rent of \$3900, with the usual covenant that he and his heirs at any time on receipt of \$65,000 and arrears of rent would extinguish the said rent. Subsequently in 1884, after the death of William L. Hirst, and under the provisions of his will, there was allotted to Adele H. Barger, trustee for Stephen C. Hirst, one undivided tenth part of this rent. On April 4, 1889, the owner of the land paid off the ground-rent. In pursuance of authority granted her by the Orphans' Court upon her petition, Mrs. Barger, as trustee, joined in the deed of extinguishment and received one-tenth part of the principal. Her *cestui que trust* died November 12, 1890.

Upon the audit of the trustee's account it was contended by those children of William L. Hirst, who were of the whole blood of Stephen C. Hirst, the deceased *cestui que trust*, that the proceeds of the ground-rent descended as real estate to them exclusive of brothers and sisters of the half blood. The latter contended, on the other hand, that the money was distributable as money to all the brothers and sisters alike. The Auditing Judge took the latter view and awarded the fund as personalty. Exceptions were filed on behalf of the brothers and sisters of the whole blood.

Anthony A. Hirst and John G. Johnson, for exceptants.

The involuntary extinguishment of the rent did not work a conversion of Stephen's share in the hands of his trustee.

The trustee had no power to effect a conversion.

The character of the property is maintained

by the Price Act, the trustee having joined in the deed under a decree of the Orphans' Court. Henry S. Cattell, contra.

March 28, 1891. PENROSE, J. The covenant of the testator bound his heirs and devisees, who could have been compelled to extinguish the ground-rent reserved by his deed of October 16, 1875, and the money paid to them in the proceeding to enforce performance of the contract would, unquestionably, have thereafter been transmissible as money, even though some of the owners may have been minors or lunatics.

It is a maxim of the law that whatever a person under disability may be compelled to do, he, or his representatives, may, with the like effect, do voluntarily (Co. Litt. 35 a; 171 a; 171 b; 172 a); hence, in the present case, as the conversion of the ground-rent, regarding it as real estate belonging in part to one *non compos mentis*, did not take place under any Act of Assembly which, so far as such person was concerned, preserved to the proceeds the character of the original estate, his share no less than the shares of the other owners, became personalty, and, at his death, passed to his next of kin without distinction of blood. The effect is precisely as if the sale had taken place under a judgment for the debt or upon the contract of the testator.

It is true that there was a petition by his trustee for leave to join in the deed of extinguishment, and it is argued that the Act of 1853 expressly provides that sales made under it of the estate of a lunatic shall not affect the question of future descent: but, manifestly, the petition could not have been under that Act, since it prohibits action by the Court unless notice has been given to all persons having a present or prospective interest. There was no notice either to the *cestui que trust* or to his committee; and the decree must be regarded simply as an approval of the voluntary joinder of the trustee in the conveyance—thus saving the *cestui que trust* from the expense and trouble of a bill for specific performance. If the *cestui que trust* was insane, no title would pass under the Act of 1853 without notice to a committee; if he was not insane, his share of the proceeds was, of course, personal estate.

If, under the will of the father, the estate of the *cestui que trust* was for life only (and the decree must be regarded with regard to it affords indication of intention to give nothing more than this), very clearly at its termination the distribution of that share would be to all of the children of the testator, and not merely to those of the whole blood of the tenant for life.

The exceptions are dismissed, and the adjudication confirmed absolutely. J. D. B., Jr.

WEEKLY NOTES OF CASES.

VOL. XXVIII.] FRIDAY, JULY 17, 1891. [No. 13.]

Supreme Court.

Jan. '91, 358.

April 22, 1891.

Mercantile National Bank v. Lauth.

Limited partnerships—Joint-stock associations—Act of June 2, 1874—Provision that association shall not be bound unless by writing signed by two managers—Whether one manager signing is personally liable—Effect of signature by one manager in the expectation that another will sign—Commercial paper—Drafts—Irregular acceptance—Effect of.

The party to whom a note is offered is bound to take notice of the instrument and to know whether it is negotiable. Notice must also be taken of the maker or drawee and whether such maker or drawee is a private person, a firm, or an unincorporated association. The purchaser must also know at his peril what is necessary to constitute an acceptance or an indorsement, and, in the case of an artificial person, who is the proper person to bind it.

Strangers dealing with a limited partnership or joint-stock association organized under the Act of June 2, 1874, are bound by the liabilities imposed upon it by the Act.

A bank received in the ordinary course of business and before maturity a draft in excess of \$500, drawn by W. & Co. upon the H. Co., Ltd., with an acceptance signed "H. Co., Ltd., per B. L., chairman." The Act of Assembly requires in such case the signatures of two managers:

Held, that if the bank intended to rely on the responsibility of the drawee, it should have returned the draft that the acceptance might be completed, and, not having done so, the presumption was that it was satisfied to take the draft on the credit of the drawers and indorsers.

In such a case, in a suit by the bank against L. (the chairman who signed the acceptance) individually, he testified: "I was under the impression that they needed two signers, and I signed as one of them. . . . I thought B. (another manager) was to sign also."

Held, that the failure of B. to do so could not change the character of L.'s act and render him liable as a matter of law.

Appeal of Bernard Lauth, defendant, from the judgment of the Common Pleas of Centre County, in an action of assumpsit brought by the Mercantile National Bank of New York.

The suit was brought originally against the Howard Rolling-Mill Company, Limited. Before trial the plaintiff was allowed to amend by striking out the name of the defendant and sub-

stituting the name of Bernard Lauth as defendant.

The action was founded on the following draft:—

\$1479.38.

NEW HAVEN, CONN., Aug. 5, 1887.

Four months after date pay to the order of ourselves fourteen hundred and seventy-nine and thirty-eight one-hundredth dollars, with current rate of exchange, the same to account of

To Howard Rolling-Mill Company, Limited, Howard, Pa. } E. S. WHEELER & Co.

Accepted August 9th, 1887; payable at the First National Bank, Lock Haven, Pa.

Howard Rolling-Mill Co., Limited, per Bernard Lauth, Chairman.

On the trial, before KREBS, P. J., of Clearfield County, the plaintiff offered in evidence the draft, which was objected to by defendant, because it was not a liability of the defendant but of the Howard Rolling-Mill Company.

THE COURT. We will admit the evidence with reservation, and, as we have already said, that this may be one step in the plaintiff's line of testimony to recover, but I am inclined to think that it is not of itself sufficient; it must be followed by other proofs to show that this institution did not do business according to the Act of Assembly. And the mere fact that the chairman signed his own name as chairman, I am not at present of the opinion that it would be sufficient to charge him individually. But we will admit the draft for the present and control it afterwards. Exception. (First assignment of error.)

The defendant testified as follows: Q. State how you came to write that acceptance. A. I happened to walk down to the works. I wasn't attending to the business, and Mr. Bancroft came into the works and said—(objected to). Q. Who was Mr. Bancroft? He was the head man. He attended to the whole business. He came in and told me that John was absent. Q. You cannot repeat what Mr. Bancroft told you, but tell us whether that draft was accepted in his presence and with his consent? A. Yes, sir; it was. Q. Who showed you the draft? A. He did, Mr. Bancroft. Q. Mr. Bancroft was the general superintendent of the works? A. Yes, sir. Q. Do you know Wheeler & Co.? A. I never heard of them until after they failed. Q. Was the Howard Rolling-Mill Company connected with Wheeler & Co.? A. That I don't know; I don't think they were. Q. Did you ever receive any consideration for these drafts? A. No, sir; nothing at all. Q. Had you prior to that time, and was it the habit of the company to sign and accept drafts by any single manager of the company? A. Yes; I had signed several. I thought it was necessary for the Howard Rolling-Mill Company to sign. I was

under the impression then they needed two signers, and I signed as one of them.

He further testified that Mershon and Bancroft had one-half interest in the rolling-mill, and that Bancroft represented this interest. Q. State what Mr. Bancroft said to you about accepting this draft, about your signing it, now state what was said? A. He told me that this note would be protested the next day if he didn't accept it, and that we were a new company and it would hurt us if our note went to protest. I think I signed it at the bottom; I see I signed it across the draft, but I thought he was to go and sign his name also. Q. Was there anything said about the absence of your son John? A. He said that John was away and he had to get me to-day to sign it, because there had to be two on it. And, of course, I signed it with the understanding that he was to sign it too.

The defendant offered to prove that the Howard Rolling-Mill Company, Limited, had been in the habit of executing the notes of the company in the transaction of their business by the chairman alone, by the vice-chairman alone, and also by the treasurer of the company, and as evidence of said facts proposed to offer sundry notes so executed by said respective officers, for the purpose of showing that the chairman, Bernard Lauth, had authority to sign the acceptance in suit so as to bind the company, and that he incurred no individual liability by so accepting the draft in suit. Objected to. Objection sustained. Exception. (Second assignment of error.)

Defendant further offered to show that the acceptance of the draft in the name of the company, per Bernard Lauth, chairman, was at the urgent request and with the consent of George Bancroft, the general manager of the Howard Rolling-Mill Company, Limited, who represented and voted one-half of the capital stock of said company at the meetings of said company, he stating at the time that it was necessary for two to sign the acceptance, and that he would also sign the acceptance, and upon the strength of his statement the defendant signed the acceptance as it appears on the draft; and that his signature was thus procured by fraud. And that the acceptance showing the signature of Bernard Lauth, chairman, to be that of a mere scribe, the present holders thereof do not stand in the relation of an innocent holder for value without notice. For the purpose of showing no personal liability on the part of Bernard Lauth, defendant, upon said acceptance. Offer overruled. Exception. (Third assignment of error.)

It was conceded that the Howard Rolling-Mill Company, Limited, was organized under the Act of June 2, 1874.

The defendant requested the Court to charge:—

(1) If the jury find from the evidence in the

case that the draft in suit was drawn upon the Howard Rolling-Mill Company, Limited, and accepted by the Howard Rolling-Mill Company, Limited, per Bernard Lauth, chairman, and that the chairman had authority of said company, by usage or by the consent of a majority of the managers, express or implied, to accept the draft, then the acceptance would bind the company and does not bind Bernard Lauth individually, and the verdict should be for the defendant. *Answer.* The acceptance of this draft in the language by the Howard Rolling-Mill Company, Limited, per Bernard Lauth, chairman, would not in my judgment, of itself, make Mr. Lauth liable; but it appearing that the amount of the draft exceeds five hundred dollars, and that no other manager of the association has accepted it but him, we are constrained to refuse this point. (Fifth assignment.)

(2) That the draft in suit having been drawn upon the Howard Rolling-Mill Company, Limited, and accepted in the name of the company, per Bernard Lauth, chairman, the principal being fully set forth in the draft, and it showing clearly on its face that in the acceptance thereof, per Bernard Lauth, chairman, said Bernard Lauth, chairman, acted as the mere scribe in accepting the draft, it imports no personal liability on his part, and he cannot be held individually liable thereon, and the verdict should be for the defendant. *Answer.* For the reason already given in answer to the first point, and our general charge, we are obliged to say we must decline this point. (Sixth assignment.)

In the general charge the Court said: "Now, the plaintiff's attorneys representing the bank in this case, claim that because Mr. Lauth accepted this draft which has come into the hands of the bank, himself, without any other manager accepting it with him, has made himself liable individually for the amount of this draft. Now, gentlemen of the jury, that is a pure question of law, and not free from difficulty to my mind, but it is our duty to follow in the line, we think, that the Supreme Court has indicated in reference to this subject. We take it to be law at the time Mr. Lauth accepted this draft, he having accepted it alone, without any other manager signing it with him, that he has made himself liable to pay that draft. He, as a manager of that association, in order to avoid a general liability for the debts of that association, was required to see that all the provisions and regulations of that Act of Assembly were duly and reasonably complied with. If he did not so see that these regulations were complied with, whether he was manager or not, he would be individually liable for the debts of the association. When it makes a contract, that is for which the association would

be liable, this Act is specific in its declarations that when an amount exceeds five hundred dollars that the instrument of liability, or cause of liability, or purpose of liability must be reduced to writing and signed by two of the managers; otherwise the Act of Assembly in its intent makes them individually responsible." (Fourth assignment of error.)

Verdict and judgment for plaintiff for \$1686.09. Defendant thereupon appealed, assigning error as above.

John G. Love and *Wayne MacVeagh*, for appellant.

It is a well-settled principle of law that there can be but one acceptor of a bill, and that person must be the drawee, unless he be an acceptor for honor. Therefore, when it is sought to determine whether the officer or agent of a corporation or the corporation itself is the acceptor of a bill, the question may generally be solved by ascertaining who is the drawee. Where a bill is drawn on the corporation by name and accepted by its appropriate officer or agent in his individual name, the acceptance will bind the company only.

Merchants' Bank v. State, 10 Wallace, 604.

1 Daniel Neg. Inst. 3d ed. § 412.

It is also well established that when an agent fully discloses his principal, and it appears on the face of the paper that he acts ministerially only and without intent to bind himself, he is not bound.

1 Daniel Neg. Inst. 3d ed. §§ 298, 400, 402.

Roberts v. Austin, 5 Wharton, 313.

Hopkins v. Mehaffy, 11 S. & R. 126.

Abrams v. Musgrave, 12 Pa. 292.

Sharpe v. Bellis, 61 Id. 69.

Passmore v. Mott, 2 Binn. 201.

The Court erred in its construction of sec. 5 of the Act of June 2, 1874 (P. L. 272). The language is:—

No debt shall be contracted or liability incurred for said association, except by one or more of the said managers, and no liability for an amount exceeding five hundred dollars, except against the person incurring it, shall bind the said association, unless reduced to writing and signed by at least two managers.

There is no specified declaration in the Act that the person assuming to sign for the association shall be liable personally in case two managers do not sign in writing. It was merely intended and enacted that no liability without the formalities should bind the association; but to prevent anything being inferred that one of the partners should not be liable at common law for his contracts, the phrase, "except the person incurring it," was introduced. The provision was intended for the benefit of the association and could be waived by it.

The object of the Act was to preserve the partnership theory of association, but to limit the agency of each partner or the manager of the

partners. Establish the agency in any particular case by proof or waiver, and the liability fastens on the association.

C. M. Bower (*John H. Orvis*, *Ellis L. Orvis* and *H. T. Harvey* with him), for appellee.

The provisions of section 5 of the Act of 1874, are much more analogous to the original Statute of Frauds and Perjuries, and other statutes requiring certain contracts to be evidenced in a particular manner, in order to be binding upon the contracting parties.

When a party undertakes to do any act as agent of another, if he does not possess any authority or if he exceeds the authority delegated to him, he will be personally liable.

Story on Agency, § 264.

Evans on Agency, 301.

Parsons on Contracts, 67.

Kroeger v. Pitcairn, 101 Pa. 317.

McCoun v. Lady, 10 WEEKLY NOTES, 493.

Rockafellow v. Bank, 12 Leg. Int. 278.

June 1, 1891. *WILLIAMS, J.* The plaintiff is the indorsee of a draft drawn by E. S. Wheeler & Co., on the Howard Rolling-Mill Company, Limited, payable to their own order. The drawee is a joint-stock association or limited partnership, organized under the Act of June 2, 1874. An acceptance was written across the face of the draft and executed in the name of the drawee "per Bernard Lauth, Chairman." The plaintiff seeks to charge Lauth personally with the amount of the draft, alleging that his execution of the acceptance was not enough to bind the company; and a judgment against him was recovered in the Court below. The ground of the recovery is found in the following provision of the fifth section of the Act of 1874: "No debt shall be contracted or liability incurred for said association, except by one or more of the said managers, and no liability for an amount exceeding five hundred dollars, except against the person incurring it, shall bind the said association, unless reduced to writing and signed by at least two managers." The signing of the acceptance "per Bernard Lauth, Chairman," was treated as an attempt to bind the company for a debt exceeding five hundred dollars contrary to the provision above quoted, which imposed no liability on the company, but rendered him personally liable for the amount of the draft.

The first question presented by these facts relates to the duty to inquire resting on the purchaser of a bill or note. When a note is offered, the bank or other party to whom it is presented is bound to take notice of the instrument, and to know whether it is negotiable. Notice must also be taken of the maker or drawee, and whether such maker or drawee is a private person, a firm, a corporation, or an unincorporated association. The purchaser must also know at his peril what

is necessary to constitute an acceptance or an indorsement, and in the case of an artificial person, who is the proper person to bind it. When this draft was presented at the counter of the plaintiff for discount it came from E. S. Wheeler & Co., who were drawers, payees, and indorsers. Their indorsement was an affirmation that the acceptance was properly executed, and an engagement that the drawee would pay, or they would do so for it. (*Chitty on Bills*, 266; *Woods' Byles on Bills*, 156.) If the acceptance was not sufficient to bind the company because not made as required by law, it was an unaccepted bill which the purchaser could only take on the credit of the drawer and indorser. (*Byles on Bills*, 168.) Strangers dealing with a limited partnership or joint-stock association, organized under the Act of 1874, are bound by the limitations imposed upon it by the Act. This was distinctly ruled in *Pittsburgh Melting Company, Limited, v. Reese* (118 Pa. 355). The bank was bound to know, therefore, what was necessary to a valid acceptance by the Howard Rolling-Mill Company, Limited. It discounted this draft with knowledge that it was not accepted by the company until two managers had signed the acceptance on its behalf, and is in no position to complain that it was misled by Lauth, whatever ground of complaint it may have against its indorsers from whom it derived its title. What the acceptance lacked, as the plaintiff alleges, was the name of another manager. If it had intended to rely on the responsibility of the drawee, it should have returned the draft that the acceptance might have been completed, but as it did not do this, it is fair to presume that it was satisfied to take the draft on the credit of the drawers and indorsers.

But if this position could be regarded as doubtful, the defendant had a right to go to the jury on the question of fact. He denied that he desired or intended to bind the company by his signature to the acceptance. He testified that, although a manager and chairman of the board of managers, he was not engaged in the active business of the company; that Bancroft, who brought the draft to him and told him that it would be protested and the credit of the company injured unless it was accepted that day, was "the head man" in the management and direction of the business, and was also a manager. In regard to the signing of the acceptance he testified: "I was under the impression they needed two signers, and I signed as one of them." Again, speaking of the same subject he said: "I see I signed it across the draft, but I thought he (Bancroft) was to go and sign his name also." He did just what it was necessary to do as he understood it. He signed as one of the two managers needed, expecting Bancroft would sign as

the other. If Bancroft had done so, then the acceptance would have borne the names of two managers, and Lauth's act in signing first would have imposed no personal liability. The forgetfulness of Bancroft in inclosing the draft before the acceptance was completed, cannot be held to change the character of Lauth's act and render him liable as a matter of law. His liability depends on the fact which he so stoutly denies.

If he made use of this draft as the means of incurring a debt in the name of the company, and binding the company for its payment by his single act of acceptance on its behalf, then it may be that the plaintiff has a just cause of action against him; but if he signed, as he testifies that he did, so that his name should be one of the two that were needed, then instead of disregarding he was complying with the law, and if the acceptance was not completed by the other manager before sending the draft away, we do not see how Lauth can be charged with the whole debt because of the neglect, intentional or unintentional, of his fellow-manager to complete the acceptance.

The judgment is reversed, and venire facias de novo awarded.

R. H. N.

July '90, 218.

March 16, 1891

Linderman v. Pomeroy.

Statute of Limitations—Acknowledgment sufficient to bar statute.

Where the plaintiff, in a disputed account which is barred by the statute, proposes to have the claim stated by an accountant, H., saying "if H. does this, if I owe you anything, I will pay you, and if you owe me anything you will pay me," to which the defendant replies, "Yes, sir, if you owe me anything you must pay me, and if I owe you, I will pay you," this reply of defendant is not such an admission of indebtedness as will toll the bar of the statute.

A statement by defendant that if a restatement of the account was to be made, he would as lief H. should do it as any one, is not an agreement of submission to arbitration, or compromise of disputed rights.

The foregoing promise to pay is unavailing for it is conditional, and there was no acknowledgment of the debt. An assent to the correctness of the accountant's figures, but coupled with a denial of any debt, cannot be considered as an admission of indebtedness.

Appeal of Eleazer Pomeroy, defendant, from the judgment of the Common Pleas of Bradford County, in an action of assumpsit, brought by Jacob A. Linderman.

The facts of the case are set forth in the following opinion of SEELEY, P. J., of the Twenty-second Judicial District, upon the rule for a new trial:—

"In disposing of this rule it is only necessary to consider whether the Court erred in refusing the

defendant's seventh request, which was, to charge 'that there is no evidence in this case which removes the bar of the Statute of Limitations.'

"The plaintiff's action was brought to recover for alleged overpayment to the defendant upon a certain judgment. The last of plaintiff's payments upon the judgment was made October 21, 1865. This action was commenced June 8, 1886, nearly twenty-one years later, and the Statute of Limitations is pleaded.

"To sustain his right to recover, the plaintiff alleged an agreement between himself and the defendant in the winter of 1883, between seventeen and eighteen years after the right of action accrued. The issue with reference to the payments themselves was clearly for the jury, and does not call for present remark.

"The plaintiff testified to an alleged conversation with the defendant by which he asserts the bar of the Statute of Limitations was tolled. The defendant denied every portion of the conversation which could be considered material for that purpose. The testimony of Mr. Hoffman, so far as it affects this question, is equally consistent with that of the plaintiff and of the defendant. The credibility of the witnesses and the correctness of their recollection was for the jury, so that in considering this rule, the single inquiry is, taking the plaintiff's testimony by itself, does it present sufficient ground to justify the jury in finding that the defendant waived the benefit of the statute?

"The plaintiff's testimony, 'after quite a long time, we agreed on Mr. Hoffman to figure it, and comply with his figures,' is evidently not intended as a statement of what was actually said between the parties, but simply of the plaintiff's interpretation of their agreement, and may be dismissed from consideration. Afterwards the plaintiff undertakes to give the conversation in part: I said to him, 'if Mr. Hoffman figures this—if I owe you anything'—(he claimed that I owed him \$100, or so—) 'I will pay you, and if I have overpaid you, you must pay me,' and he said, 'all right,' and he told me 'to take the papers to Mr. Hoffman and have it figured,' and I did so.

"The witness was afterwards asked by the plaintiff: 'Give the words that were used by Mr. Pomeroy and you in this agreement,' and in reply gave a more full statement of the conversation, as follows: 'As I said before, we had some little talk about it, and he insisted that he knew it was right, and it was not necessary to figure it, and finally I spoke of several, or I told him to pick his man, and he didn't do it, and finally I said to him that I had thought of Charles Paine and Frederick Hoffman, and told him that I was going to have it done,' and, 'well,' he said, 'if anybody had got to do it, he would as lief

Frederick Hoffman would do it as any one.' Q. You said you was going to have it done any way? A. 'Yes, sir.' Q. And he said he would rather have Frederick Hoffman? A. 'Yes, sir. He said he would as lief Frederick Hoffman would do it as any one. And I then asked him, I said, 'if Frederick Hoffman does this, if I owe you anything I will pay you, and if you owe me anything you will pay me.' 'Yes, sir,' said he, 'If you owe me anything you must pay me, and if I owe you I will pay you.' Q. State that again?

A. After we had agreed to let Frederick Hoffman figure it, I said to him: 'If I owe you, I will pay you, and if you owe me, you will pay me,' and said he, 'yes, if you owe me, you must pay me, and if I owe you, I will pay you.'

"The work which Mr. Hoffman was to do was simply from the papers to make a computation. No question of fact or dispute as to any payment was referred to Mr. Hoffman, nor was it contemplated that any time should be fixed for a hearing, or that the parties should meet before Mr. Hoffman.

"Upon cross-examination the plaintiff testified as follows: Q. He claimed \$100, or thereabouts, was his due? A. Yes, sir. Why, I went there to try to figure, and he wouldn't do it. Q. He wouldn't do it? A. No. Q. Pomeroy didn't figure? A. No, he would not. He said he knew it was right, and as much as to say it didn't make any difference whether I did or not. Q. State what was said. A. Why, he wouldn't settle it, or consent to let any other man settle it or figure it up until he came to Mr. Hoffman, and when he found I was determined to have it figured, then he consented to let Mr. Hoffman figure it. Q. You told him you were going to have it figured anyway? A. Yes, sir.

"Now, it will be noticed from the plaintiff's testimony, that Mr. Pomeroy did not acknowledge any indebtedness to Mr. Linderman, but on the contrary, claimed that Linderman owed him. That Mr. Pomeroy at first refused to consent to having the matter computed, asserting that he knew it was right, and only when Mr. Linderman asserted that he was going to have it done any way, did Mr. Pomeroy say, 'if anybody had got to do it, he would as lief Frederick Hoffman would do it as any one.'

"It will not be contended that a promise to pay whatever I owe, or, if I owe anything, would toll the bar of the statute.

"The general rule is that the evidence must show a clear, distinct, and unequivocal acknowledgment of a debt, clearly identified, and the amount of which is specified, or the means of definitely and certainly ascertaining it recognized, with a promise to pay or at least such declaration as is consistent with a promise to pay. (*Weaver v. Weaver*, 54 Pa. 152; *Burr v.*

Burr, 26 Id. 284; *Miller v. Baschore*, 83 Id. 356; *Landis v. Roth*, 109 Id. 621; *Macrum v. Marshall*, 129 Id. 506.)

"In *Kensington Bank v. Patton* (14 Pa. 481) it was said, *ROGERS, J.*: 'Expressions equivocal, vague, and indeterminate, will not suffice. The statute was designed to guard against persons being entrapped in careless conversations and betrayed by perjuries. The promise to pay must not be vague, shadowy, and uncertain; it must be plain, unambiguous, and express, and such as to preclude hesitation and doubt.' 'It must be so distinct and unambiguous as to remove hesitation in regard to the debtor's meaning.' (*Palmer v. Gillespie*, 95 Pa. 344.) And in *Johns v. Lantz* (63 Id. 326), and *Shaeffer v. Hoffman* (113 Id. on page 5): 'The decisions of this Court apply very strict rules to acknowledgments to take a case out of the Statute of Limitations, and very rightly so. We mean to adhere to them in letter and spirit.'

"Taking Mr. Linderman's testimony alone, can we say without hesitation or doubt that Mr. Pomeroy intended to recognize the result of Mr. Hoffman's computation as binding upon him, and in saying, 'If I owe you anything I will pay it,' under the circumstances and in the connection testified by the plaintiff, is it clear that he intended that if Mr. Hoffman's computation should show a balance against him he would pay the balance so shown?

"I find nothing in the conversations or declarations made after the alleged agreement, which can assist in sustaining or interpreting that agreement.

"Plaintiff testifies that when he handed the statement of Mr. Hoffman's computation to the defendant, the defendant wanted the paper left with him; that subsequently he went down to see if he had looked it over and Mr. Pomeroy said he had, and that Mr. Hoffman's figuring was all right, and that the way the mistake came to be made was that plaintiff had left two of the receipts at home. We understand the witness to mean that when Mr. Pomeroy computed, the absence of two receipts led him into an error. Mr. Pomeroy did not say then that the balance ascertained by Mr. Hoffman was correct, nor promise to pay it, but simply that the figuring was all right. This conversation is said to have occurred 'a few days after the paper was left with Mr. Pomeroy.'

"The plaintiff also testifies that some time afterward, possibly on the same day, on the stairs leading to Mr. Fanning's office, 'the defendant said he would pay me, or it amounted to the same thing—he would pay me what he owed me.' But the plaintiff also testified: Q. When did Mr. Pomeroy notify you or claim to you that this receipt of April 8, 1862, was given for a

note? A. At the time after leaving the paper that Mr. Hoffman figured upon—after Mr. Hoffman figured this up and left that paper with him, then I went down after that, and he told me that one of those receipts was given for a note. Q. This was after the figuring was made known to him? A. Yes, sir. Q. How long after that was it? A. Why it was only a short time after the figuring had been done.

"This receipt of April 8, 1862, and whether it represented an actual payment in money or simply the giving of another obligation, presents the whole contention between the parties as to the account, and the ground upon which the defendant denies the correctness of the result reached by Mr. Hoffman, and claims that a balance is due from the plaintiff to him. Mr. Hoffman, plaintiff's witness, testifies that Mr. Pomeroy promptly asserted the incorrectness of the result reached by his computation, when that result was communicated. Mr. Pomeroy testifies to the same thing.

"This concurrence of testimony renders it at least very improbable that Mr. Pomeroy ever intended to admit the correctness of the result reached by Mr. Hoffman, conceding that he said to Mr. Linderman 'the figuring is all right.'

"Nothing in all this evidence assists in establishing a waiver of the benefit of the Statute of Limitations. Such a waiver must be found if at all from the plaintiff's direct statement of the alleged agreement before the computation was made.

"At the trial, when we were compelled to rely upon our recollection of the evidence as it was given by the witnesses (except as to a small portion which we caused to be transcribed), we submitted the question of waiver of the statute to the jury, with a good deal of hesitation, reserving our doubts in favor of such a submission. The examination of the evidence as transcribed does not make it clear to our mind that we were right in so submitting the case.

"This case has now been tried twice, at considerable expense and inconvenience to the parties. Whether the Court should have given binding instructions to the jury to find for the defendant, because the plaintiff's claim is barred by statute, is a question which must ultimately be answered by the Supreme Court. Whatever might be the ruling of the trial Court, one of the parties will insist upon a review of that ruling. The record contains probably all the evidence which could be obtained to give light upon that question, and the case so stands that it can be affirmed or reversed without a new venire, for if the case ought not to have been submitted, no occasion for another trial exists. Under the circumstances it has seemed to us wise without asserting or denying the correctness of the rul-

ing at the trial, to discharge this rule, in order that the matter may be finally determined with the least expense and loss of time. And we have written this opinion simply to present the facts, as after careful examination of the evidence they appear to us, hoping in some degree to relieve the labor of the Court of review.

"The question of common law submission and award need cause no confusion. If the evidence sufficiently shows such a submission, it would certainly be a sufficient waiver of the statute. (See *Shreiner v. Cummins*, 63 Pa. 374.) If it does not show such a submission the question is of no consequence.

"Now, July 10, 1890, the rule for a new trial is discharged."

On the trial, defendant requested the Court to charge the jury, *inter alia*, as follows:—

(5) If the jury believe, under the evidence in this case, that there was an agreement between the plaintiff and defendant that Frederick Hoffman should compute and calculate the amount due on judgment No. 728, May Term, 1862, and papers connected therewith, then there can be no recovery upon such computation, because it shows on its face a wrongful calculation of interest, by charging interest on advance payments and computing interest on balance after last payment made; and for the further reason that judgment No. 146, May Term, 1880, *E. Pomeroy v. J. A. Linderman*, is not included in that calculation. *Answer.* We decline that point, because it involves matters that we have already submitted to you. But in declining it we express no opinion with reference to the facts stated in this point, but simply say that it concerns matters that the Court cannot pass upon in this case. We may say further that although they agreed to accept Mr. Hoffman's computation as the basis of payment, we do not think if errors appear in the computation, that that fact is fatal to the agreement. We think that the errors may be corrected, if they made that agreement. (First assignment of error.)

(7) That there is no evidence in this case which removes the bar of the Statute of Limitations. *Answer.* We refuse this point. We have already instructed you that you must determine this fact. (Second assignment of error.)

The case was tried twice, and verdicts in each case rendered for plaintiff. The last verdict was for \$1287.66, and judgment was entered thereon. Whereupon defendant took this appeal, assigning for error the answers to points, as above.

William T. Davies and H. N. Williams (Parsons & Morgan and Lewis M. Hall with them), for appellant.

Delos Rockwell (J. T. McCollom and A. C. Fanning with him), for appellee.

May 4, 1891. *MITCHELL, J.* We gather from the opinion of the learned Judge below, on the motion for a new trial, that his matured view was that there was no sufficient evidence to toll the bar of the statute, and that the jury should have been directed to find for the defendant. He, however, allowed the verdict to stand, on the ground that the case, whichever way decided, would probably come to this Court for final determination, and that if the judgment he entered was wrong we could set it right without the expense of another trial. We can hardly commend the practice of entering judgment against the Judge's own view of the law, and putting the additional labor upon us, for the mere purpose of saving the plaintiff's pocket. Litigation is too cheap in this Commonwealth for Courts to be tender about calling upon those who indulge in it to pay for it. But the careful review of the testimony by the learned Judge has greatly facilitated our labor, and saves us the necessity for doing more than applying the law to the case as stated by him. The presumption was strongly against the plaintiff. He was the original debtor, and by his version he had overpaid, not by one erroneous payment, but by several. He waited eighteen years, and then made his claim upon the alleged mistake. According to plaintiff's own testimony, appellant denied that there was any mistake; insisted that the plaintiff still owed him a small balance; that he knew it was right, and there was no necessity to refigure it; refused to name a man to go over the calculations, and when finally told that plaintiff would have it done anyway, and by Hoffman, said he would as lief Hoffman would do it as any one. Then plaintiff, according to his own account, said: "If Hoffman does this, if I owe you anything I will pay you, and if you owe me anything you will pay me. Yes, sir," said he (appellant), "if you owe me anything you must pay me, and if I owe you I will pay you." It is on this promise, if at all, that plaintiff must sustain his recovery.

It is clear, in the first place, that this was not an agreement of submission to arbitration, or compromise of disputed rights. Defendant did not admit that plaintiff had ever had any claim, and if he had, it was barred three times over. There was no element of reference or compromise in it, for Hoffman was not to do anything for defendant, to hear any evidence on his behalf, or to take any action that would bind him. The most that can be made out of defendant's language is an impatient, indifferent acquiescence that if a recalculation was to be made he would as lief Hoffman should do it as any one, but without the slightest assent to be bound by the result.

As a promise to pay it was equally unavailing for it was clearly conditional. There was no

acknowledgment of a debt, but, on the contrary, a strenuous and reiterated denial. Nor was there any such acknowledgment after Hoffman's calculation was submitted to defendant. What he then said was at most an assent to the correctness of Hoffman's figures, but coupled, at the same time, with a reiteration of the denial of any debt, and an explanation that Hoffman was mistaken because he had counted a receipt as for cash, when it was only for a note. On plaintiff's own account there never was any admission by defendant of a debt, and such promise as there was did not name any certain amount, and was merely a conditional promise to pay "if I owe you." Under all our cases, this is not sufficient. In *Emerson v. Miller* (27 Pa. 278), the promise was "he would fix it, or settle it;" in *Weaver v. Weaver* (54 Pa. 152), and *McClelland's Exr. v. West* (59 Id. 487), "I agree to settle with him for above balance," and "I agree to settle this bill;" in *Harbold's Exrs. v. Kuntz* (16 Id. 210), "would settle and pay all he owed him;" in *Miller v. Baschore* (83 Id. 356), "after he is paid I will pay you all I owe you;" in *Landis v. Roth* (109 Id. 621), "we will pay you every dollar," and "yes, we will pay you," and in *Lowery v. Robinson* (28 WEEKLY NOTES, 28), "I will pay him when I get ready." In each case the words used were held insufficient to toll the bar of the statute, although in several of them the words quoted were in writing, and might therefore be considered as intended for a more formal and definite acknowledgment than if they had been used in mere conversation. The present case is no stronger than any of those cited, and not nearly so strong as some of them. It must go into the same class.

Judgment reversed.

H. S. P. N.

July '90, 134.

April 27, 1891.

Baker v. Pennsylvania Company.

Damages for personal injuries—Measure of damages—Compensation for pain and suffering.

Where the trial Judge, in commenting upon the testimony of a doctor who had testified "that the immediate cause of death was the wasting away or loss of strength, but that the loss of strength was caused by the injury," says, "so that the injury would be the remote cause of her last sickness," he does not violate the maxim *causa proxima non remota spectatur*. The word "remote" was mistakenly used, but in view of the context could not have misled the jury.

It is error in charging a jury upon the question of the measure of damages to say, "It is, of course, difficult to give a money value to pain and suffering. No person would voluntarily endure such pain and

suffering as it is proven Mrs. Baker endured for any amount of money. But it is the duty of the jury, if they find for the plaintiff, to fix some sum which would be a compensation for this pain and suffering."

The effect of such instruction is to suggest the price in money sufficient to induce a person to undergo voluntarily the pain and suffering, for which a recovery was sought in the action, as a measure of the compensation due the plaintiff for having been subjected to it.

The idea of a price as the measure of the plaintiff's compensation is not applicable to this class of cases. Such a standard cannot be applied in an action for a personal injury, not wantonly inflicted, which results in severe pain. There is no market in which the price of a voluntary subjection of one's self to pain and suffering can be fixed.

The true rule is, that in addition to loss of time and expenses actually incurred by the plaintiff by reason of the injury, the jury may consider also the nature of the injury, the pain and inconvenience resulting from it, and make such allowance therefor as in view of all the attending circumstances may seem to be just and reasonable.

The age, the health, habits, and pursuits of the plaintiff must be taken into consideration in determining what is a reasonable allowance for inconvenience and suffering in any given case. The absence of a cruel or wanton purpose in the defendant must not be overlooked.

The question of what is a reasonable allowance for the suffering necessarily endured is for the jury, subject, nevertheless, to the supervisory control of the Court, whose duty it is to set aside a verdict that is unreasonable and excessive.

Appeal of the Pennsylvania Company, operating the Erie and Pittsburgh Railroad Company, defendant, from the judgment of the Common Pleas of Erie County, in an action to recover damages for personal injuries, brought by Charles Baker and Phoebe Baker his wife, in right of said Phoebe.

On the trial, before GUNNISON, P. J., the following facts appeared: On February 24, 1885, Mrs. Phoebe Baker took passage in a train upon defendant's road. The train was derailed, and the car in which Mrs. Baker was riding was overturned. She suffered serious injury, the smaller bone by the nose being broken, her head cut, shoulder and neck bruised, one rib broken, and the fifth rib broken off where it unites with the vertebra. It also appeared that she suffered from nervous shock and partial paralysis. The other material facts of the case are set forth in the opinion of the Supreme Court, *infra*.

Mrs. Baker died in December, 1886, and her husband as administrator of her estate was substituted as plaintiff. He died subsequently, and D. S. Spaulding was appointed administrator of the estate of Phoebe Baker, and substituted as plaintiff of record.

The Court charged the jury, *inter alia*, as follows:—

["There is one principle, however, which has not been argued at length by either counsel for the plaintiff or the defendant, which is proper to state to you; and that is that where an accident occurs and an injury ensues, in the case of a passenger the law presumes that the accident occurred through the negligence of the railroad company."] (First assignment of error.) "That is the presumption; it is not a conclusive presumption which cannot be rebutted, but in the absence of any testimony it is the presumption of law that the accident resulted from the negligence of the railroad company, and it then becomes the duty of the railroad company to satisfy you that that is not so. And in the absence of any evidence on their part to show that they were not negligent, you would be justified in presuming that they were, and they must show upon their part that they were not guilty of negligence in order to rebut this presumption.

"Those are the legal principles that you will be called upon to apply in the determination of the main question in this case. The main question of fact in this case is, what was the cause of this accident? A large proportion of the testimony that was presented to you by both the plaintiff and the defendant, was for the purpose of fixing upon the one side the cause of this accident as the negligence of the railroad company, and on the other side in fixing the cause of the injury to be an accident for which they were not responsible and which they could not have foreseen. That is the main question. Now it is alleged on the part of the plaintiff that the road-bed at this point where the accident occurred was deficient; that the ties had become rotten to such an extent that they were not suitable for the purpose for which they were used. That the rails had become old and splintered, and the flanges worn down and splinters formed upon them, and that the rails were not of sufficient length—that short pieces were put in, and that they were not securely fastened to the ties, and that it was in consequence of this that the accident happened.

"Now right here, gentlemen, it may be well to call your attention to the principle of law, that although all this may have been so, and that although all the facts that were proven or attempted to be proven by the plaintiff in regard to the rottenness of the ties and the defective condition of the rails, and the fact that the spikes would not hold the rails—although all that may have been true yet if it was not the cause of the accident the plaintiff cannot recover. They cannot recover because the railroad company was negligent in one respect, if the accident occurred for some other reason, although they should prove to your satisfaction the negligence of the railroad company in that respect. So that it is not only necessary that the plaintiff show to your satis-

faction from the evidence that the railroad company was negligent, and that the track was maintained in this defective condition, but you must also be satisfied that the accident resulted from that negligence and not from some other cause.

"On the question of the condition of this track you have the testimony of a number of witnesses. There was Mr. Spaulding, Mr. Mott Sherman, and Mr. Matthews, and Mr. Patterson, and Mr. Thornton, and some other witnesses who told you that they were all at the scene of the accident at or very soon after the accident happened. Mr. Matthews and Mr. Thornton I believe were on the train when it happened, and the others came to the scene of it very soon afterwards. They tell you that the ties were in a bad condition, and were not capable of holding the spikes. That some of them tested the ties with their foot and that they were so rotten that they could kick chunks out of them, and another one says that he tested the ties with his cane and that he could stick it into the ties, they were so rotten, and others say that they could lift the spikes from the places into which they were driven and drop them back into their places, they were so rotten. All that of course is evidence to show the want of care on the part of the railroad company which they are bound to exercise; because their duty is not fulfilled when they put down a substantial and safe track in the first place, but they are bound to maintain it in a solid and safe condition, and if the ties become rotten from long use and exposure, it is their duty to replace them with sound ties.

"Upon that point the testimony of the witnesses for the railroad company is to the opposite. They tell you that those ties were sufficient and not unsound, but that they were good, solid, sound ties; that in relaying the track after the accident when they were drawing the spikes from the ties and replacing the rails, that they held so strongly that they pulled the heads of the spikes off in many cases in trying to draw them. Of course that would be evidence that the ties were sound and not in the condition testified to by the witnesses for the plaintiff. That will be a very important question for you to determine; the question of veracity between the two sets of witnesses. Either the witnesses upon the one side or the other are mistaken, and it is for you to determine which ones are telling the truth and which ones are mistaken. And in doing that of course you will have various ways of arriving at the conclusion as to which set of witnesses are entitled to the most credit. You have their appearance on the stand, their apparent intelligence in testifying, the apparent candor with which they testify and the interest they may have in the result of this suit and their means of information. The witnesses on the one side may

have better means of knowing what they testify to than those upon the other, and if you can come to the conclusion that they are entitled to the credit of truthfulness equally with the others, then the ones who have the best means of information would be entitled to credit, because a man who knows about the facts that he is testifying in regard to will satisfy you much better than a man who does not know what he is talking about. All of these considerations are for you in determining to whom you will give the most credit in deciding this question.

"On the part of the railroad company it is claimed that this accident resulted from a cause which was entirely beyond their control; that it was purely an accident and not resulting from negligence upon their part. The witnesses on the part of the railroad company tell you (and in this the witnesses on the part of the plaintiff substantially agree) that the morning was cold. Some of them say it was comfortable riding from Albion, but they all admit that it was a cold winter morning. The witnesses on the part of the defendant tell you that iron when it has become frosted on account of cold weather is much more liable to break than during warm weather, and it is claimed on the part of the company that this condition of the weather, the frosted condition of the rail, resulted in this rail breaking at that particular time. Of course, why it broke at that particular time or under that particular car which passed over it at that time, no one can tell; but if it was the result of the cold weather and the frost, over which of course the company had no control—if that was the cause of the rail breaking and the rail breaking was the cause of the accident—then of course the company was not liable for the damages that ensued. It was something entirely beyond their control, and it is something for which they are not responsible; and although the track may have been in a bad condition otherwise, and the ties old and rotten and the rails defective, if the cause of the accident was the breaking of this rail and the cause of the breaking of the rail was the cold weather, over which the company had no control, they are not responsible to the plaintiff, and your verdict should be for the defendant.

"Those are the main important questions in this case. It is not necessary for me to recall to you the evidence of the witnesses in detail. You have listened to them, the main portion of the testimony has been repeated time and again before you by one witness after another, so that you are familiar with it, and you are the proper judges as to the fact. You all have experience which will assist you in determining as to which witnesses are telling the truth. If, as I say, you find that the accident resulted from a cause over

which the company had no control, your verdict will be for the defendant; but if you find the accident was caused by the negligence of the railroad company it will be your duty to assess the amount of damages that shall be recovered. You will have to name in your verdict the amount that the railroad company shall pay to the plaintiff.

"The old lady, Mrs. Baker, who was injured was a married woman. Her husband was living. He was responsible for the medical attendance and the expense thereof, and he was entitled to whatever earnings she was capable of acquiring. Her earnings under the law as it stood at that time belonged to the husband, and he was responsible for the cost of her maintenance and medical attendance. For that reason in this suit you cannot take into consideration in assessing damages any expense that may have been incurred in attending her. Any expense of physicians, or nursing, or anything of that kind you cannot consider, and you have no right to consider that during all this time from the time she was hurt until she recovered or until her death, that she had lost any capacity for labor; if there was any such loss as that, her husband only was entitled to recover for it, and this suit is brought upon her own part and not on the part of her husband, and therefore you cannot award damages either for the cost of medical attendance or the loss of earning power.

"The only element that goes in to constitute the damages in this case is the pain and suffering that she has endured.

"Upon that question you have the testimony of her two daughters, who tell you how she suffered. You have the testimony of Dr. Tracy, who attended her, and who tells you the condition in which he found her after the accident. He tells you that he found the contusions or cuts on the face, one above the left eye, one on the forehead, and one on the left cheek, and in that place the bone had been fractured. He tells you also that he found the second rib broken, and the fifth rib where it was joined to the vertebra broken. He tells you also that he found the processes upon two of the vertebrae broken. Those processes are two little pieces of bone starting out from the vertebra in the rear and projecting a little from it; not projecting as a rib does, but projecting only a very short distance. Those are called processes, and he says that he found two of those broken. He tells you also that he found a sensitiveness, an evident suffering of pain upon applying pressure to the bone at the base of the neck, at the point between what he calls the cervical vertebrae and the dorsal vertebrae. The cervical vertebrae are the vertebrae that constitute the neck, and the dorsal vertebrae are the vertebrae that constitute

the back below the neck, and the point where these two sets of vertebræ join would be the point where he tells you that he found this evidence of pain, and which he tells you in his opinion was an injury to the spinal cord at that point.

"Now it is shown that after the injury Mrs. Baker was unable to do the work that she had formerly done; that there was a weakness in her arm that the doctor tells you resulted, in his opinion, from this injury to the spinal cord, the nerves from the spinal cord branching out about that place, about that point, and supplying the arms—the nervous force and nervous sensation and power of the arms—and that that was caused by the injury to that point, he thinks. Now I do not mention this for the purpose of giving you an opportunity to take into consideration the loss of strength or loss of power to labor for the purpose of estimating that in your damages, but merely to call to your attention the claim of the plaintiff that she suffered from this injury to her neck—suffered in the loss of strength to her arm; [and of course a loss of strength or partial paralysis is a subject of pain, and is perhaps attended with pain as much as anything else.]" (Second assignment of error.)

"Now about the 7th of April she was taken to her home. She had to be assisted to her sleigh at her daughter's house at Albion, and was assisted on board the cars at Erie when she was transferred to the train on the Philadelphia and Erie Railroad. After that time it appears that she recovered, to a certain extent at least; whether fully recovered from the consequences of that injury it is for you to determine. [And whether the subsequent sickness and sickness which caused her death were caused by this injury is for you to determine.]" (Third assignment of error.) "At any rate it appears that she did to a great extent recover; that she was about her house and did her housework. A witness saw her washing, and other witnesses saw her walking down the railroad track to Garland, a distance of a mile and a half; another witness says that she told her that she had been out blackberrying, and I think one witness says that she was with her blackberrying in the field; and the various branches of household work which were testified to as having been performed by her all show that to a certain extent at least she did recover from the injury, for a time at least.

"Now did the injury result in her death? You can give no damages by reason of death. This suit is not for damages for death, because it was brought by her herself before she died, and she of course could not bring a suit for damages for her own death. There is no claim here on account of her death. But in estimating pain and

suffering you must consider the amount of pain that she endured up to the time that she died, and therefore it becomes important to ascertain whether or not the last sickness was caused by this accident. The only medical authority who testifies in regard to that is Dr. Blodgett, and he tells you that after receiving an account from her and her daughter of the injury in April when he was called to attend her, and having noticed her condition at the time and carefully taken a memorandum of it, so that he could refer to it afterwards, and afterwards being called at the time of her death in 1886, and noticing her condition at that time, he is of the opinion that the remote cause—not the immediate but the remote cause of the death—was this accident. [And if the remote cause of the death was the accident, of course it must have been the remote cause of her last sickness and the pain which she experienced in her last sickness, and if so she would be entitled to recover for that, providing your verdict was in her favor.]" (Fourth assignment of error.) "On the other hand, the doctor tells you that the immediate cause of death was the wasting away or loss of strength, but that that loss of strength was caused by the injury she sustained at the accident, so that that injury would be the remote cause of her last sickness. On the other hand, you have the testimony of several witnesses, who have not been impeached in any way, who tell you that the old lady told them—one of them says that before she sustained this injury she complained of having been subject to heart disease; that afterwards when she was sick in her last illness that she said she felt her old trouble coming on—the heart disease. And that she said, at some time previous to this, to one of the witnesses, that she had heart disease for forty years. Now if this last sickness was caused by heart disease, the pain and sickness that she experienced at that time would form no element whatever in making up the damages that she should be awarded. It would be only the damages which resulted from the accident for which the railroad company would be liable, and not for any other pain or suffering that she experienced. It is of course difficult to give a money value to pain and suffering. [No person would voluntarily endure such pain and suffering as it is proven Mrs. Baker endured for any amount of money.]" (Fifth assignment of error.) "But it is the duty of the jury if they find for the plaintiff to fix some sum which would be a compensation for this pain and suffering."

Verdict for plaintiff for \$3500 and judgment thereon; whereupon defendant took this appeal, assigning for error the portions of the charge included between brackets.

J. Ross Thompson, for appellant.
S. A. Davenport, for appellee.

May 25, 1891. WILLIAMS, J. The first, second, and third assignments of error are hardly just to the learned Judge of the Court below. They rest on detached sentences taken from the charge, which need to be read in their proper connection, and which, when so read, are unobjectionable.

The fourth assignment is directed to what is evidently an inaccurate expression, which may seem to lay down the doctrine that remote as well as proximate causes are sufficient to sustain an action; but the context shows that this was not the meaning of the Judge, and that the jury could not have been misled by the use of the word "remote" in the paragraph complained of. What was said was this: "The doctor tells you that the immediate cause of death was the wasting away or loss of strength, but that the loss of strength was caused by the injury." He then added: "so that the injury would be the remote cause of her last sickness," for the pain experienced in which he had already said, "she would be entitled to recover, providing your verdict was in her favor." But upon the testimony of the doctor it is clear that the injury was not the remote but the proximate cause of her last sickness, for he says that the loss of strength and wasting away of which she died "were caused by the injury." There was, therefore, no disregard of the maxim "*causa proxima non remota spectatur*," recognized and applied in *Penna. R. R. Co. v. Hope* (80 Pa. 373); *Lehigh Valley Railroad Company v. McKeen* (90 Id. 122), and several other cases. It was simply a mistake to use the word "remote" in describing the relation between the injury and the sickness which the doctor described as the result of the injury.

The fifth assignment is of a more serious character. The learned Judge, while speaking of the measure of damages, told the jury that the plaintiff's cause of action rested mainly on the inconvenience and pain suffered by her in consequence of the injury she received, and to guide them in deciding what compensation to make for suffering he used this language: "It is of course difficult to give a money value to pain and suffering. No person would voluntarily endure such pain and suffering as it is proven Mrs. Baker endured for any amount of money. But it is the duty of the jury, if they find for the plaintiff, to fix some sum which would be a compensation for this pain and suffering."

The effect of this was to suggest the price in money sufficient to induce a person to undergo voluntarily the pain and suffering for which a recovery was sought in the action, as a measure of the compensation due the plaintiff for having been subjected to it.

The learned Judge first spoke of the difficulty in the way of fixing a money value upon suffer-

ing. He followed this by the statement that no amount of money would be regarded as sufficient to induce a person to undergo the pain complained of in this case, which suggested a possible standard of value that might be applied. He then finished the presentation of the subject by telling the jury that if they found for the plaintiff it was their duty "to fix some sum which would be a compensation for this pain and suffering."

The idea of a price as the measure of the plaintiff's compensation is not applicable to this class of cases. In actions upon contracts it often happens that the price of the article or of the services sued for is a proper measure of the plaintiff's damages for the failure to deliver the article or to render the services. So in actions founded on tort, the cost of repairing or replacing the property injured or destroyed may show to what sum the plaintiff is entitled. Such a standard cannot be applied in actions for a personal injury, not wantonly inflicted, which results in severe pain. There is no market in which the price of a voluntary subjection of oneself to pain and suffering can be fixed. There is no market standard of value to be applied, and to suggest the idea of price to be paid to a volunteer as an approximation to the money value of suffering, is to give loose rein to sympathy and caprice. The true rule is that in addition to loss of time and expenses actually incurred by the plaintiff by reason of the injury, the jury may consider also the nature of the injury, the pain and inconvenience resulting from it, and make such allowance therefor as, in view of all the attending circumstances, may seem to be just and reasonable. The age, the health, habits and pursuits of the plaintiff must be taken into consideration in determining what is a reasonable allowance for inconvenience and suffering in any given case. The absence of a cruel or wanton purpose in the defendant must not be overlooked. From the whole case, the question is, what is a reasonable allowance for the suffering necessarily endured? This question is for the jury, subject, nevertheless, to the supervisory control of the Court, whose duty it is to set aside a verdict that is unreasonable and excessive.

In all other respects this case seems to have been well tried, and we greatly regret the necessity for sending it back. There seems, however, no escape from the conclusion that the fifth assignment presents substantial error, which requires correction.

The judgment is reversed, and a venire facias de novo awarded.

H. S. P. N.

WEEKLY NOTES OF CASES.

VOL. XXVIII.] FRIDAY, JULY 24, 1891. [No. 14.

Supreme Court.

Jan. '91, 397.

April 15, 1891.

Quigley v. Delaware and Hudson Canal Company.

Negligence—Negative testimony, what is—Liability for probable consequences of negligence.

When witnesses testify that they did not hear the whistle or bell of a locomotive until the lead horse of a team was on the railroad crossing, and further, that as the passenger train was about due, they were giving particular attention, were listening for the whistle, and if it had been blown they would have heard it, under these circumstances their testimony is more than merely negative, and therefore cannot be disregarded.

Where the driver of a team before attempting to cross a railroad track, stops at a proper place, looks and listens for the approach of a train, and not hearing the train, starts and drives upon the track and then sees the train approaching him, he is not guilty of negligence, in view of all the circumstances, in jumping off the wagon to avoid the peril which seemed imminent, and in abandoning the team to the probable consequences.

An engineer is held to have foreseen whatever consequences might ensue from his failure to give warning of the approach of his train, without the intervention of some other independent agency, and both he and his employer will be held for what might, in the nature of things, occur in consequence of that negligence, although in advance the actual result might have seemed improbable.

Appeal of the Delaware and Hudson Canal Company, defendant, from the judgment of the Common Pleas of Luzerne County, in an action for injuries to a team, brought by Thomas F. Quigley.

On the trial, before RICE, P. J., the following facts appeared: In May, 1884, Thomas F. Quigley was hauling stones along the Mocktown Road, which crossed the defendant's railroad tracks. The wagon was drawn by three horses, and was in charge of the driver, William Muench, Quigley himself accompanying the team. When the lead horse was about fifty feet from the railroad crossing, the driver stopped the team, looked up the railroad, listened, and not hearing any warning of an approaching train, started his team, and just as the lead horse reached the track, the driver saw an engine coming down upon him, dropped the reins, and jumped from the wagon. The horses becoming frightened, plunged and ran; the engine did not strike them, but when

they had gotten about thirty-five feet beyond the track, the lead horse in some way, presumably by the lines catching in the wheels, became entangled and was thrown; he was run over by the wagon and so seriously injured that he had to be killed. The harness also was broken. This suit was then brought to recover damages for the value of the horse and the injury to the harness.

The engineer, fireman, and another witness testified that the whistle of the engine had been blown at the usual distance from the crossing, 1300 feet; the plaintiff and his driver testified that they did not hear any bell or whistle, that they would have heard it if any signal had been given as they were listening, expecting a passenger train. The other facts are given in the opinion of the Supreme Court, *infra*.

The defendant requested the Court to charge the jury, *inter alia*, as follows:—

(3) The proximate cause of the injury to the plaintiff's team was their being abandoned by the driver, who testifies he believes he could have controlled them if he had remained on the wagon. *Answer.* We decline to charge as requested in that point. (Second assignment of error.)

(2) If the plaintiff and his driver were not negligent, then it is a case where neither party to this suit was guilty of negligence, and the injury complained of was the result of pure accident, for which the plaintiff cannot recover. *Answer.* We decline to charge as requested in that point. (Third assignment of error.)

(6) Under the whole evidence in this case your verdict should be for the defendant. *Answer.* This point is negatived. (Fourth assignment of error.)

(4) The engine having, as shown by the testimony of both plaintiff and defendant, stopped before it reached the crossing, thus proving conclusively that the engine was under control, the rate of speed of the engine is not in question in this case. *Answer.* We answer that point in the affirmative. The only bearing which the evidence as to the rate of speed has upon the case, in our judgment, is upon the action of the driver in jumping from his wagon. It may have some bearing upon that question, but it is not evidence, in our judgment, of negligence upon the part of the defendant, because, as stated in the point, the engine was under control. (Fifth assignment of error.)

The Court further charged the jury, *inter alia*, as follows:—

"Now, with regard to the action of the plaintiff's driver. It has been the rule of law in this State for many years, and is well settled beyond any controversy, so far as our State is concerned, that it is the duty of a driver approaching a railroad crossing, to stop, to look in both directions

and to listen. This is an imperative duty, and the failure to perform that duty is negligence: and it is his duty to stop at a proper place—not at some remote point from the track where it would do no good to stop—not at some point where he could not see in either direction, provided there was some other point where he could see in both directions or in either direction, but he must stop at a proper place and look for approaching trains, and listen. Now, did the driver stop at a proper place? Did he look? Did he listen? And then, having started and driven upon the track, did he exercise the care of a prudent man in leaving the wagon when he saw the engine? He has testified that he thinks he could have held the team if he had remained on the wagon, but his reason for leaving the wagon was that he felt himself to be in great peril. Now, then, it is for you to decide whether he was prudent in jumping from the wagon at that time, or whether or not an ordinarily prudent man would have remained upon the wagon under all of the circumstances, with an engine approaching with that nearness to him that this engine was, and his horses acting as he says they did. Of course, this is peculiarly a question for the jury and not for the Court. [But it is argued upon the part of the defence, that even if the whistle was not blown and the bell was not rung, yet the proximate cause of the accident to the plaintiff's team, was their being abandoned by the driver, who testifies that he believes he could have controlled them if he had remained on the wagon. We think that this is too extreme a view of the law. The purpose of giving a warning before a railroad train comes to a crossing is not only to prevent drivers from driving on the track in front of the approaching engine, but also to give notice to persons travelling upon the highway, so that they shall not approach within dangerous proximity to the train that is approaching: and if this was a duty upon the part of the defendant company, and if this duty was neglected, and this caused the plaintiff's driver to approach so near the engine that was approaching that his horse took fright, or it made it necessary for him in the exercise of ordinary prudence to jump from the wagon and abandon the horses, then we are of opinion that this negligence is not so remote but that the defendant company may be held liable therefor.]

Verdict for plaintiff for \$250 and judgment thereon; whereupon defendant took this appeal, assigning for error the answers to points and the portions of the charge included in brackets as above.

George R. Bedford (*Andrew H. McClintock* with him), for appellant.

John Lynch, for appellee.

May 18, 1891. *CLARK, J.* In the general charge the Court instructed the jury, that inas-

much as it clearly appeared in the testimony the engineer had the locomotive in such control that he was able to stop at least twenty feet above the crossing, it could not be said, under the circumstances of this case, that he was running at a negligent rate of speed; and that if the usual warnings had been given, the engineer would be taken to have performed his full duty in stopping the engine before he arrived at the crossing.

But the jury found that no warning had been given; that the whistle was not blown, nor the bell rung, and whilst we think the weight of the testimony was, perhaps, to a different effect, the Court would not have been justified in withdrawing that question from the consideration of the jury. The testimony on part of the defendant, it is true, was positive. The engineer and the fireman, and also Hopkins, testified distinctly to the fact that the whistle was blown, not only at the bridge, 1000 feet, but at the third telegraph pole, 400 feet, above the crossing. The testimony on part of the plaintiff, however, was not of a purely negative character. Quigley and Muench testify that they did not hear either the whistle or the bell until about the time the lead horse was on the crossing. They say further, however, that as the passenger train was about due, they were giving particular attention, were listening for the whistle, and that if it had been blown, they would have heard it. Under these circumstances their testimony is more than merely negative, and therefore could not be disregarded. The jury has found the fact, and that this failure to give proper warning, as the engine approached the crossing, was an act of negligence on part of the engineer, which is to be imputed to the company.

The jury has also found, upon competent testimony and under proper instructions, that the driver of the wagon, before attempting to cross the railroad tracks, stopped at a proper place and looked and listened for the approach of a train, and did not hear the engine; and that having started and driven upon the track, when he saw the engine approaching as it did, he acted as an ordinarily prudent man would have acted, in view of all the circumstances, in jumping off the wagon to avoid the peril which seemed imminent, and in abandoning the horses and wagon to the probable consequences.

The verdict of the jury involves the fact, that the driver was not guilty of any negligence which contributed to the injury. Assuming this to be so, what was the proximate cause of the injury? The purpose of giving a warning before a railroad train or locomotive engine comes to a crossing, as the learned Judge very properly said in the general charge, is not only to prevent persons from driving on the track in front of the approaching train or engine, but also to give

notice to travellers upon the highway, so that they may not approach within dangerous proximity to the train. The alleged neglect of this duty caused the driver of this wagon to go upon the track, and into the peril, in which he was there seemingly exposed. The dropping of the lines and the leap from the wagon, according to the finding of the jury, were such acts as an ordinarily prudent person would have done to extricate himself from the threatened danger, and they may, therefore, be said to have been necessitated by the negligent conduct of the company. It was the fright of the horses, and their abandonment by the driver, that caused the injury, but these causes were produced by the negligence of the defendant, who without warning ran the engine into such dangerous proximity to the wagon, as to produce this fright of the horses, and to oblige the plaintiff, who felt that he was in peril, to jump from the wagon, and let the horses go without control.

It might not, perhaps, have been foreseen exactly how, or to what extent, injury would result, but the engineer, as we said in *Bunting v. Hogsett* (27 WEEKLY NOTES, 317), would be held to have foreseen whatever consequences might ensue from his negligence, without the intervention of some other independent agency, and both his employer and himself would be held for what might, in the nature of things, occur in consequence of that negligence, although in advance the actual result might have seemed improbable. It is not certainly known that the lines were caught in the wheel. The witnesses say that it is "likely" they did; we do know that they were liable to be caught in the wheels, and this would account for the lead horse having been turned around, as he was. If the engineer, by his negligence, compelled the driver to abandon the horses, he would be presumed to have foreseen what was reasonably liable to occur. There was not any intervening cause, disconnected with the primary fault, and self-operating, shown to exist in this case to affect the question of the defendant's liability. The negligent act of the engineer was the natural, primary, and proximate cause of the injury.

The judgment is affirmed.

H. S. P. N.

Jan. '91, 366.

March 12, 1891.

Commonwealth v. Ruddie.

Interfering franchises — Respective rights of holders of franchises to be exercised in the same place.

When two public franchises have to be exercised at the same point, each must be regulated by due regard to the other, but the burden of proof is on the

last comer to show that he is encroaching no more on the prior privilege than necessity requires.

Where a public road is laid out over the towpath of a navigation company whose rights had been granted long before the road was laid out, the limit of the legal right of the county is to cross the towpath with as little interference as possible.

Where the admitted or undisputed facts show that the offence charged in an indictment has not been committed, it is the duty of the judge to direct the jury as matter of law to find a verdict of not guilty.

Appeal of John Ruddie, Stephen Shoemaker, Joseph Shaffer, and John Bloss, defendants, from the judgment of the Quarter Sessions of Northampton County, upon an indictment found against them for maintaining a public nuisance upon the complaint of John A. Snyder, supervisor of public roads in Lehigh Township.

By the Act of March 20, 1818 (P. L. 201), certain persons therein named were granted the right to build a canal along the Lehigh River. By the Act of February 13, 1822, these rights became vested in the Lehigh Coal and Navigation Company, by whom the canal was opened for traffic in 1828, and used down to the time this action was begun. In 1887 a public road was laid out crossing this canal, and the present proceeding arose out of the respective claims of the supervisor of the road and the navigation company.

The facts are set forth in the opinion of the Supreme Court, *infra*, and in the charge to the jury by SCHUYLER, P. J., *inter alia*, as follows:—

"It seems that in 1887 a public road was ordered to be laid out and opened in Lehigh Township, in this county, leading from a point near Mouser's Mill to the northern entrance of the bridge which crosses the Lehigh River near Treichler's Station. A portion of this road lies between a bridge which crosses the canal of the Lehigh Coal and Navigation Company and the northern entrance of the bridge that crosses the Lehigh there.

"On the 24th day of last November the supervisor of Lehigh Township caused certain repairs to be made upon that portion of the road last mentioned. The repairs consisted in hauling dirt or ground there and unloading it in the road at this place for the purpose of filling up the road and putting it in repair. A portion of this filling in was on the towpath of the Lehigh Coal and Navigation Company's Canal. [Upon the following day the defendants hauled away all the dirt which had been deposited on the towpath of the Lehigh Coal and Navigation Company's canal, and some more.]

"The defendants have been prosecuted for hauling away this dirt, the allegation on the part of the Commonwealth being that by removing this ground from the road where it had been

placed by the supervisor left the road in a worse condition for public travel than it had been before the ground was removed.

"A very simple way of determining what your verdict should be will be to inquire, in the light of the evidence, in the first place, what was the condition of this part of the public road immediately after the supervisor had finished his filling in of the road. Having ascertained that you will inquire, in the second place, what was the condition of this road immediately after the ground had been taken away, and then you will inquire, in the third place, whether the road was in as good, safe, and passable condition immediately after the ground had been removed as it was at the time when the filling in was completed by the supervisor.

"If you find that the removal of this ground by the defendants did not put the road in any worse condition for travel than it was before, then your verdict would be a verdict in favor of the defendants, because, while the defendants might have no right to take away ground from a public road which had been put there by a regularly appointed officer, and whilst they might be liable to a civil action for doing so, yet they cannot be held liable in a prosecution for a nuisance for taking away and removing dirt from a public highway unless the result of such removal of the ground was an additional inconvenience to the public in travelling over the road. A slight inconvenience would not constitute a nuisance. But if you find from the evidence that after this dirt had been removed the public had greater difficulty in using that portion of the public road than they had before it was removed—in other words, if you find that the removal of the ground constituted a material obstruction to public travel—then I say to you that the removal of the dirt was the creation of a nuisance, and that your verdict in that event should be a verdict of guilty."

The defendants requested the Court to direct the jury to find defendants not guilty. *Refused.*

Verdict, "guilty," and defendants were sentenced to pay a fine of \$1 and costs of prosecution; whereupon they took this appeal, assigning for error, *inter alia*, the action of the Court in refusing to direct the jury to render a verdict of "not guilty."

W. E. Doster, for appellants.

J. Davis Broadhead, district attorney (with him *George W. Geiser*), for appellee.

May 4, 1891. MITCHELL, J. The defendants were the authorized agents of the Lehigh Coal and Navigation Company, and their rights must be judged by the authority of that company to do the acts complained of. The place of the alleged nuisance was part of a public road in Lehigh Township, and was also part of the tow-

path of the navigation company. Both parties therefore had the right of way at this point, but that of the navigation company was prior and superior. It existed by direct legislative grant long before the road, and when the latter was opened the limit of its legal right was to cross with as little interference as possible to navigation, including the use of the towpath. Undoubtedly when two public franchises have to be exercised at the same point, each must be regulated by due regard to the other, but the burden of proof is on the last comer to show that he is encroaching no more on the prior privileges than necessity requires. In the present case the location of the road at this point was opposed by the navigation company, on the ground that it would interfere with their franchises, and their exceptions to the report of the viewers were dismissed, on the express ground that the road would not, and could not legally, be allowed to do so. It appears from the opinion of the learned Court in that case, that the chief interference anticipated was from the contemplated building of a bridge across the canal and towpath. We gather, however, from the present record that the contemplated bridge was never built, but instead, the public crossed directly over the lock-bridge and towpath, the supervisor treating them as part of the public road for that purpose, and raising the towpath so as to make the road easier for public travel. Whether this was in strict accordance with the decree of the Court confirming the view of the road, or with the rights of the navigation company, we need not at present inquire. It is sufficient that it established a status as to the respective rights of the two highways, and may be fairly considered as doing so under the implied sanction of the Court in its decree in the road proceedings. This status lasted more than two years, from June, 1888, to November, 1890, when it was changed by the supervisor. The facts are not disputed. The point of intersection was a hollow as to the road, while it was a rise or elevation as to the towpath. It was to some extent an inconvenience to both. The supervisor, under the pretence of repairs, filled in the hollow for the convenience of the public, without regard to the corresponding inconvenience to the navigation company. This action was apparently of his own head, or at the suggestion of interested parties in the neighborhood, without the sanction of the Court, without legal proceedings, and without any authority at all to justify it. The defendants, in the performance of their duties to the navigation company, removed the recent filling in, and restored the prior condition of the locality. In so doing they were clearly within their legal rights. They would have been justified in preventing the filling in, but they adopted the more prudent course

of peaceably removing it instead. Their action bears no possible analogy to the conduct reprobated in *Easton R. W. Co. v. Easton* (133 Pa. 505), or *Cooke v. Boynton* (135 Id. 102). The unlawful and violent act here was that of the supervisor in changing the previously established grade. The erroneous theory on which this was done runs all through the case, including the trial, that the place had become so completely a part of the public road that the defendants were to be treated as trespassers and their acts as those of strangers on an ordinary highway, instead of joint owners, whose rights were to be considered in any change of the condition of the joint property.

On the undisputed facts in evidence, the defendants' fourteenth point should have been affirmed, and the jury directed to render a verdict of not guilty.

Judgment reversed.

H. S. P. N.

Orphans' Court.

May 18, 1891.

Phillips's Estate.

Will—Construction of—Devise—Ambiguity—Trusts—Powers of a referee appointed by the will to settle disputed questions that might arise.

Sur exceptions to adjudication.

Before the Auditing Judge (ASHMAN, J.), it appeared that the fund accounted for arose under a trust created by the will of the decedent by which the sum of \$100,000 in bonds and mortgages were given in trust—

To collect and receive the interest thereof and pay the same unto my three grandchildren, children of my dear son Jonathan D. Phillips, deceased, Frank, Charles, and Marie (Marie Hatch), for and during the term of their natural lives, so that the same shall not be liable for any of their contracts, debts, or engagements, nor shall the same be subject to anticipation, and immediately after the death of any one of them, dying without issue, then the same to revert to the surviving heirs of my son Jonathan D. Phillips, their receipt only to be in payment of interest from time to time as the same may become due and payable.

The residuary estate was given in equal shares to Charles, a son of the decedent, and to the said grandchildren—children of decedent's deceased son Jonathan. There was a further provision in the will, that if there was any dispute as to the construction of the will it was to be referred to the Hon. F. Carroll Brewster, whose decision "was to be final and binding upon all parties interested."

Frank C., a grandchild, died April 16, 1888, leaving no issue surviving; Charles D. Phillips, another grandchild, died December 5, 1890, leaving a widow but no children.

The questions raised at the audit were (1) Whether the principal should now be divided? (2) If the trust shall continue as to the whole fund to whom shall the interest be paid?

The referee had decided that the clause of the will only governed the interest on the fund.

The Auditing Judge held that on the death of Frank C. Phillips his share, one-third, passed equally to Charles D. Phillips and Marie A. Hatch, and that the share of Charles D. Phillips, one-third, passed to Marie A. Hatch as follows: Charles D. Phillips's estate one-sixth absolutely, Marie A. Hatch three-sixths absolutely, Marie A. Hatch two-sixths for life.

To this finding of the Auditing Judge exceptions were filed, because he erred in finding that the principal of the trust fund should be divided, and that the word *same* referred to the principal and that there was a gift to the grandchild of the principal.

F. Carroll Brewster, for exceptants.

John G. Johnson, contra.

May 29, 1891. PENROSE, J. It is very clear that the primary gift by the testator to the three children of his deceased son was only of an equitable life estate in one-third of the income of the trust estate, with a gift, by implication to their issue, respectively, if there should be such issue living at the time of their respective deaths—the subject being personalty and dying without issue being, therefore, the equivalent of "without issue then living." (Eachus's Appeal, 10 Norris, 105.) But in case of death without such issue, the provision, which has given rise to the present controversy, is made for the survivors: and if that provision relates to principal, as two of the beneficiaries have died without issue, the trust has terminated in whole or in part; if to income, the estate must remain in the hands of the trustees in order to accomplish the purposes for which the trust was intended.

On its face, the main purpose of the trust was the protection of the beneficiaries from their own improvidence and want of business capacity; and the fact of its creation affords the most convincing evidence that the testator believed it unwise to give them control of principal. It is difficult to believe, therefore, that in making provision with regard to interests to accrue to the survivors in the event of the death of any without issue, he would deliberately confer as to such shares powers of ownership which were withheld from those originally given. He was, as it is fair to infer from the size of his estate, a practical business man; and if the language

which he has used were ambiguous, we would, under well-settled principles, be justified in straining the words in order to prevent inconsistency and carry out what, upon the will taken as a whole, appears to have been his manifest intent. *Verba intentioni debent inservire.*

But is there any ambiguity? The entire clause is as follows: "I give and bequeath unto the said Charles G. Phillips and John Flowers . . . the sum of \$100,000, in bonds and mortgages, . . . to be held by them . . . in trust to collect and receive the interest thereof and pay the same unto my three grandchildren, children of my dear son, Jonathan D. Phillips, deceased, . . . Frank . . . Charles . . . and Marie . . . for and during all the term of their natural lives, so that the same shall not be liable for any of their contracts, debts, or engagements, nor shall the same be subject to anticipation, and immediately after the death of any one of them dying without issue, then the same to revert to the surviving heirs of my son Jonathan D. Phillips, their receipt only to be in payment of interest from time to time as the same may become due and payable."

The subject of the provision for the event of the death of any one of the beneficiaries without leaving issue then living, it will be observed, is described as "the same." Does this refer to principal or to income? The principal is only mentioned in connection with the direction that it shall be "held for and during *all* the term of" the natural lives of the grandchildren; the purpose was to provide for an event, affecting the right to only a part of it, which might occur during the period of such holding; and the word "same" as descriptive of only a part of the principal so mentioned would be so inaccurate as to require very clear evidence of an intention thus to use it. The rule is a fundamental one that where a testator uses a word in several parts of his will he is presumed to use it with the same meaning; and the presumption is almost irresistible if the repetition of the word occurs in the course of the same sentence. Here it occurs five times, and as to four of these it is conceded there is an identity of meaning: the trustees are to receive the *interest* and pay "the same" to the beneficiaries while they are all alive; "the same" is not to be liable for their debts or engagements; receipts for payment of interest are to be taken as "the same" may become due and payable; "the same" is not to be subject to anticipation, and then follows the part in question,—"the same," immediately after the death of "any one" of them dying without issue, "to revert to the *surviving* heirs of my son Jonathan." Interest alone seems to have been the thought in the mind of the testator: grammatically, it was the only antecedent to which the words "the

same" could refer; and referring it to principal involves the absurdity of withdrawing from an accrued share the protection thought essential in the original gift. Moreover the word "revert," which in a popular sense implies devolution upon one having an already existing interest, is not without significance. The only existing interest which the "heirs" had was in the income, and with no propriety could a share of principal be said to revert to them: but at the death of one without leaving issue, the entire income, which before was divisible among all, "reverts" to the survivors.

Finally, the clause which follows the provision in question, as if for the purpose of preventing doubt as to its meaning, declares in express terms that "their receipt *only* to be in payment of *interest* from time to time as the same may become due,"—thus forbidding *any* payment of principal.

Understanding, therefore, the word in the sense in which it is used in every other instance, we have simply a direction, such as, under the circumstances, it was most natural to expect, that the interest previously paid to the grandchild dying without issue shall thereafter be paid, subject to the original restrictions, to the survivors or survivor; and the question as to what becomes of the principal, should the last survivor die without issue, will not arise until then.

The consideration of this question, however, is rendered unnecessary by reason of the fact that the testator directed that in case of any difficulty the matter shall be submitted to an eminent member of the Bar, named in the will, "whose decision shall be final and binding upon all parties interested," and the referee has decided that the trust continues as to the entire principal, notwithstanding the fact of the death of two of the beneficiaries without leaving living issue. If, as must, of course, be conceded, a testator may, instead of himself designating the objects of his bounty, confer the power of selection upon a third person, his right to direct that all questions of distribution or construction, arising under his will, shall be similarly determined, necessarily follows. *Omne majus continet in se minus.* Even as between parties to a contract, an agreement to refer disputed questions to the judgment of a chosen referee is entirely binding (*Navigation Company v. Fenlon*, 4 W. & S. 205; *Connor v. Simpson*, 8 Outerb. 440); *a fortiori* in the case of a testator disposing of his own estate, and, therefore, a law unto himself (*Bainbridge's Appeal*, 1 Outerb. 482). The question has been expressly decided. (*Naglee's Estate*, 2 Smith, 154; *Wait v. Huntington*, 40 Conn. 9; *Seagrave's Appeal*, 10 Crumr. 362, etc.)

That the referee here subsequently became counsel does not affect the validity of his judg-

ment, though he would have been disqualified had his connection with the case in that capacity preceded or been contemporaneous with his action as judge. Nor can it be doubted that the power extended to the determination of questions of interpretation. The natural purpose of such a provision would be to meet just such cases, and the language used in this will is of the broadest, most comprehensive character. In case of "any difficulty" the "matter" shall be submitted. We have no right to say that "any" difficulty means only such as may arise outside of the will. Words are, *prima facie*, to be taken in their ordinary sense and according to their grammatical construction. "The moment we depart," said Judge SHARSWOOD, in *Dame's Appeal* (12 Smith, 422), "from the plain words . . . according to their ordinary and grammatical meaning in a hunt for some intention founded on the general policy of the law, we find ourselves involved in a sea of trouble." (See, also, *Turnpike Co. v. McNamara*, 22 Smith, 280.)

The exceptions are sustained and the adjudication modified accordingly.

E. F. H.

March 17, 1891.

Thomson's Estate.

Principal or income—Question arising between cestui que trust for life and parties in remainder—Rule in case of "stock dividends"—Only profits accrued since death of testator belong to owner of the income—Oliver's Estate (26 WEEKLY NOTES, 392), considered.

Sur exceptions to adjudication upon the second account of The Philadelphia Trust, etc., Co. *et al.*, trustees of the estate of J. Edgar Thomson, deceased.

At the audit, before HANNA, P. J., testator's widow, Mrs. Lavinia F. Thomson, claimed that certain sums charged to principal account should be awarded to her, tenant for life, as income.

As to these claims the Auditing Judge found as follows:—

"(1) Western Land Company. A certificate of the stock of this company was given in evidence, from which it appeared that the par value of this stock was fifty dollars per share, and that there had been dividends or distributions made from time to time on account thereof amounting in all to 275 per cent. Mr. Charles S. Hinchman, the secretary of the company, was examined as a witness, and testified that these amounts had been declared either as dividends of profits or as payments on account. He further testified that from his acquaintance with the affairs of the company, he having been an officer thereof for many years, it was safe to say that the real estate and other assets of the company now on hand as

its property were equal to the whole capital of the company at its par value.

"Under this state of facts Mrs. Thomson asks that the whole amount of these dividends be awarded to her, as they were all profits over and above the amount of capital invested, which remains intact.

"(2) National Land Improvement Company. In support of this claim the report of this company to its stockholders, dated December 31, 1889, was offered in evidence as if the statements contained therein had been regularly proved under a commission or otherwise. From this report it appeared that the original amount of capital stock subscribed was \$288,949.50, and that the assets now on hand were largely in excess of this amount. Dividends had been made from time to time in and since the year 1874, amounting to 150 per cent. As the whole capital remaining, however, is at present in excess of the capital originally subscribed, all the dividends included in the present account—to wit, the sum of \$2861.50—are therefore claimed as income, and asked to be awarded to Mrs. Thomson.

"(3) Dennison Land Company. In support of this claim Mr. George J. Garde, assistant secretary of the Philadelphia Trust Company, which is one of Mr. Thomson's trustees, was examined. He proved that the original investment of Mr. Thomson in this company was \$5695.73. By the trustees' first account, which was offered in evidence, it was shown that the estate had received in distribution, from time to time, a sum in excess of the original investment—to wit, \$6425.61. The whole of the payments included in the present accounts, amounting to \$4667.68, are therefore claimed as income, and asked to be awarded to Mrs. Thomson.

"(4) Clearfield and Jefferson Railroad Company. Mr. J. Edgar Thomson, at the time of his death, in May, 1874, was the owner of 200 shares of the Bell's Gap Railroad Company, a railroad in the western part of this Commonwealth. Somewhat recently, in the year 1885, an extension of this road was contemplated, to be called the Clearfield and Jefferson Railroad Company, and in order to raise funds for the purpose, bonds were issued to be guaranteed by the Bell's Gap Railroad Company. As an inducement for subscriptions to these bonds, a privilege or option was annexed thereto of a right to take at par a certain number of shares of new stock to be issued by the Bell's Gap Railroad Company, which company's stock then commanded a premium in the market. Mr. Thomson's Estate declining to avail itself of this privilege, sold the same in open market upon the two occasions heretofore stated under this claim. As the value of the stock of the Bell's Gap Railroad Company over the par value thereof has

been admittedly due to the development of this company since Mr. Thomson's death in 1874, the price of this option is manifestly an increment which belongs to the life-tenant, and has both in form and substance been so decided by this Court. This amount of \$2136.75 is therefore claimed as income, and asked to be awarded to Mrs. Thomson.

"The aggregate amount of these several claims is the sum of \$16,739.18.

"From the facts shown and conceded the question presented is one purely of law—viz., whether the moneys thus received by the trustees are properly included among the "principal" assets of the estate or form part of the "income" of the trust estate, and therefore to be awarded to the life-tenant.

"Under all the authorities upon the subject, the Auditing Judge is of the opinion that the several sums received by the trustees, as above set forth, do not belong to the capital or principal of the trust estate, but to the income thereof, to which the tenant for life is entitled.

"This view is sustained by Oliver's Estate (24 WEEKLY NOTES, 139); Trust Company's Appeal (Id. 137); Thomson's Estate (11 Id. 482); Eastwick's Estate (12 Id. 67).

"The amount claimed—viz., \$16,739.18—is accordingly transferred from the principal account and added to the balance of income."

To this finding the accountants excepted.

John G. Johnson, for exceptants.

George W. Biddle, contra.

April 4, 1891. *PENROSE, J.* As between *cestui que trust* for life and the persons to whom, at his death, the principal of an estate is given by will, the only profits to which the former is entitled, as owner of the income, are such as have accrued since the death of the testator. The question, where stocks are the subject of the gift, is not affected by the form in which dividends may be declared, nor by the name given to such dividends by the association or corporation declaring them: and whether a stock dividend or the price at which the option to subscribe for new stock may be sold is to be regarded as principal or income depends upon whether the new stock represents a capitalization of profits earned since the death of the testator, or merely a change of the number of shares into which the capital was before divided. Whatever was principal or assets of the company at the death of the testator or at the creation of the trust under which the stocks are held, remains principal until the death of the tenant for life, without reference to mere change of form or to increase of value. It is true in case of stock in a company, incorporated or unincorporated, whose business consists of buying and selling lands and dividing among the stockholders the profits thus

made, it has been held in *Oliver's Estate* (21 Crumr. 43), that where lands owned by such company in the lifetime of the testator are sold after his death, the proceeds of sale, if the value of the remaining lands is not less than the capital originally subscribed, are to be regarded as income "earned after his death, if the profit was due to a discovery of mineral deposit after his death," and the rise in value was "not from a change in the actual value but from a correct knowledge of that value which increased the market price." But to come within the principle of that decision it would seem to be necessary that it should be shown by the tenant for life that the circumstances were identical with, or analogous to those there presented, viz., that the rise in value took place after the testator's death, and that it was due to some real or supposed cause not known or discovered in his lifetime. *Oliver's Estate* does not profess to overrule *Earp's Appeal* (4 Casey, 368), nor does it refer to *Vinton's Appeal* (3 Outer. 434), where it was held, as a general rule, that the proceeds of sale of that which composed the capital of a company cannot go in the shape of dividends to the person for whom, as tenant for life, shares of stock are held. There is certainly no warrant for saying that proceeds of sale of capital since the death of a testator are income simply because what may remain may be equal "to the whole capital of the company at its par value," or even that it is "in excess of the capital originally subscribed."

In the present case we are without information as to the sources from which the moneys were derived by the companies, and the character of the operations carried on by them; the nature of their obligation to their stockholders; what their assets consisted of, and their value at the time of the testator's death; when the increase of value, if any, took place, and to what cause it was due; and whether the stock which was the subject of the options sold represented profits earned or merely, as in *Moss's Appeal* (2 Norris, 264), "the right of the holder to increase his investment with a view to enlarged operations and greater profits to be earned thereby in the future." (*Oliver's Estate*, 21 Crum. 61, etc.) We are compelled, therefore, in order that his finding upon these subjects may form part of the record, to refer the account back to the Auditing Judge.

If the sums claimed by the *cestui que trust* for life are ultimately held to belong to her, the commissions upon the amount will, of course, be chargeable against them and not, as now, against principal.

The omission to state the agreement of counsel as to the worthlessness of the Hamilton Wheel Company stock was simply an oversight which will be corrected.

J. D. B., Jr.

WEEKLY NOTES OF CASES.

VOL. XXVIII.] FRIDAY, JULY 31, 1891. [No. 15.]

Supreme Court.

Jan. '91, 240.

April 16, 1891.

Bacon v. Delaware, Lackawanna and Western R. R. Co.

Railroad company—Negligence—Contributory negligence—Moving train—Injury received by passenger at railroad station while attempting to board a moving train—Duty of trial Judge where the evidence is undisputed.

It is negligence *per se* for a passenger to attempt to board a railroad train while it is in motion.

Where the evidence is undisputed that a passenger did so attempt to board a moving train, it is the duty of the Court to pronounce upon it by a binding instruction to the jury to find a verdict for the defendant.

In an action against a railroad company by the widow of a passenger killed at a railway station, the plaintiff averred in her narr. that the accident happened while her husband was "in the act of walking upon said platform for the purpose of getting on the cars of said defendant." The witnesses of the plaintiff did not contradict the fact thus averred in the narr. and those of the defendant confirmed it. It appeared that the accident was caused by the decedent's catching his foot in a hole in the platform. The Court gave the jury binding instructions to find for the defendant, as the accident occurred while the deceased was about to board a moving train:

Held, not to be error.

Appeal of Lena Bacon, plaintiff, from the judgment of the Common Pleas of Luzerne County, in an action brought against the Delaware, Lackawanna and Western Railroad Company, to recover damages for the alleged negligence of the defendant company, whereby the plaintiff's husband was killed.

The facts, as they appeared on the trial, before WOODWARD, J., are recited in the opinion of the Supreme Court, *infra*.

The Court charged the jury as follows:—

"To recover damages in this case it was necessary for the plaintiff to show, first, that the defendant was guilty of negligence which caused the accident resulting in the death of the deceased; and [secondly, the Court must be satisfied from the evidence, that if the negligence of the company has been established, it has not been shown that negligence of the deceased concurred with that of the company in producing the result. Or, to put it in a different form, if the

Judge trying the case, after a careful examination of all the evidence submitted, is satisfied that this evidence establishes the fact of concurring negligence at the time of the disaster, on the part of the person injured, then it is his duty of taking the responsibility of saying, under the rules of the law, there can be no recovery.]

"Now, we have examined this case with these legal rules in view, and our examination results in this:—

"(1) The declaration in this case alleges negligence on the part of the defendant company, also that the deceased was upon the platform at the company's depot, with the intention of boarding the cars.

"(2) The evidence shows that the deceased was injured while making an effort to board the train of cars while it was in motion.]

"(3) The evidence also shows that the deceased while making an effort to board the train in motion, was distinctly warned of the danger of so doing, but insisted on making the effort, notwithstanding the warning.]

"A thorough analysis of the evidence in the case compels us to say that these three statements are a fair deduction from the undisputed facts, and it therefore becomes our duty to affirm the third point of the defendant, which reads as follows:—

"(3) Under the undisputed testimony of the plaintiff, it having been shown that the decedent purchased a ticket for the excursion from Scranton to Hiawatha Island and return, that he was a passenger on the train returning to Scranton, and that he got out of the train at Nicholson, an intermediate station, of his own volition, and attempted to get on the train again when it was in motion, he was of his own action guilty of contributory negligence, and the verdict must be for the defendant.

"In affirming this point we say, after examining the law, we find it to be the general rule, leaving out of view extreme cases and emergencies, that the attempt to board a train in motion is negligence, and we see nothing in the present case to take it out of the effect of this general rule. It is, therefore, our duty on this question of contributory negligence to affirm the third point of the defendant; and this results in our being obliged to say to the jury, as matter of law, the plaintiff cannot recover in this action; and we so instruct you. The verdict should be for the defendant.

"I am requested by the plaintiff's counsel to charge you:—

"(1) That the deceased had a right, under the evidence in the case, to be upon the passenger platform at Nicholson.

"That point we affirm.

"(2) If the injury done to Mr. Bacon was the

result of carelessness and negligence on the part of the defendant, without fault on the part of the deceased, plaintiff may recover in this action.

"As a legal proposition that is correct, although we are unable to apply it in the present case; we therefore affirm it as a legal proposition.

"(3) If the jury believe that on the approach of the train at a speed of between three and four miles an hour, Mr. Bacon left a party of friends with whom he had been conversing on the station platform and walked towards the train, intending to enter a car after the train had stopped, and that without negligence on his part and not having attempted to board the moving train, he caught his foot in a hole, as described by the witnesses on the part of the plaintiff, and was thereby thrown under the car and injured, plaintiff may recover.

"We decline to affirm that point, because we do not think it is justified by the evidence in the case, and it is disaffirmed."

Verdict for the defendant and judgment thereon; whereupon the plaintiff took this appeal, assigning for error the portions of the charge included in brackets, and the answers to the defendant's third point, and to the plaintiff's third point.

John Lynch, for appellant.

The Court erred in withdrawing the case from the jury, and deciding as a matter of law that the plaintiff could not recover, upon the testimony of the defendant that Bacon was attempting to board a moving train. Wherever there is a doubt upon the question of contributory negligence the case must go to the jury.

Kohler v. Penna. R. R. Co., 26 WEEKLY NOTES, 176.

Fisher v. Railway Co., 25 Id. 161.

Railway Co. v. Boudrou, 92 Pa. 475.

It was the duty of the company to erect and keep in repair a safe platform. Bacon, although he had left the car at a way station, was still a passenger and entitled to protection as such.

Wood's Railway Law, §§ 1046, 1047.

Cusman v. L. I. Ry. Co., 73 N. Y. 606; 9 Hun, 618.

Packet Co. v. True, 88 Ill. 608.

R. R. Co. v. Riley, 39 Ind. 568.

Railway Co. v. Krouse, 30 Ohio St. 222.

Henry W. Palmer (Andrew H. McClintock with him), for appellee.

The Court was justified in holding, as a matter of law, that it was contributory negligence for the decedent to step upon the train when in motion.

R. R. Co. v. Aspell, 23 Pa. 147.

McClintock v. R. R. Co., 21 WEEKLY NOTES, 133.

N. Y., etc., R. R. Co. v. Enches, 24 Id. 261.

Harvey v. Eastern R. R. Co., 116 Mass. 269.

Where there is no conflict in the testimony, and the testimony establishes certain facts, which constitute contributory negligence, it is the duty

of the Court to direct a verdict for the defendant.

Hoag v. Lake Shore, etc., R. R. Co., 85 Pa. 293.

Barnes v. Sowden, 21 WEEKLY NOTES, 81.

The duty of the defendant to the decedent was only as a passenger; and in alighting at an intermediate station the contractual relation ceased.

2 Wood's Railway Law, p. 1134.

State v. Grand Trunk Ry. Co., 58 Me. 176.

May 27, 1891. *GREEN, J.* If the plaintiff's husband was killed while he was attempting to get upon a moving train she cannot recover, because, notwithstanding the negligence of the defendant in having a defect in the platform, his death was caused in part by his own negligence, and the law will not discriminate between his negligence and that of the company. If there was doubt, or if there was conflicting evidence as to his being engaged in an attempt to board the train while in motion, it would have been necessary to leave that question to the jury; but if there was no doubt about it, and the undisputed testimony proved it, it was the duty of the Court to pronounce upon it by a binding instruction to the jury to find a verdict for the defendant. This was what the learned Court below did, and upon a thorough examination of the testimony we are convinced the Court was right.

The first and one of the most important considerations upon this subject is that the plaintiff in her narr. declares that her husband was attempting to get upon the defendant's cars when the accident occurred. The language of the narr. is that "the plaintiff's husband, Arthur Bacon, being lawfully upon the said platform at said station, as a passenger on the cars of said defendant, and while in the act of walking upon said platform for the purpose of getting on the cars of said defendant, in the night-time, his foot sank into a hole in the said platform, thereby causing him to be thrown with force against and under the moving train of cars at the platform and station aforesaid, by means whereof the said Arthur Bacon, plaintiff's husband, was greatly bruised, hurt, and wounded, so that afterwards, to wit, on the twelfth day of October, 1886, at the county aforesaid, he died of said wounds."

It is difficult to understand how there could be any more solemn assertion than this by the plaintiff herself, that her husband received his injuries, of which he died, while walking upon the platform for the purpose of getting on the cars of this moving train. It is her declaration of her cause of action upon which she asks the Court and jury to act in adjudging her case. As a matter of course it is binding upon her, not only because she asserts it, but also because, upon this subject, there is no issue between her and the defendant. The defendant also asserts, and gave evidence to prove, precisely what the plaintiff

alleged, to wit, that the injury was received while her husband was walking on the platform for the purpose of getting on the cars of the defendant's moving train.

We know of no reason why this consideration alone does not dispose of the case. It is however very easy to show that all the evidence in the case, on both sides, tended to establish this averment of the narr.

The plaintiff herself testified that her husband had gone on an excursion train, which left Scranton at eight o'clock in the morning, to go to Hiawatha Island, expecting to return about the same time in the evening. Also that he bought his ticket for the round trip from one of the members of the lodge. He was therefore undoubtedly intending to return upon the same excursion train upon which he left. All of the other testimony established that in the evening, on the return, the train stopped at Nicholson Station, and in consequence of some defect in the pump of the engine, it became necessary to attach another engine in front of the train. For this purpose the train was backed up above the station past a switch over which the second engine could run on the track and then back up and be attached to the train. All this was done, and the train then started and ran on without stopping at the station. While the change was being made, a number of the passengers left the train and stood upon the platform for some little time. Among these was the plaintiff's husband. After the train had stood a short time at the depot, the conductor called out "all aboard" twice, and many of the passengers got on. This was proved by overwhelming testimony, and was entirely uncontradicted. One of the witnesses, Lee, who was one of the excursionists, testified that the conductor said, "All aboard, won't stop when we get up to the station again. Wanted everybody to get on. That is the way I understood it." Then the train started to back up, and after the engine was attached, started to go on the return. The train was passing the depot at a moderate rate of speed, estimated at four or five miles an hour, when the deceased moved towards it and attempted to get on.

The plaintiff examined two witnesses to prove what was done the moment before the accident. One of them, Seymour Pratt, said: "My attention was called to a man that passed by me walking quite fast—midding fast—as the train was going, walking the same direction, and he turned facing the car, and caught his foot and fell between the car and the platform." The witness further said he did not know whether the deceased was trying to get on the train or to see somebody or what he was calculating to do. Q. Was the train going faster than he was or was he going faster than the train? A. About the same speed. Q. You

say he was walking fast? A. Quite fast. Q. Did he catch hold of the rail? A. No, sir; I don't think he did. Q. Did he reach for it? A. He reached out as he fell. Q. How far was he from the opening between the platform of the cars when he fell? A. He was about the end of the cars. Q. That is he was near the platform of a passenger car? A. Yes, sir.

There is no possible theory with which this testimony is consistent, except that the deceased was endeavoring to get upon the car when he fell.

The other witness for the plaintiff upon this subject, W. S. Knapp, said: "I saw him a few minutes before he was hurt, and I saw him shortly after he was hurt. I was the second man that was up to him. . . . I saw him start towards the edge of the platform. What his object was—whether to get on the train or what, I could not say, and I saw him act as though his foot was fast going like that [indicating] towards the train. Q. As he was falling? A. As he was falling. That is all I can tell you about it."

This testimony also is consistent only with the theory that the deceased was endeavoring to get upon the train. He had a ticket which included his return to Scranton. He was one of the excursionists and they were all returning by this particular train. He merely left the train temporarily and got off on the platform at this small way station. There is not a particle of testimony that he intended to remain at the station or to leave the train at that point. On the contrary, all the testimony, as well for the defendant as for the plaintiff, shows with conclusive force, that he was intending to return with the party, and to get upon the train for that purpose. According to the plaintiff's witnesses he was close to the train walking fast, he turned towards the train facing it, and reached out the moment before he fell. Lee, one of the defendant's witnesses, was with him when the train was backing up. He was asked: "Q. Did you get on? A. No, sir. I took hold of this gentleman's arm, and tried to walk down the track with him. Q. You walked down in the direction the train was going? A. In the direction the train was backing up. Q. Whose arm did you take hold of? A. Mr. Bacon's, the gentleman that got killed; he was a friend of mine. Q. Where did you leave him? A. He would not go any further when we started off the platform; said he was not afraid, he was a trainman, he could jump a train anywhere. Q. What did you say to him when you took him by the arm to lead him down? A. I says: 'Go, get on, because don't you hear the conductor say he won't stop when he gets up again. They will send down to Factoryville for another engine.' Q. After he left you or you left him where did you go? A. Got on the train."

The same witness said he saw Bacon again when the train came down standing by the freight house door. Q. "Alone? A. Yes, sir; seemed to be, when I seen him he was making efforts to come towards the train. . . . He made pretty good time. I hollered at him, 'Young man, you cannot make that. Mr. Bacon, for God's sake, stay back; you will get killed.' He grabbed with his hands, and his foot did not make it."

Caygell, another witness for the defendant, was a member of the band that went with the excursion. He said: "I heard the conductor holler all aboard, he hollered 'all aboard;' my partner with me said 'come, let's go on;' so I walked back with him, we got on. And when she pulled out again, I stood on the steps of—I think it was the third car—on the head end, and as we came into the depot I noticed this gentleman, Mr. Bacon, talking with some ladies, and he seemed to bid them good-bye, and came running forward to the car to the steps I stood on; as he came up he took hold of the hand-iron with his left hand, and instantly she bumped him off his feet, and slammed him up against the side of the car, then he fell in behind the first wheels of that car; then I jumped up and caught the bell wire and pulled it and that is all I know."

Sarah E. Pratt, was one of the ladies with whom Bacon was conversing on the platform of the station, and she said, "He stood there talking with us all the while that the train stood there and while it backed up, and I don't remember whether he started from us before the train came back or not. I cannot tell; and he walked down the track and I saw him make the attempt to get on the train and supposed he did. . . . Q. Whether the train was in motion, going rapidly or otherwise? A. I thought it was going quite fast. Q. You say he made the attempt to get on the train; just describe how he did that. A. I saw him reach his hands out to take hold of the car, and I supposed he got on the car."

There was other testimony of a similar character, but it is not necessary to repeat it. There was no testimony of any kind, or from any witness, tending in the least degree to contradict the evidence as to Bacon's attempt to get on the car the moment before he fell. It proves nothing to show there was a hole in the platform. While it is not at all certain that his foot was caught in the hole, it is a matter of no consequence in determining the question of the negligence of the deceased in attempting to get on board of a moving train. That attempt was an established fact, first asserted by the plaintiff in her narr., then proved substantially by her own witness on the trial, and proved most conclusively by other and disinterested witnesses for the defendant who were entirely uncontradicted, and the whole of

the oral testimony conclusively corroborated by all the attending facts and circumstances. This whole array of concurring proof shuts out every inference or conclusion but the one that the deceased was attempting to board the train while it was in motion, and the Court had no alternative except to pronounce upon the undisputed state of the testimony. It is not necessary to cite authorities that it is negligence for one to attempt to get upon a train of steam railroad cars while they are in motion.

Judgment affirmed.

S. H. T.

[See next case.]

Jan. '91, 436.

May 7, 1891.

Leggett v. Western New York and Penna. R. R. Co.

Negligence — Contributory negligence — Railroads—Moving train—Injury to passenger alighting from, at station.

In an action by L., a passenger, against a railroad company for an injury received while getting off a train at a station, it was in evidence that when the train arrived at the station it stopped, but only for a very short time; that the brakeman having announced the station, when the train stopped ran forward to the engine, from which point he signalled to the conductor that all was right, and the conductor then started the train; that L., the plaintiff, when the station was called left her seat and went out on the platform, and that she did not observe that the train was in motion until after she was descending the steps, and that immediately afterwards she fell to the ground and was injured. Upon these facts the Court left the question to the jury as to the negligence of the defendant, and also as to whether the plaintiff had stepped off the car voluntarily or fell off:

Held, not to be error.

Appeal of the Western New York and Pennsylvania Railroad Company, defendant, from the judgment of the Common Pleas of Warren County, in an action of trespass brought by Neva E. Leggett, to recover damages for an injury alleged to have been sustained by reason of the negligence of the defendant company.

The facts of the case are sufficiently set forth in the opinion of the Supreme Court. The plaintiff contended that the railroad train was not stopped at the station for a time sufficiently long to allow the passengers to alight, and that she was thrown from the step of the platform while leaving the car. The defendant company on the other hand contended that the accident was caused by the contributory negligence of the plaintiff in getting off the car while the train was in motion.

The plaintiff submitted, *inter alia*, the following points:—

(3) If, when the train stopped at the Sugar Run Station, the plaintiff proceeded to leave the car with reasonable expedition and care, and when she was on the steps of the car platform was thrown off by reason of the movement of the train before she had sufficient time to alight, and in consequence of the movement of the train was thrown off and injured without any fault on her part, she is entitled to recover. *Affirmed.* (Assignment of error number four and one-half.)

(4) If the jury find from the evidence that the railroad company was guilty of negligence in not stopping its train a sufficient time to enable the plaintiff to alight with safety; that when the train stopped at the station the plaintiff proceeded to leave the car with reasonable expedition and care; that when she reached the steps of the car platform and was descending them she then for the first time discovered that the train was moving; that her position was then one of danger, occasioned by the fault of the defendant starting the train too soon; she is not chargeable with contributory negligence, if, realizing the danger in the excitement of the moment and without time to deliberate and choose between the danger of remaining on and stepping off, she voluntarily stepped off; and much less is she so chargeable if under such circumstances she stepped off by reason of the loss of her self-possession and not knowing what she did. *Answer.* We affirm this point except to say to you that "if she voluntarily stepped off," and was at the time in such condition that she was competent of judging as to her safety, then her "voluntarily stepping off" might not be good law; but if it was done under an impulse of the moment and she was utterly incapable by reason of the suddenness of the danger confronting her to form a proper judgment and to act with any greater prudence, then, of course, in making a choice, such as she did, although it might be a dangerous one, she would still be held to be free from fault. (Fifth assignment of error.)

The defendant submitted, *inter alia*, the following points:—

(2) Under the law of Pennsylvania it is negligence *per se* for a passenger to alight from a moving train, and in order to escape this conclusion the plaintiff must show affirmatively that after the train was moving she was induced by the train officers to leave the train, or that she had reason to apprehend greater danger from remaining on the train, or that the starting of the train and her stepping from it were simultaneous. *Answer.* We affirm this point, as far as it goes, but it does not contain all the facts that, we think, cover this case. We therefore qualify this point, for the reason that it does not contain all the facts by which the presumption of negligence in alighting from a moving train may be

overcome. In addition to what the point contains on this subject we say to you, that if the defendant company did not stop its train at the station a sufficient time to enable the plaintiff to alight with safety, and the plaintiff proceeded to leave the car with reasonable expedition and care, and did not discover that the train was in motion until she came to the steps of the platform and was descending them, then her position of danger was one occasioned by the negligence of defendant; and if the jury further find from the evidence in this case, that the danger was so sudden and unexpected that she had no time to deliberate and choose between the danger of remaining on and stepping off, and that under all the circumstances she acted according to her best judgment, then she is free from fault, and it does away with the presumption of negligence arising from the fact of alighting from a moving train. (First assignment of error.)

(4) If the evidence shows that at the time the plaintiff reached the platform of the car before alighting, the train was moving, and that if she had used her senses she should have been aware of the fact, and notwithstanding this fact she jumped from the car, this constitutes contributory negligence, and the plaintiff cannot recover. *Answer.* We affirm this point, if you find no other facts in the case than what are stated here. But if you find the facts which we have stated to you in our answer to the second point, and find that she was placed in the position in which she was at the time she alighted, or was about alighting from the car, by the negligence of the defendant, and that the suddenness of the danger which confronted her was such as to deprive her of power to form proper judgment and make a judicious choice, then, although she might have retained her senses to a certain extent, she would still be free from fault. If she got into a position of danger through no fault of hers, but solely through the negligence of the defendant, she can not be held responsible for a mistake of judgment in attempting to get out of the danger. (Second assignment of error.)

(5) If the undisputed evidence on both sides shows that at the time the plaintiff reached the steps of the car before alighting, the train was moving, and that she was aware it was moving, and notwithstanding this fact she jumped from the car, this constitutes contributory negligence, and the plaintiff cannot recover. *Answer.* We affirm this point provided you find she did jump from the car, and at the time of so doing was in a condition to judge whether it was a judicious and proper act or not. (Third assignment of error.)

(6) Under the law and the evidence in this case the plaintiff cannot recover. *Answer.* We refuse to answer as asked in this point. We

think there are sufficient disputed facts which warrant us in submitting it to you for determination. (Fourth assignment of error.)

The Court (METZGER, P. J., of Lycoming County), charged the jury, *inter alia*, as follows:—

"I will not recapitulate the testimony farther than I deem it necessary in order to draw your attention to the question involved in the case, and enable you to see what the real issue is that you are trying, and also to understand the testimony. The plaintiff herself is not here; and it is stated that the reason of her not being present is the fact of her present physical condition being such that she could not appear here. But we have her deposition, which has been read in your hearing. [She testifies that when the train arrived at Sugar Run Station it was dark; that she understood the train was two minutes late; that she sat in the rear car about midway in the car, and that as the train approached the station the brakeman opened the door of the car, announced the station and the train stopped; that while the train was stopping she immediately gathered up her satchel, her money bag, and umbrella, which she had with her, and walked out; that when she got upon the steps of the platform she became aware that the train was moving; that she had her valise in one hand and her money bag and umbrella in the other hand; that she has no recollection of making any effort to step off; and in cross-examination she says that she stood but an instant, I think, and then knew nothing more; the next thing she remembered she was lying on the ground.

"Mr. Wooster is called, who, it seems, that evening was at the station, and was standing at the window, right inside of the door; that the moment the train approached and he saw it stop he started out of the door, and he didn't go more than three or four steps, he says, until the train started. You have also the testimony of young Miss Morrison, who testifies that the train, in her judgment, did not stop five seconds. You have the testimony of her sister, who is probably mistaken, but will illustrate, probably, the shortness of the stoppage. She was called by the defendant, and she testified that she did not think the train stopped at all. We have also the testimony of one Mr. Sheldon, who testifies that he saw the two ladies, Misses Morrison, and this other lady, whom he did not know at the time, but who, undoubtedly, was the plaintiff in this case, get up and go out of the car; and that the train was moving, or moved before they got off; and he must, from his testimony, have suspected that an accident would occur, as he says he opened the window and looked out, and the train was moving at that time.

"The defendant then calls one Vangorder, who

testifies that he was on the train, and that he saw these ladies get up and go out; and he also saw another lady, whom he never saw before, and I believe has not seen her since, get up and walk to the door and then go back for something, and all this while, if his testimony is to be believed, the train was moving. This is all the testimony that I remember that bears directly upon this point, except the general testimony of the employees of the road, who state that they stopped, as they believe, the usual time.] . . .

"In law it is presumed that a prudent person will not attempt, knowingly, to alight from a train while it is in motion. Therefore, when one undertakes to do so, such person is guilty of contributory negligence, if an injury occurs. If, however, the circumstances at the time were such that the plaintiff was not aware of the motion of the train until it was too late for her, by the exercise of ordinary care and prudence, to avoid the fall or the going off whether by falling or stepping, and the train had not stopped sufficiently long to enable her, by the use of reasonable expedition, to get off in safety, then she is free from fault and the injury was caused by the sole negligence of defendant, and she is entitled to recover. [She may be said to have exercised proper care and prudence, if, in a sudden emergency, she acted according to her best judgment, or if because of want of time in which to form a judgment she omitted to act in the most prudent and proper manner. The law will not hold one responsible for alleged negligence where it consists in the omission of a duty suddenly and unexpectedly arising, where the circumstances are such that the party has no time to think and is consequently unable to form a proper judgment before acting. In such case all that is required is that the party act according to his or her best judgment at the time.] Now, gentleman, this case resolves itself, therefore, into a question of fact, and the pinch of the case seems to be whether or not the plaintiff contributed by her negligence in any degree to the accident. If it were true that the train was in motion while she was yet at her seat, and she, knowing this to be the fact before she got out of the car, went out and stepped down while the car was in motion, we instruct you, if such was the fact, that she would be guilty of contributory negligence. [On the other hand, if you find the fact to be that the train did not stop sufficient time to enable passengers who acted expeditiously and prudently to get off in safety, and that she was not aware of the fact of the train being in motion until she got out on the platform and undertook to step off, then she may be entirely free from fault—if you are satisfied from all the circumstances under which it occurred that she acted at the time according to her best judgment, and that

by reason of fright, when thus confronted so suddenly with the danger which she for the first time saw when she was stepping off, she was impelled to do what she might not have done if she had time to consider. If you find the facts and circumstances to be of such character as I have last stated, then she would be free from fault, provided you find that the defendant company was guilty of negligence, and the fact of stopping too short a time placed her in this position of danger."']

The jury rendered a verdict for plaintiff for \$11,000, which, upon motion for a new trial, was reduced to \$8000, and judgment was entered thereon. Whereupon the defendant took this appeal, assigning for error the answers to the points and the portions of the charge inclosed in brackets.

James D. Hancock (W. G. Trunkey and J. H. Donly with him), for appellant.

It is *per se* and *prima facie* negligence for a passenger to alight from a moving train.

Railroad Co. v. Aspell, 23 Pa. 149.

McClintock v. R. R. Co., 21 WEEKLY NOTES, 133.

R. R. Co. v. Enches, 24 Id. 261.

The burden of proof was therefore imposed upon the plaintiff to show sufficient facts to constitute a legal excuse for her alighting from a moving train. She was bound to show these facts affirmatively, as any other facts are shown, not by a mere scintilla of evidence, nor by conjecture.

Howard Express Co. v. Wile, 64 Pa. 201.

First National Bank v. Wirebach, 106 Id. 37.

Marland v. P. & L. E. R. R. Co., 23 WEEKLY NOTES, 93.

Railroad Co. v. Bell, 22 Id. 370.

Carroll v. Penna. R. R. Co., 12 Id. 348.

The only legal excuses recognized by this Court as justifying a passenger in alighting from a moving train are, where the commencement of the motion of the train and alighting therefrom are practically simultaneous; where the passenger is induced to alight by an officer of the train; and where the passenger has reason to apprehend greater danger from remaining on the train than from leaving it.

Canal Co. v. Webster, 18 WEEKLY NOTES, 339.

William D. Brown (Watson D. Hinckley and William E. Rice with him) for appellee.

The burden of proving contributory negligence was upon the defendant, especially when the plaintiff's testimony raised no presumption of it.

Mallory v. Griffey, 85 Pa. 275.

Schum v. P. R. R. Co., 107 Id. 8.

R. R. Co. v. Ritchie, 102 Id. 425.

Penna. R. R. Co. v. Werner, 89 Id. 59.

Penna. R. R. Co. v. Coon, 17 WEEKLY NOTES, 137.

It is not under all circumstances negligence to alight from a moving train.

Penna. R. R. v. Kilgore, 32 Pa. 292.

Penna. R. R. v. Peters, 19 WEEKLY NOTES, 418.

Johnson v. West Chester R. R., 70 Pa. 357.

May 27, 1891. CLARK, J. This action is brought by Neva E. Leggett against the Western New York and Pennsylvania Railroad Co., to recover damages for personal injuries received through the alleged negligence of the company's employés. On the 14th of December, 1889, the plaintiff, who was a young lady of twenty-two years, was a passenger on the defendant company's road. She took the train at Corydon and arrived at Sugar Run, the place of her destination, about six o'clock in the evening. Putting her story in narrative form, she relates the occurrence substantially as follows: I sat in the rear car, about midway. As we approached Sugar Run the brakeman opened the door and called the station; he closed the door and walked out. The train came to a stop. I had with me a money satchel, a valise, and an umbrella. I gathered them together as quickly as possible and started out. I didn't stop anywhere or speak to any person between that and getting off; there was no one on the car I knew. I opened the door and walked out, and was on the steps when I became aware that the train was moving. I saw that we were passing the lights in the depot; that was what made me aware that it was moving. There was no brakeman or conductor to be seen and there was no light, because we had passed the depot. It was very dark; dark as night could be; there was not even a star. In my right hand I had my umbrella and satchel, in my left the valise. I have no recollection of making any effort to get off. The next thing I remember I was lying on the ground, and heard the voices of two or three men who had just approached. The depot agent came then with his light. I could not tell whereabouts on the steps I was; I cannot remember. I had not hold of anything. I did not have hold of the guards. It was only an instant, and I still had hold of my baggage. I didn't lose consciousness. I fell forward, with the right arm extended, and it was dislocated at the shoulder. I did not fall toward the engine. I fell just straight forward from the steps. Mr. Lawson, the station agent, picked me up; there were two others; I didn't know them. On cross-examination she testified, among other things, as follows: "I took the train about 5.40 P.M. It is six miles from Corydon to Sugar Run. When we arrived there it was not quite six o'clock. I understood the depot agent to say that night we were about two minutes late. The brakeman's name, I have since learned, was Harry Farrand. There were two passenger cars on the train. The satchel was about five inches square, a lady's shopping bag. The valise was of good size and was quite heavy. When they called the station I got my baggage ready and waited till they stopped. When I came on the platform I did not notice the train was mov-

ing. When I stepped on to one of the steps, can't say which, I noticed the train was moving. Can't say how far it had moved, it was not moving more rapidly than usual when it moves out of the station. Do not know how long they stopped. I realized they had stopped, and then that I was on the step. I just remember standing there for an instant, and I remember no more. I didn't think anything about stepping off the train, whilst it was moving; hadn't time to. I was off so soon after I realized they were moving." There is some evidence that after she had started to the door she seemed to have forgotten something at her seat, and that she returned for it, before going out upon the platform. Of this circumstance, if it occurred, she makes no mention.

The negligent act of the company complained of is that the train did not stop long enough at the station to give the plaintiff a reasonable opportunity to get off the cars in safety, and that in consequence of this she received the injuries. It was the undoubted duty of the company not only to carry the plaintiff safely, but to set her down safely at the place of her destination, if in the exercise of the utmost care it could be done. The company was of course not answerable for the rashness or folly of the plaintiff. She was bound to exercise ordinary attention for her own safety, even though the company's agents in charge of the train were also remiss in their duty.

Richards, the conductor, testifies that the train made the "usual stop," and that when the brakeman, as was customary, halloaed "All right here!" he gave the signal to start. Crahan, the engineer, says they made the "ordinary stop," and he started as soon as he got the signal from the conductor. Tyler, the baggage-master, says he remembers nothing more than that it was the "usual stop," and Davis, the fireman, that the train stopped the "usual time" and until they got a signal to go. Harry Farrand, the brakeman who halloaed "All right here!" as a signal to start, was not called as a witness. All that the testimony discloses concerning his movements and whereabouts during the occurrence is that as soon as the train stopped, or before, he ran forward to the engine. He did not assist the passengers to get off the train, as it was his duty to do under the regulations of the company, nor was there any person with a light at the place of landing. If he had remained at his place of duty he would have known that the passengers were not yet off when he gave the signal to the conductor. As it was, although the accident occurred at the exact place where he should have been, neither he nor any other of the trainmen appears to have been aware of its occurrence until they arrived at Kinzua, where the conductor received a telegram an-

nouncing the fact. John Wooster testified that just as the train stopped he started out of the station, and when he had taken four or five steps it started; that he saw the two lady passengers who were in advance of Miss Leggett, the Misses Morrison, get off after it started, and that it "staggered one of them and she ran quite a ways." Fannie Morrison says the train was in motion just as she got off. When asked how long the train stopped she replied: "I should say five seconds." She further says that neither the conductor nor the brakeman was present to assist them, nor was there any light. Her sister Maud, who alighted from the train after Fannie, and was called as a witness for the company, says the train made something of a halt, but she did not recollect of it stopping entirely; it was moving when she got off. Miss Leggett was behind both of these ladies, and the testimony would seem to show that the train had moved some sixty feet before she went off. Mr. Sheldon testified that the train made a very short stop and started about the time the first two ladies got to the door. He says he looked out of the window "to see where some of them landed."

In view of this evidence the Court was obliged to, and did very properly, submit the question to the jury as follows: "Now did the defendant company discharge this duty to the plaintiff? It is alleged by the plaintiff that when the cars arrived at Sugar Run Station, which was the point of her destination, the train was not stopped a sufficient time to enable her to get off in safety, and that in consequence thereof she sustained serious injuries. This is the first question that presents itself for your consideration; for if the defendant was not guilty of negligence—if the train stopped a sufficient time to enable the plaintiff to get off in safety by using that degree of care required of every prudent person—then there can be no recovery in this case." The reference to the facts which followed was full and fair. We find nothing to complain of. The charge upon this branch of the case was impartial, and not one sided, as the appellant contends. The trainmen testified to nothing of value to the defendant bearing upon this question, excepting that they made the usual stop, and their testimony to that effect was called to the attention of the jury. Under this instruction of the Court the verdict of the jury convicts the company of negligence, and it is difficult to see how any jury could have determined otherwise.

The negligence of the company being thus established, the question arose, was the plaintiff guilty of contributory negligence? Upon this branch of the case the burden of proof was upon the company. The company's contention in the Court below was that the plaintiff had voluntarily

stepped or jumped from the train whilst it was in motion, and there is some testimony to this effect. Mr. Morrison testifies that after the train was in motion he saw her "walk down the steps off, and get off"—"saw her walk off, step to the ground." But as the night was dark, and he was some fifteen feet distant, the jury may well have believed it impossible for him to know whether she actually stepped off, or fell off, as she states. Mr. T. H. Jones says the plaintiff told Wilmarth, the company's detective, three or four days after the injury, in his presence, that she threw the packages and jumped off the train. Mrs. T. F. Jones, however, who was present at the same conversation, says that the plaintiff said she "threw the packages," and "that was all she remembered," and that she said she thought if she hadn't so many packages she might have got off safely. This testimony was of course proper for the jury. It was not specifically or particularly referred to in the charge; there was much testimony on both sides to which no reference was made. But the general subject to which it referred was fully discussed. Whether or not she stepped down, or jumped from the moving train, was a question of fact very fairly submitted to the jury, to be determined upon all the evidence, with specific and plain instructions that if she did so, unless in a sudden emergency, with danger threatening in either event, she was guilty of contributory negligence, and could not recover. This qualification of the general rule, so well settled in our cases, is only applicable to the case at bar if the jury should find that she left the step of the car voluntarily. The points submitted by the defendant's counsel proceed wholly upon the hypothesis that the plaintiff left the steps of the car either by deliberately stepping or jumping off, and undertake to define the precise and only circumstances which would justify such an act. The Court simply supplemented the points by adding another state of facts which would justify the act. But the other circumstance thus suggested, like those suggested in the point, were only applicable to the case under the defendant's theory upon the facts, and was pertinent in that aspect of the case only.

If the plaintiff was believed, the instant she found herself in an emergency she went off the train. She says that when she came upon the steps of the car, she for the first time knew that the train was moving, and at that instant, although she was conscious of no effort on her part to leave the car, she went off the train, falling on her shoulder. She does not pretend that she acted upon her best judgment, in an emergency, with danger threatening, whether she remained upon or left the car. She says she had no time for deliberation, and she did not pretend to have deliberated.

The defendant cannot complain of instructions, even in the general charge, which were thus invited in the points, and without which the answers would have been imperfect. Besides, we think, the effect was to give the defendant company another chance with the jury—more than they would otherwise have had.

Upon an examination of the whole case, we are of opinion that it was fairly tried. The company failed to satisfy the jury that the plaintiff by her own negligence had contributed to the injury, and as the company's negligence was clearly established and found,

The judgment is affirmed.

S. H. T.

[See preceding case.]

Orphans' Court.

April, 1891.

Kates's Estate.

Practice—Laches—Petition for issue to determine facts—Discretion of the Orphans' Court—Partition—Acts of June 16, 1836, and March 15 and 29, 1832—Jurisdiction—Evidence—Competency of witnesses in questions of pedigree.

The only case in which an issue is demandable as of right occurs under the Act of June 16, 1836, relating to the distribution of proceeds of sheriff's sales, but even under this Act a mere allegation without evidence or against the evidence, or where the record shows that a trial will avail nothing, will not entitle the party to the process. So, under the Act of March 15, 1832, an issue, respecting the validity of a will, will not be granted if upon the evidence submitted a verdict against the will would not be sustained.

Under the Act of March 29, 1832, the Orphans' Court has full power to make partition and "to give judgment that the partition thereby made be firm and stable forever," and by the same Act it is provided that said Court "shall have power to send an issue to the Court of Common Pleas of the same county for the trial of facts by a jury whenever they shall deem it expedient so to do."

Held, (1) that under the discretion thus given, said Court has power to determine such facts in their own forum and through their own forms.

(2) That the clause in the Fourteenth Amendment to the Constitution of the United States that "no State shall deprive any person of property without due process of law," does not prevent a State from giving to a Court equity jurisdiction of a suit brought by the owner of an equitable interest in land, to establish his rights against the holder of the legal title, although it deprives the latter of a right to a jury trial, which he would have in a suit at law.

The testimony of relatives, who openly avow a hostility to one branch of a family, cannot be received in questions of pedigree and legitimacy affecting that branch of the family.

Sur petition for reargument.

Two petitions were presented by Theodore N. Kates, the one for partition and the other for an issue to determine questions of fact set up in the first petition.

The facts are fully set out in the opinions *infra*.

On April 4, 1891, the Court dismissed these petitions in the following opinion by—

ASHMAN, J. In this case two petitions, the one for partition and the other for an issue to determine a question of fact set up in the former petition, were presented. In his prayer for partition, Theodore N. Kates alleged that he was a son of the decedent; an allegation which the respondents denied. The claimant testified that he was born on January 28, 1827, in New Jersey, of William Kates and Eliza Jane Thompson, and a few weeks after his birth was placed by his mother in the family of Joel Holman and wife, and remained with them until he was sixteen years of age. Two months after his birth his parents, he says, were married in Philadelphia, where they always afterwards resided, the putative father dying in 1868, forty-one years after that event, and the alleged mother in 1882, fifty-five years after. Joel Holman and his wife died many years ago. The claimant saw his mother, he says, two or three times a year at his adopted home in New Jersey, where she brought him clothing and paid his board. He also saw her at her house in Arch Street, Philadelphia. Here he was enjoined, he says, by his mother not to disclose his identity for the reason that it would disgrace her, and he accordingly gave his name as Holman, and disguised his visits under a pretence of selling market produce. At ten years of age he first saw his father, in the store of the latter, whither he was taken by Mr. Holman, and he was here forbidden to address the decedent as father in the hearing of others. When he reached the age of twenty-one he called on his parents and was presented by them with a gold watch. Some years after that he met his father on the street, and was given \$100 to enable him to buy the house in which the Holmans lived, and in 1862, when he was thirty-five years old, he again met his father on the street, and was given \$200 with which to pay off a mortgage on the house. Several years later, he encountered his father on Market Street, and in an interview lasting a few minutes, in which he urged that something should be done for him, his father promised to give him \$10,000 on the following Saturday, at

a designated place and hour. The father did not, however, appear, and did not pay the money. He was soon afterwards confined to his house by illness, and, although he lived some years longer, he was never again seen by the claimant. The mother survived the father fourteen years, and the claimant saw her for the last time about two years before she died. Neither she nor the claimant had ever divulged to the children who were born of the marriage their alleged kinship to the claimant.

This autobiography was admitted as evidence under a rule of law which allows a party in interest to testify on his own behalf where a question of pedigree is in dispute. It embodied all the facts bearing in any way upon the most vital point in his history—his parentage—which a man who was unusually shrewd could gather from the incidents and memories of a lifetime. It was delayed until the claimant had reached the age of sixty-four years, and until only two months remained before the Statute of Limitations would have forever barred his claim. It was, moreover, not only the corner-stone of his case, but its entire framework; without it there would have been no edifice and no case. Outside of what came from his own mouth, there was absolutely nothing in the history and proofs to connect him in any way with the decedent. Not a line nor a word, nor even a memento was produced which had proceeded from William Kates, and which, even by the subtlest play of the imagination, could be tortured into a recognition of the claimant's sonship. This circumstance is significant, because, when the statement was produced, the alleged parents and the guardians to whom they were said to have committed the claimant, and indeed every person who in 1827 was old enough to have an intelligent knowledge of his relations, had passed away. That the narrative, to serve as the basis of a judicial decree, shall be free from contradictions, is manifest, not only from these considerations, but from the added one that the few facts which it details, if they happened at all, were of a character to so fasten themselves upon the memory, that they could have been related in but one way. The fatal defect in the story is that the one incident, which, if true, would have shown that ties of some sort, and very close ones, existed between the decedent and the claimant, was so narrated by the witness as to be wholly unworthy of belief. We allude to the interview in which the decedent was said to have promised \$10,000 to the claimant. The remainder of his narrative calls for no comment. His testimony as to his birth was hearsay; his alleged visit when a child to decedent's shop did not prove that the decedent was his father; and the gifts of a watch and of money rested on his own assertion,

and might as well have been of any other article and in any other sums. It is true that the claimant produced a watch and also a mortgage; but in this pantomime he was only rehearsing the part of Falstaff, when that hero, in proof of his combat with the robbers, produces his sword. The interview, which, if not fictitious, must have been a momentous one to the claimant, was casual so far as the decedent was concerned; it took place on the street, and it lasted not longer than ten minutes. The reason assigned by the claimant for demanding assistance was sufficiently cogent to induce the decedent, who was described as so penurious that his children were forced to beg their pocket-money from their uncle, and whose holdings were chiefly real estate, to promise to bring \$10,000 to the claimant on the next Saturday, and this, too, although the claimant had not asked for that nor any other specified amount. The reason which thus touched the heart of the decedent and unlocked his pocket-book at the same moment, we are assured by the claimant, was the marriage of the latter. That event, however, had taken place ten years before; and a marriage so ancient was an unwieldy subject for the pathetic, even when embellished with the dramatic skill of the claimant himself. But he rose with the occasion, and with the aid of the license which is sometimes accorded to a novelist, he transposed the nuptials from the past to the future, and he told his alleged parent that he was "going to be married." To this the decedent replied: "What in the world do you want to get married for?" Unfortunately for the unities of the plot, it appeared from the testimony, both of the claimant and of his wife, that the latter, some time before this conversation, had, as they asserted, written to the decedent, informing him that she had been married to his son eight years. When this fact was recalled to the claimant, on cross-examination, he said: "Perhaps I told him I was married." But this reply only lifted him from one horn of the dilemma to impale him on the other. If he really told the decedent that he was about to be married, the decedent would have answered that his wife had declared that he was married already; and if he really said that he was married, the answer could not possibly have been, "What in the world do you want to get married for?" The claimant has given to this conversation, which is the central fact of his case, two versions, each of which cuts the throat of the other. If a conversation took place at all, it could not have been what he has said it was. But if we dare not believe in the conversation, how can we believe in the promise which formed part of it? It is easier to believe that the promise to give the money was made than it is to believe that, if made, the claimant

would not have asked for its fulfilment. Yet he confessed that he did not, although the decedent lived for several years thereafter. Naturally the claimant was anxious to account for his inaction, and he sagaciously put it on the sole ground which would secure him a hearing, when he said that he waited out of regard for the feelings of his mother. His sensibilities were not shocked, however, when his wife, with his knowledge, and because, as he stated, "he thought it was time something should be done," made it her business to divulge, as she asserts, to his aunts, the whole story of his mother's shame. He afterwards resolved to call upon the aunts himself. He gave no reason for the visit, and he could not well give one, because he admitted that he knew before he started on the errand, that both of the ladies were dead. But he made the visit notwithstanding, and he learned, either from the dead or the living, that his mother had also died. He then hastened to his alleged brothers and sister, made known to them his relationship, and offered to settle for a sum which was elastic enough to expand in proportion to the number of his visits.

Passing from his individual testimony we find two witnesses who were faithful to his interests in Nathan Holman, the son of the person with whom he had been placed in his infancy, and Amelia Holman, the wife of the witness. The former was seventy-three years of age when he appeared at the hearing, and he was able to swear that in 1827, and therefore when he was only eleven years old, to the fact, so apt to be within the knowledge of a child of that age, that Mrs. Kates paid the board of the claimant to Holman's parents, and that she cautioned the witness at a time when her daughter Catharine was three years old, not to tell the child that claimant was her brother. He also declared that a certain Tom Burkitt once took him to the shop of the decedent. When Tom Burkitt was called, he testified to the visit, but he could not tell why he made it, nor what took place at the interview. He was careful to add, that he *supposed* the decedent asked about the boy. Nathan Holman, in his interview with Catharine, though he did not venture to say so when testifying, also detailed a conversation between himself and the decedent, in which the latter was made to go beyond the offer which he was said to have before made to the claimant. According to the witness, the decedent expressed an intention to give a farm to the claimant which should cost \$20,000, and to stock it besides; and he directed Holman to look up such a property. The witness was asked: "Did you do it?" and he answered, "No, we looked around for quite awhile, and did not see anything that exactly suited; and then we did not look any more." The person on whose

behalf this munificent offer was made, and by whom it was so jauntily dismissed, was living at the time on a farm which, he says, cost \$400. Nathan Holman, Amelia Holman, and the wife of the claimant all testified to a visit which they declared the wife of the decedent, accompanied by her daughter Catharine, once made them at Mount Holly. They diverged somewhat as to its date; Amelia fixing it about 1845, Nathan at 1850, and the claimant's wife at 1857. The last-named witness, however, was sure as to the time, because her first child was then three years old. She also recalled it by the circumstance that Catharine was eating peaches, and did not know what to do with the peach stones. Yet this person, who was so youthful that she had not learned how to eat a peach, was at that very time at least twenty-eight years of age. Catharine was placed on the stand, and denied that she had ever been to Mount Holly, and that she had ever heard or known that her mother had seen the place.

Very little else appears in the case. Some testimony was offered to show that the claimant bore a strong personal resemblance to the decedent. Of course, this could weigh only in the event that other evidence established the existence of relations between those parties. Estates are not to be given away and reputations imperilled upon the strength of a casual coincidence. Mr. Pugh testified, that fifty-three years before, when he was an apprentice boy, he had overheard Mr. Kates speak of having married a woman and cared for a boy, or of having taken care of a woman and cared for her boy. His method of fixing the time of this conversation was as singularly unfortunate as his remembrance of its terms. He said he was able to hear what was said, although in another room from that of the speakers, because the doors and windows were open by reason of the heat of the weather. When reminded that he had described the season as winter, he revised his theory of the heat by explaining that it arose from the fumes of the vitriol which was used in the establishment. Several cousins of the Kateses testified to a family tradition that the decedent was never married at all, which was manifestly false, and others to a tradition that there was somewhere an illegitimate son. There was also record evidence that the decedent, at different times, had given bonds to the guardians of the poor for the support of more than one illegitimate child. One of these, dated as far back as 1819, described the mother as Eliza Thompson, and it was argued that she must have been the woman who became his wife in 1827 under the name of Eliza Jane Thompson, and who married him three months after her second illegitimate child was born, and had a third child in the first year of her married life.

The case stands then in this shape: Ever since the passage of the Act of 1857, and its supplement of 1858, the lifetime of a generation, the claimant, if the allegations respecting his parentage are true, has been in a position to vindicate himself before the law. His father has been dead twenty-three years and his mother nine years, and the mother's death threw down the last obstacle which a regard for her peace of mind might have raised to the enforcement of his rights. We have seen how far a solicitude for her welfare animated him in her lifetime, but we are dealing with him in the attitude which he has now assumed. With some tactical skill he has chosen his ground where, as he believed, no enemy could confront him. His alleged parents and the guardians to whom he declares they confided him are dead; and with them disappeared the only witnesses who could directly affirm or deny the truthfulness of his own testimony. Even with this vantage he seems to have required the spur of the statute to set him in action. He has allowed a family, of which he claims to be a member, to remain in ignorance of his title, and to adjust their affairs upon the theory of an undivided ownership of property in which he now claims an interest. When his own declarations are eliminated from the record, the few shreds of evidence which remain make up no greater inventory than this: that a tradition was extant in one branch of the family to which he claims to belong, that one member of another branch was illegitimate, and that this had enlarged into a tradition which bastardized all the issue of that branch; that the claimant bore a strong resemblance to the decedent; that the decedent had been seen by two witnesses, and as one of them conjectured, had asked about the claimant; that he had once been heard to say that he had cared for or married a woman and had cared for a boy; and that he had given more than one bastardy bond to the guardians of the poor. It is hard to believe that if the claimant regarded the rehabilitation of his rights as a thing of any moral worth, he would have been so tardy in asserting them; its commercial value he fixed himself in his proposal to compromise with the heirs of the decedent, and in that estimate lies the only assignable motive which appears to have swayed him.

In passing upon the merits of this case we have assumed in advance the fact of jurisdiction. The power of the Orphans' Court to decree partition of the lands of decedents is statutory, and has been gradually enlarged by successive Legislatures; and that Court is not subject to the rule which in a Court purely of equity must prevail, that disputed legal rights are determinable only at law. (Washburn's Appeal, 9 Out. 480; Ferguson's Appeal, 2 Crum. 426.) In exercising

its statutory functions, it has inherent power to pass upon the status of the parties who invoke its jurisdiction; and hence, in *Welch's Appeal* (11 Crum. 297), where the respondent set up an adverse possession in himself, denying thereby the tenancy in common, the Court held the testimony of the exceptant insufficient, and confirmed the inquest.

In the present case the tenancy in common was not disputed, and the petitioner did not hold adversely because he had never been in possession at all; the single question was whether he was an heir. Our authority to resolve that question was necessary to a proper disposal of matters over which jurisdiction had been expressly conferred by statute. (*Lowry's Appeal*, 4 Amer. 219.) On the ground of laches alone many authorities would sustain us in dismissing the petition at the outset. The claimant, however, has been allowed full sway in asserting his rights. Having slept upon his claim until the Statute of Limitations was about to extinguish it, he should at least have satisfied us beyond a reasonable doubt that his pretensions were well founded. He has failed in the effort; and we are forced to find from the evidence that he has not established his claim to be the son of the decedent. We also are of opinion that even if, upon that evidence, a verdict in his favor should be rendered by a jury, it would be set aside.

We therefore dismiss both petitions.

This petition for a reargument was then made.
Furman S. Phillips, Samuel M. Hyneman,
and *Mayer Sutzberger*, for petitioner.
John G. Johnson, for respondents.

May 9, 1891. *ASHMAN, J.* This case did not come to us overlaid with merit. The petitioner's claim was founded upon a marriage solemnized in 1827, which, by force of the Act of 1858, legitimated his birth. He lay quiet for more than thirty years after his alleged rights had accrued to him, and until all who could intelligently contest them had died, before he made known his pretensions. In explanation of this delay, he proffered the excuse, which, if it had not been belied by his acts, would have exhibited an element of manhood—regard for the reputation of his mother. He has now withdrawn that plea, and has substituted the shallower one of ignorance of the law. It is remarkable that a reason which is assumed to be sufficiently potent to justify a reargument upon the merits, should have been overlooked by counsel, who certainly overlooked nothing else in his advocacy, and even by the petitioner himself. He, at least, except by a miracle of forgetfulness, could not have failed to mention it, when the fact of his thirty years' delay was the point upon

which he was most severely examined; and he would scarcely have instructed counsel, as he did, to bring suit, if he was ignorant that he had any rights to assert. Even if true, however, this reason would not clear up the contradictions in the testimony. That he might have the benefit of an unbroken narrative of events, in the light and coloring which he and his witnesses gave to them, we considered the testimony as though it had passed the ordeal of criticism and had been adjudged competent. We have little doubt that some of it was inadmissible. The declarations of the cousins, for instance, as to family traditions of illegitimacy, were given by witnesses whose hostility to the branch represented by the respondents, was so undisguised that they avowed they held no social relations with its members. Testimony thus tainted, it has been held, cannot be received in questions of pedigree and legitimacy. (*Waldron v. Tuttle*, 4 N. H. 371; *Phil. on Ev.*, 4 Am. ed. 248-9.) So if the alleged declarations of the deceased Holmans, which were the veriest hearsay, are to weigh as evidence, they show simply that the mother of the claimant said that William Kates was his father. We are unable to agree with the suggestion that the wife of the testator was identified as the mother of the bastard. The evidence that she visited the claimant at Mount Holly or paid his board, was so absolutely conflicting, both as to time and circumstance, that no jury could believe it; and there was not a particle of evidence that William Kates had ever lived with her illicitly before marriage. The claimant, it is true, was known at his home in New Jersey as Kates; but what was to prevent a woman anxious to hide her shame from giving any name rather than her own to her offspring. He resembled in features the Kates's family; but on this point, in *Sheehan's Estate* (27 WEEKLY NOTES, p. 534) where, in addition to such resemblance, there was a birth-mark, *PAXSON, C. J.*, says: "Granting the likeness, it may be the result of the merest chance. We all know that striking likenesses often occur between persons who are not of the same blood; so strong that in many instances the one is mistaken for the other." Men's rights will be in grave peril if they are to be at the mercy of accidents and coincidences; if a woman, for instance, by giving a fictitious name to her child can fix its parentage as she pleases; or if a man, by reason of similarity in features to another, can install himself into that person's family.

The only case in which an issue seems demandable as of right occurs under the Act of June 16, 1836, relating to the distribution of the proceeds of sheriffs' sales, which required the Court, where a fact was in dispute, to award an issue at the request of any person interested.

Even under that statute it has been repeatedly held that a mere allegation without evidence, or against the evidence, or where the record shows that a trial would avail nothing, would not entitle the party to the process. (Knight's Appeal, 7 Har. 493; Dickerson & Haven's Appeal, 7 Barr, 255; Benson's Appeal, 12 Wr. 160; Martin's Appeal, 1 Out. 85.) The supplementary Act of April 20, 1846, provides that before an issue shall be directed upon the distribution of money arising from sales under execution or Orphans' Court sales, the applicant must make affidavit that there are material facts in dispute therein, "upon which affidavit the Court shall determine whether such issue shall be granted." The language of the Act of March 15, 1832, sec. 41 (Pur. 1476), declaring that whenever a question upon a matter of fact arises respecting the validity of a will the Court shall direct a precept for an issue to the Court of Common Pleas, is mandatory; yet an issue will not be granted if upon the evidence a verdict against the will would not be sustained. (Wainwright's Appeal, 8 Nor. 220.) The pending question is raised in partition proceedings, where this Court, by the Act of March 29, 1832, has full power to make partition and "to give judgment that the partition thereby made be firm and stable forever;" a power which of necessity included the right to dispose of all matters which come within the jurisdiction thus expressly conferred (Lowry's Appeal, 4 Amer. 219), and which was exercised in a case in no wise different in principle from the present. (Welch's Appeal, 11 Crum. 297.) What follows by implication from this statute was however expressly conferred by section 55 of the same Act, which provided that the Court "shall have power to send an issue to the Court of Common Pleas of the same county for the trial of facts by a jury, whenever they shall deem it expedient so to do." Behind the discretion which is thus broadly bestowed, is the power, without which it would amount to nothing, to determine those facts in their own forum, and through their own forms. No constitutional right of the petitioner was impinged upon; he waived his action of ejectment in a Court of common law, for the speedier process of this Court, with the knowledge that the judgment of either was equally final. It would be an idle formality to discuss a question which was long ago put at rest—the question of constitutional rights. The "due course of law," by which, under the Constitution, the property of a party is alone to be taken or preserved, is process according to the law of the land, to which, except in regular common law proceedings, a trial by jury is not necessarily incident. (Reagh v. Spann, 3 Stew. (Ala.) 108; Walker v. Sauvi-

net, 92 U. S. 90.) Hence it was held in *Church v. Kelsey* (7 Sup. Ct. Reporter, 897) that that clause in the Fourteenth Amendment does not prevent a State from giving to a Court of Equity jurisdiction of a suit brought by the owner of an equitable interest in land, to establish his rights against the holder of the legal title, although it deprives the latter of the right to a jury trial, which he would have in a suit at law.

We have gone into this detail because, while we are agreed upon the question of law as to our jurisdiction, we are not unanimous as to the force of some of the testimony.

The motion for a reargument is refused.

Dissenting opinion by FERGUSON, J.

In this case I am reluctantly compelled to dissent from the opinion of the majority of the Court in refusing the prayer of the petitioner for an issue to try the question of fact, whether he is the son of William Kates and Eliza Jane Kates.

As I understand the law, such a petition should only be refused, when all the evidence which the petitioner is able to produce to support his petition is not sufficient to sustain a verdict in his favor in case of a trial by jury. In my judgment, the evidence in this case is amply sufficient to sustain such a verdict.

The claim of the petitioner is, that he is the son of William Kates, the decedent, and Eliza Jane Thompson, since Eliza Jane Kates. That he was born on the 8th day of January, 1827. That his parents were then unmarried, but that about two months after his birth, to wit, on the 11th day of March, 1827, they were married, and he thereby, under the provisions of the Act of 21st of April, 1858, became legitimated, and entitled to enjoy all rights and privileges as if he had been born during the wedlock of his parents.

There can be no question in this case, that immediately before the birth of the petitioner, his mother went from Philadelphia to an obscure farm house occupied by a family named Fennimore, near a place called Grubbs Hill, Burlington County, N. J., where she gave birth to this child, and three weeks afterwards took him to the house of Joel Holman in the vicinity, and made a bargain with his wife Nancy, who was then nursing a child of her own, to nurture and raise this one. She then returned to Philadelphia, but made periodical visits to the child, paying his board, furnishing his clothing, etc., until he was sixteen years of age, when she made an arrangement with Israel Stokes, the farmer who served her with produce, to take him to learn the business of farming; and upon leaving Holmans to go to his new home, she gave him an outfit of clothing.

Was this woman Eliza J. Thompson, who, two months after the birth of this child, married

Wm. Kates, the mother, and was Wm. Kates the father of this child? Because both of these propositions must be established to give the petitioner any standing. There can hardly be a doubt as to the first of them. It is not necessary to go over the evidence in detail. It is sufficient to say, that it clearly appeared, not only from her admissions to various people, but from the testimony of numerous witnesses, that the woman who gave birth to the child, and took it, when three weeks old to Holmans, and who continued to visit it there and pay its board, was the same woman who was ever afterwards known as Mrs. William Kates, and who lived with him as his wife in the several residences they occupied in this city down to the time of his death. These witnesses knew her as the same woman, because they saw her on her visits to her child, and some of them visited her here, and their testimony is very strongly corroborated by a very old memorandum which was found in Joel Holman's account book, to wit: "You must direct your letters to Samuel Day, corner of Cherry Alley and Fifth Street, for Eliza Kates." It is a conceded fact, that after her marriage, Mrs. Kates boarded with Samuel Day at the above address, and that it was there that her second child, Catharine, was born. All these facts appear without the evidence of the petitioner; but when they are supplemented by his testimony, as to his visits to his mother, and her's to him, when he called her mother and she called him son, and the repeated gifts of books, clothing, money, etc., the conclusion is irresistible, that Theodore N. Kates was the son of Eliza J. Kates.

While this is no doubt true, if the petitioner is not the child of William as well as Eliza Kates, he is not within the saving or restoring power of the statute, and he is as much a bastard as he ever was, so far as any capacity to inherit from William Kates is concerned. Upon this question of paternity, what is the evidence? *First*, there is the testimony of two cousins of William Kates, that he had lived with Eliza J. Thompson in meretricious relations, and that they had children before their marriage, and also the evidence of a brother-in-law of the respondent, that "he had heard of another child." While these family traditions are competent evidence in a case of pedigree, standing alone they are not very conclusive, but when taken in connection with the fact, about which there is no doubt, that Eliza J. Thompson left Philadelphia and went to a secluded place in New Jersey to have a child born, which she left there, and that almost immediately upon her return William Kates married her, the conclusion is forced upon us that William Kates knew of her condition before she left the city, and was a party not only to the original transaction, but also to the

subsequent attempt to hide her shame. It is almost incredible to believe that he could have maintained the intimate relations with her incident to an engagement of marriage without knowing her condition, and it is equally incredible that he would have married her at once upon her rising from the bed where she had given birth to a child of which another man was the father. In this connection it may be well to refer to the testimony of Jonathan Pugh, a respectable citizen, who has lived long in this community, and occupied positions of trust and responsibility, and whose testimony is therefore entitled to the greatest credit, that upon one occasion, when a young man at work in the shop of his employer, he heard a quarrel between him and William Kates about women, in which Kates was accused of having improper relations with one of them, when William Kates replied to this accusation, "Damn it, haven't I married the woman and done for the boy." As Eliza J. Thompson was the only woman that he ever married, there can be but one conclusion as to whom the woman and boy referred to by him were.

In cases of this kind family resemblance is a circumstance to be considered, and where we have so strong a case as is here presented, is entitled to great weight. Eight witnesses, some of whom are relatives of the family, testify that the petitioner "looks exactly like Wm. Kates," "the resemblance is very strong," "I recognize him as the very spawn of Wm. Kates, the expression, the eyes, color of hair, etc.," and Margaret Katz, a cousin of decedent, "recognized him as Arch Street Kates the moment she laid her eyes on him." There was also evidence of declarations in the family with reference to the petitioner. John E. Yeager, a cousin, said his father, pointing to the petitioner, said: "Look at that man, that is Dory Kates. His father lives on Arch Street, but they do not recognize him;" and Anna Y. Lawrence, another cousin, said: "My father pointed him out to me as William Kates's son, living on Arch Street, between 1860 and 1863."

The petitioner testified, that in his early life he visited his father at his shop, Seventh and Arch streets, frequently, with Joel Holman, who called on his father to collect the money for his board, which he saw his father pay and take a receipt for it. That he afterwards met his father at different times at his house No. 1606 Arch Street, and on the street. That petitioner called him father, and that he recognized the petitioner as his son, and told him that "he was as near to him as any boy he had." That he frequently gave him money in small sums. That he gave him \$300 to buy a house and pay off the mortgage. That he promised to buy him a farm, and afterwards

the sum of \$10,000 in lieu of the farm, etc. The testimony of the petitioner is positive as to the recognition of him by both his father and mother as their son when not in the presence of any one else. At their request he concealed his identity when visiting the home on Arch Street, and was there known as Theodore Holman. The family had risen in wealth and position, were living in an aristocratic neighborhood, with three children, a daughter and two sons born in lawful wedlock. How anxious must have been the solicitude of these parents that their youthful escapade should be concealed from their other children, and how natural that they should desire that petitioner, when at their home, should be called by some other name. But is it not also a remarkable circumstance that he was never called by that name by any one else in any other part of the world? He took his father's name at his birth, at least that was the name his mother then gave him, and from the mouths of twenty-six witnesses, who have known him from that time to the present, and been his friends and neighbors, he has never been known by any other name than Theodore N. Kates, and he was the only person of the name of Kates that ever lived in Burlington County, N. J. Certainly there is enough in what has been stated to send this question to a jury. More might be added, if it were necessary, but the only effect would be to extend this opinion to an unusual length, when it is already long enough to express the reason why I cannot agree with the majority of the Court, who base their refusal to grant an issue upon two grounds, namely—

First. That there were contradictions and improbabilities in the petitioner's testimony; and

Second. There was unusual delay on his part in presenting his claim.

While it is admitted that there are discrepancies and contradictions in the testimony of the petitioner, yet it will be found that they are principally with reference to matters of detail, dates, etc., which do not affect the main story. The case must be considered as a jury would look at it. The petitioner is an uneducated farmer, and in the hands of the able and astute counsel for the respondents he was as clay in the hands of the potter, especially when we recollect that at the argument the counsel was frank enough to admit that he purposely dug pits for this unwary witness to fall into. The fact that there are some discrepancies and contradictions in the petitioner's testimony only shows that the story was not a concocted one, otherwise each part would have been made to dovetail and fit in so as to make a complete whole. At any rate the question of the credibility of witnesses is pre-eminently one for a jury, who can see the witnesses, and note their manner on the stand, an advantage we do not possess, as we see nothing but what the typewriter

furnishes. Every Judge knows that evidence so presented looks entirely different from what it does when coming from the mouths of the witnesses. As was said by PAXSON, C. J., in the very recent case of *Sheehan's Estate* (27 WEEKLY NOTES, 530): "The learned Judge below saw this witness face to face. He was on the stand for one or two days, and underwent a lengthy cross-examination. The learned Judge below believed he was telling the truth. *The manner of the witness on the stand may have great weight in disposing of the question of credibility; nay, more, it may have controlled it, and properly so.*"

In my opinion, the only question for this Court in a case of this kind is, Would the facts as sworn to, if believed by a jury, sustain a verdict? If they would, we must award an issue. It is certainly a hard case to throw a man out of Court and deprive him of all chance of ever establishing his claim, because of some contradictions and discrepancies in his testimony, when all he asks is the privilege of going before a jury, the tribunal established by law to pass upon his credibility (*Vowles v. Young*, 13 Vesey, 145).

With regard to the delay in the presentation of his claim, the opinion of the majority of the Court is based upon the presumption, that in the year 1858, when the Legislature passed the Act legitimating bastards, this petitioner knew of it, and slept on his rights down to the time of the commencement of these proceedings. To my mind it is most unreasonable to impute this knowledge to the petitioner. He lived in an obscure part of New Jersey, he was a farmer, and it was the most unlikely thing in the world that he could have known of this law, of which, I venture to say, a very small proportion of the population in our own State, outside of the legal profession, have any knowledge. But putting the case in its worst aspect for him, his action was brought before the bar of the statute and must be in time. As said by Sir GEORGE JESSEL, in *Collins v. Rhodes* (20 Chancery Division, 238): "If the statute has run, then the deed or claim is barred; if not, then there is nothing else to be said in the case." And by Lord Justice COTTON, in *Banking Co. v. Maddever* (27 Chancery Division, 532): "I am of opinion that in the case of a legal right we cannot refuse relief to the plaintiff on the mere ground of delay, unless there has been such delay as to create a statutory bar. The plaintiffs have made an attempt to explain their delay; an attempt in which I am of opinion they have not succeeded, but, there having been no such delay as to bar their legal right, it is, in my judgment, immaterial that they have shown no sufficient reason for not coming sooner."

I think the prayer for an issue in this case should have been granted.

W. M. S., Jr.

WEEKLY NOTES OF CASES.

VOL. XXVIII.] FRIDAY, AUG. 7, 1891. [No. 16.]

Supreme Court.

Jan. '91, 279.

February 12, 1891.

Chambers v. Borough of South Chester.

Municipal corporations — Boroughs — Roads and highways — Change of grade — Damages — Measure of — Evidence.

The proper measure of the injury sustained by a land-owner, by reason of a change of grade in the road upon which his property abuts, is the difference between the market or selling value of his land before and after such change of grade.

Speculative damages cannot be allowed. The plaintiff, therefore, cannot prove what the cost would be of filling up his lot to the level of the changed grade, or any other expense to which he might be put, as specific items of damage. All of these matters are elements, only as assisting in determining the market value of the property before the change and unaffected by it, and its market value with the grade and as affected by it.

In a suit by C. against a borough for damages to his property, by reason of the change of grade of the road upon which his property abutted, C. offered evidence of what it would cost him to fill up his lot and raise the buildings thereon, and asked the Court to instruct the jury that he could recover damages for any loss or inconvenience he might suffer in the prosecution of his business, caused by increased difficulty of access to his building, and for the consequences of increased water in his cellar and on his lot, occasioned by difficulties in the drainage resulting from the change of grade. The Court ruled out the evidence, except as an element in determining the market value of the property before and after the change of grade, and refused to charge as requested:

Held, not to be error.

Appeal of James Chambers, plaintiff, from the judgment of the Common Pleas of Delaware County, in an action of trespass brought against the borough of South Chester, to recover damages caused by the change of grade of Edwards Street, in the borough of South Chester.

The facts were as follows: Edwards Street was a thoroughfare in the borough of South Chester, which had been dedicated to public use by the owners of a large tract of land when they divided the same into building lots and sold them. James Chambers, the plaintiff, became a purchaser of the property as to which this case arose, either from the original proprietors or their successors in title. Edwards Street remained at

the natural grade of the ground, and the dwelling and appurtenances of the plaintiff had been erected on that grade a number of years before the grading complained of had been attempted. On August 28, 1888, the burgess and council of the borough of South Chester enacted an ordinance defining the grade, and pursuant thereto the work was done. Its effect was to fill the street in front of the plaintiff's property with an embankment of earth about eight feet higher than the original grade, and this, the plaintiff alleged, affected very seriously his property in point of value by reason of interference with drainage, increased difficulty of access, and giving an unsightly appearance to the locality. To recover damages resulting from these causes Chambers filed his petition, asking for a jury to view and assess the damages, and after the award of viewers an appeal was entered and issue framed thereon.

The plaintiff offered in evidence testimony as to the cost of filling up his lot and grading it to a level with Edwards Street, the quantity of earth it would require, and the cost of raising the buildings to the grade of the street; all of which testimony was rejected. (First to fifth assignments of error, inclusive.)

The plaintiff submitted the following points:—

(1) The several plaintiffs are entitled to recover for the damages suffered by their respective property in consequence of the filling of Edwards Street by the defendant. *Answer.* I say to you that they are entitled to recover damages for the change of grade of Edwards Street. The filling is only important as showing, as far as it goes, what the change of grade will be; that is all. When the work is once commenced the damages are recovered, but the jury are not to look at the amount of work that has been done there, but they are to look at the grade that has been established, and decide what the effect of the filling or grading the road-bed or street-way, as established by the ordinance, is. It is the change of grade that gives the plaintiffs damages, and not the filling. If the filling was above grade, of course they would be entitled to damages for that, for that would be a new change of grade if it was authorized by the borough. But it is the changing of the grade that is the foundation of the cause of action in this case, and if you come to the conclusion, as I before stated, that these several plaintiffs have suffered damages greater than the benefits from the change of grade, they are entitled to recover. (Sixth assignment of error.)

(2) If the jury should find that the best method of restoring the property of any of the plaintiffs to the condition it was in before the filling, would be by raising the building thereon to the present grade of the street, and filling with earth around the same, protecting the embankment at the rear with the retaining wall, then the measure

of damages would be the cost of such raising, filling in, and building the wall, taking into account the risk that might be incurred in such a process, injury to the building therefrom and the repair of the same. *Answer.* I decline to so charge you, and I say to you that is not the law. You may consider these several matters as elements in the cause, but you are not to award damages for the building of walls or the filling up of lots as special damages, or for the likelihood of injuring the building, etc. You are not to take up these separate items and award separate damages for them and add them together, and say that is the damage suffered. The law has given another rule for the measuring of damages, and that rule is as before stated and which I will now repeat. The law is this: You are to consider the market value of the property before the change and unaffected by it and its market value with the grade and as affected by it. If the establishing of the new grade has added more value to the property than it has depreciated from it, the verdict should be for the defendant; if it has depreciated from the property more than it has added to it the verdict should be for the plaintiffs, and the measure of damages should be the difference between its value before and its value after. Now I think that it will not be necessary for me to repeat that again. You understand it, I suppose, perfectly. (Seventh assignment of error.)

(3) As to the plaintiff, James Chambers, he is entitled to damage for any loss or inconvenience caused to the prosecution of his business by reason of the increased difficulty of access to his property, and for any damages that might result from consequences following increased accumulation of water in his cellar or other parts of his premises, if the jury find that such consequences were caused or aggravated by the filling of said street. *Answer.* I decline to so charge you. Loss of his business has nothing to do with the case unless it effects an injury to his land. That is all, and I have stated to you what injury to his land is to be considered—an injury that is over and above the benefits that he has received. Neither can I affirm the latter part of that point. If water is thrown upon his premises and lays upon his property it is his duty to conduct the water away from his cellar, if he can, and whatever that would cost would be his damage if that was his only claim; but you will allow full and ample damage for all these elements when you take the value before and after, and allow the difference. In doing that you get rid of all these claims, and that is the way the law lays down the rule. That is the rule. (Eighth assignment of error.)

(4) The only advantages that might be allowed as a set-off against the damages found for

the plaintiffs are only such advantages as are peculiar and special to the several properties, and not such as are enjoyed by these lands in common with other properties in the community. *Answer.* That is affirmed as a matter of law.

Of course the building of a street is an advantage to the whole community; it must be of some special advantage to this property. If it has brought its grade up, and made what were low lands and worthless lands more valuable, that is to be considered; but this property has the same right to these advantages as other properties. There is no doubt about that, and you see, gentlemen, the wisdom of the rule which the law has adopted. If you take the value of the property immediately before the establishing of the grade and unaffected by it, and then take its value immediately afterward as affected by it, it must be obvious to every reasonable man that there is no intervening time when there can be a general depression or decrease from other causes, and all these questions therefore are merely elements, and the question of the general rise of the property or general depreciation of it from other causes cannot enter into the case if you confine yourself to the almost imperceptible time immediately before and immediately after; that is to say, here is a property with no established grade—nothing but a surface grade: what would it be worth if it continued to remain in the same condition and if no grades were ever established? what is it worth with the grade as established and as it would be with the certainty that the street will be useless without a grade? what is it worth now? what is it worth with an established grade? That is the question. If you find it is worth more, then there is no damage; if you find it is worth less, then there is. Now, gentlemen, you may retire and take up the questions I have laid down, considering each case by itself and arriving at the best conclusion you can. After you have arrived at your verdict I suppose there will be no objections to you coming into Court and having the prothonotary to receive it, and then you can be discharged. You will take August, 1888, as the time upon which all your calculations are based. What was it worth at the time without a grade? what was it worth in August, 1888, with the grade? Now, of course, you must look to the future to a certain extent; but the future can have no effect whatever upon this property in your consideration unless it immediately appreciates. Now let me explain what I mean. Town lots that are not built upon or may never be built on may have a value far above farm lands. Why? Because of their future prospect of becoming building lots; but that future prospect must operate upon the immediate value of the property if it is to be con-

sidered. You may, therefore, consider the grade; you may look at it; you may consider it as it now is, and aided by that you may look back to the time when the grade was laid out, about August, 1888. You are to set the damage not what it is now but what it was then. You may consider what the advantage of the grade as established at that time would probably be, and to aid you in arriving at that you may take things as they are now; but you are not to consider what the property is worth to-day. The question for you is, What was it worth then? And, I say, what it is worth to-day may have some bearing upon what it was worth then, provided the rise in value has not been produced from other causes, or the depreciation, if such there be. If the property has advantages from other causes the plaintiffs are entitled to that. The time, therefore, to which you will direct your attention is August, 1888, and as that was the time the grade was established the plaintiffs were entitled to their damages, if they suffered any, and you may add six per cent. to that from August, 1888, up to the present time as a fair compensation for the withholding of the money.

Mr. Lindsay: If you allow any damages.

THE COURT: If damages are allowed they were due August, 1888; and if you find any damages you will add six per cent. for the use of the money from that time to this as fair compensation. (Ninth assignment of error.)

The Court, CLAYTON, P. J., charged the jury, *inter alia*, as follows: "So you see, gentlemen, the rule of law is one easily understood by the jury; it is a sensible rule. The question now before you is not what it will cost to fill up these lots and bring them to the level of the grade; that is not the question; for it may never be necessary to fill them up. The question is what is the difference in the market value of these lands before the street was improved and afterward; and whatever that difference may be, if it is in favor of the land owners, that is the damage to be awarded. If, however, you find that the advantages are in excess of the disadvantages, then there is no damage, because it must be obvious to all that the making of a street at a place where it was worthless before, if it followed the natural surface of the ground, must necessarily enhance the value of the land on each side of it." (Tenth assignment of error.)

Verdict for plaintiff for \$50 and judgment thereon; whereupon the plaintiff took this appeal, assigning for error, the rejection of his evidence, the answers to his points and the portion of the charge, as above.

William Ward, for appellant.

George B. Lindsay, for appellee.

March 9, 1891. GREEN, J. The learned

Judge of the Court below so carefully and with so much correctness and emphasis, laid down the rule by which the damages were to be assessed, that the jury could not possibly be mistaken as to their duty in disposing of the subject. Experience has constantly demonstrated the correctness of the old rule established in the case of *Schuylkill Nav. Co. v. Thoburn* (7 S. & R. 411), to wit: "The jury are to consider the matter just as if they were called on to value the injury at the moment when compensation could first be demanded; they are to value the injury to the property, without reference to the person of the owner, or the actual state of his business; and in doing that the only safe rule is to inquire what would the property unaffected by the obstruction have sold for at the time the injury was committed? What would it have sold for as affected by the injury? The difference is the true measure of compensation." Attempts have often been made to introduce particular items of damage into the case, such as the cost of fencing, loss of business, expense of altering buildings, the value of minerals under the surface, the danger of fire, the price of particular pieces of land in the neighborhood, and many other distinct and independent matters, in order that the damages to be recovered might be swelled unreasonably, but we have repudiated them all. More and more closely in recent years we have held parties to the rule that, after all things are considered which may affect the mind of the witness, he must give his estimate of the money-value of the injury by contrasting the market-value of the property as it was before the injury was inflicted, with its value immediately after the injury; and the jury is instructed that the difference of these values is the measure of damage. Instances of specific rulings on this subject are, *East Pa. R. R. v. Hiester* (40 Pa. 53); *Railroad v. Patterson* (107 Id. 461); *Railroad v. Springer* (21 WEEKLY NOTES, 143), and *Railway v. McCloskey* (110 Pa. 436). It is not necessary to review these or any other of the decisions in detail. In the last of the cases above referred to, our brother CLARK, in delivering the opinion, presented the doctrine in comprehensive and at the same time precise terms, which are quite sufficient to dispose of this case. He said: "Merely speculative damages cannot be allowed. The inconvenience arising from a division of the property, or from increased difficulty of access, the burden of increased fencing, the ordinary danger from accidental fires to the fences, fields, or farm buildings, not resulting from negligence, and generally all such matters as, owing to the particular location of the road, may affect the convenient use and future enjoyment of the property, are proper matters for consideration; but they are to be considered in

comparison with the advantages, only as they affect the market value of the land. The jury cannot include in the verdict a fund to cover the costs of fencing, or to provide an indemnity against losses by fire, or casualties to the cattle and stock upon the farm. Such an assessment must necessarily be purely speculative, as the matters thus sought to be provided against are in their nature altogether ideal and fanciful."

And so here, the plaintiff sought to prove how much it would cost to fill up his lot to the level of the changed grade of the street, and asked that the cost of such filling, as well as the cost of raising the building and erecting retaining walls to hold the earth filling, should be allowed as part of the damages to be recovered. The learned Court below very properly rejected the offers of testimony on this subject, and refused the instruction asked for by the plaintiff's second point, saying that the law did not permit a recovery for any such matters. In the third point the Court was asked to instruct the jury that the plaintiff might recover damages for any loss or inconvenience in the prosecution of his business caused by increased difficulty of access to his building, and for the consequences of increased water in his cellar and on his lot, occasioned by difficulties in the drainage resulting from the change of grade, all of which was refused. To the second point the Court answered, "You may consider these several matters as elements in the cause, but you are not to award damages for the building of walls or the filling up of lots, as special damages, or for the likelihood of injuring the building, etc. You are not to take up these separate items and award separate damages for them, and add them together and say that is the damage suffered. The law has given another rule for the measuring of damages, and that rule is as before stated, and which I will now repeat. The law is this: You are to consider the market value of the property before the change and unaffected by it, and its market value with the grade, and as affected by it; if the establishing of the new grade has added more value to the property than it has depreciated from it, the verdict should be for the defendant. If it has depreciated from the property more than it has added to it, the verdict should be for the plaintiffs, and the measure of damages should be the difference between its value before and its value after." To the third point the Court answered, "Loss of his business has nothing to do with the case unless it effects an injury to his land If water is thrown upon his premises and lies upon his property, it is his duty to conduct the water away from the cellar if he can, and whatever that would cost would be his damage if that was his only claim, but you will allow full and ample damage for all these elements when you take the

value before and after, and allow the difference. In doing that you get rid of all these claims, and that is the way the law lays down the rule." All of this is so entirely correct and so perfectly in accord with the decisions, that it needs no vindication at our hands. The widest latitude was allowed in permitting the witnesses to describe all the methods in which the change of grade would, or might, affect the value of the property, and they were all at liberty to give full effect to their views as to how, and to what extent, the value of the property was affected by the change of grade, and they were allowed freely to say how much, in dollars and cents, the damage of the plaintiff was, but it was required to be expressed in the change of the market value of the property as it was before and after the change of grade was made. This is undoubtedly the correct rule, and it was properly administered by the Court below.

The first five assignments of error are in violation of our rules of Court. The rejected offers of testimony are not printed in any one of them, and we must search the appendix to discover what they are. It is much to be regretted that we are obliged so frequently to call attention to the careless practice which prevails so extensively in this respect. We hold ourselves at liberty at all times to reject such assignments, and we frequently do so. We should have done so in this case had it been of any consequence, but the answers to points raise the same questions, and it was therefore unnecessary.

Judgment affirmed.

S. H. T.

Common Pleas.

C. P. of Dauphin Co.

June 30, 1891.

**Commonwealth of Pennsylvania, ex rel.
W. U. Hensel, Attorney-General, v.
D. J. Waller, Jr.**

Constitutional law—Constitution of Pennsylvania, Art. IV., sec. 8—Extent of power of governor to fill vacancies, in appointive offices, during recess of Senate—Where the governor nominates an officer, and the Senate confirms such nomination, the issuing of a commission by the governor is a requisite to vest title to the office in the nominee—Office of superintendent of public instruction.

Quo warranto. The facts are fully stated in the opinion of the Court.

James A. Stranahan, deputy attorney-general, and *W. U. Hensel*, attorney-general, for the Commonwealth.

C. W. Stone, *W. S. Kirkpatrick*, and *Robert Snodgrass*, for the respondent.

July 16, 1891. SIMONTON, P. J. This case was by agreement of the parties tried by the Court without a jury, as provided by the Act of April 22, 1874. It is a proceeding in the nature of a quo warranto to try the title of the respondent to the office of superintendent of public instruction. The pleadings consist of a suggestion filed in the name of the Commonwealth of Pennsylvania, by the attorney-general, a plea on behalf of respondent, a demurrer on behalf of the Commonwealth to parts of the plea, and a replication denying the allegations of fact made in one paragraph of the plea. From the averments and admissions contained in the pleadings we deduce the following

FINDINGS OF FACT.

(1) *James A. Beaver*, then governor of the State of Pennsylvania, on May 13, 1889, by and with the advice and consent of the Senate, appointed *E. E. Higbee*, superintendent of public instruction for the term of four years from April 1, 1889; said *Higbee* duly qualified, and by virtue of his appointment and the commission issued to him, entered upon the duties of said office, and continued therein until he died, December 13, 1889, at a time when the Senate was not in session, whereby said office became vacant.

(2) While said office was thus vacant, and before the next session of the Senate, on February 14, 1890, said governor appointed the respondent superintendent of public instruction, and on said day commissioned him "to have and to hold the said office, together with all the rights and privileges thereto belonging or by law in anywise appertaining until the end of the next session of the Senate, if he shall so long behave himself well."

(3) When the Senate next met, on January 6, 1891, said governor nominated respondent to the Senate for confirmation as superintendent of public instruction for the term of four years from the first day of March, 1890, being the date on which respondent took possession of said office under the appointment first above mentioned, and on January 20, 1891, during the same session of the Senate, said nomination was by the Senate confirmed.

(4) The term of office of said *James A. Beaver*, as governor, expired on January 20, 1891, and *Robert E. Pattison*, was on said day duly inaugurated as governor of this Commonwealth, prior to the particular session of the

Senate at which the nomination above stated was confirmed.

(5) No commission was issued by *Robert E. Pattison*, governor, to respondent in pursuance of the nomination and confirmation by the Senate above stated, nor was any further action taken in the matter, until May 27, 1891, when said governor nominated to the Senate *Z. X. Snyder*, to be superintendent of public instruction, for the term of four years from June 1, 1891, and on May 28, 1891, the Senate, refusing to advise and consent to said nomination, rejected it.

(6) The Senate finally adjourned on the same day, May 28, 1891, and on the next day, May 29, 1891, the governor appointed and commissioned said *Z. X. Snyder*, to be superintendent of public instruction from said day, May 29, 1891, until the end of the next session of the Senate, which is still in the future. Said *Z. X. Snyder* accepted said commission and duly qualified, and on June 3, 1891, demanded possession of said office of superintendent of public instruction, from respondent, who refused, and still refuses, to deliver the same to him, and at the date of the commencement of these proceedings respondent held, and still holds, said office.

Certain averments of matters of fact were made in one paragraph of the plea filed on behalf of respondent, which were denied in the replication filed on behalf of the Commonwealth. An offer was made on the trial to prove these facts, which was objected to by the learned attorney-general, on the ground that they were irrelevant and immaterial. This objection was sustained by the Court and a bill of exceptions was sealed for the respondent. The facts thus offered to be proved are, therefore, not in the case at present and hence are not found.

The legal questions supposed by counsel to be involved in these facts and raised by the pleadings will appear in the course of this opinion. They were discussed with great ability and thoroughness by the learned attorney-general and his able deputy on behalf of the Commonwealth, as well as by the eminent counsel who represented the respondent, and must now be considered by the Court.

The answers to be given to these questions depend mainly upon the proper construction and meaning of section 8, Article IV., of the Constitution, which is as follows:—

"He shall have power to fill all vacancies that may happen, in offices to which he may appoint, during the recess of the Senate, by granting commissions which shall expire at the end of their next session: he shall have power to fill any vacancy that may happen, during the recess

of the Senate, in the office of auditor-general, State treasurer, secretary of internal affairs, or superintendent of public instruction, in a judicial office, or in any other elective office which he is or may be authorized to fill; if the vacancy shall happen during the session of the Senate, the governor shall nominate to the Senate, before their final adjournment, a proper person to fill said vacancy; but in any such case of vacancy, in an elective office, a person shall be chosen to said office at the next general election, unless the vacancy shall happen within three calendar months immediately preceding such election, in which case the election for said office shall be held at the second succeeding general election."

It is contended on behalf of respondent, as stated by counsel in their brief, that—

"By this provision there is the absolute power to fill a vacancy happening during a recess of the Senate in the office of superintendent of public instruction. The general language of the first clause of the quoted portion is subject to the exception contained in the second clause, and the two together will be read that he may appoint during the recess of the Senate to vacancies by granting commissions which expire at the end of their next session, except in case of certain enumerated officers, to wit: Auditor-general, State treasurer, secretary of internal affairs, and superintendent of public instruction, judicial offices, etc. If a vacancy happens in any of these offices in a recess, no vote of the Senate is necessary, and no limitation is placed upon the commission, except in case of elective offices, in which case provision is made according as the vacancy happens within or more than three months before the next election. The superintendent of public instruction not being an elective office and no limitation being placed upon the commission, the power is conferred in case of a vacancy happening during a recess of the Senate, to appoint for the full vacancy."

"There is absolutely no power to fill for less than the period of such vacancy; nor can he make two appointments which in succession may fill the vacancy; the superintendent being irremovable at the pleasure of the governor, according to sec. 4, Art. VI., of the Constitution. He can exercise the power of appointment to a vacancy but once, and then only for the full constitutional period."

"The language of the Constitution being that the governor shall have power to fill any vacancy that may happen during the recess of the Senate, in the office of superintendent of public instruction, and no limit being placed upon the appointment as to when it shall expire, the language naturally imports that the appointment shall fill the entire vacancy once for all, otherwise, in some succeeding part of the article it

would have indicated the limitation by express language. The earlier part of the section provides for the filling of appointive offices until the expiration of the next session of the Senate. In the succeeding clause one appointive office is expressly named, to which the appointment in case of vacancy is made to fill the vacancy without any limitation or restriction to a less period of time than would be covered by the full extent of the vacancy. The governor not only has the power to completely fill the vacancy, but it is his duty to make the appointment, and for the entire period of the vacancy. It is quite clear that Governor Beaver intended to exercise his full constitutional duty in the case, and to appoint for all the time that he had power to appoint. This is evidenced, not only by the fact that he made the appointment and issued his commission therefor, but also by the fact that as soon as the Senate was assembled he presented the name of Mr. Waller for the fullest period possible, dating from the time of the original appointment, to wit, March 1, 1890. This indicates a completed purpose to appoint, so far as his action was concerned, for the entire period for which appointment was supposed to be possible."

This proposed construction of the Constitution and the arguments brought forward in support of it are very ingenious, and there is certainly, to say the least, a discrepancy between the two clauses of section 8. The second clause ordains that: "He—the governor—shall have power to fill any vacancy that may happen during the recess of the Senate in the office . . . of superintendent of public instruction . . ." This gives absolute power to the governor to fill any vacancy in the office of superintendent of public instruction occurring during the recess of the Senate without limitation as to time. But the first clause ordains that: "He shall have power to fill all vacancies that may happen, in offices to which he may appoint, during the recess of the Senate, by granting commissions which shall expire at the end of their next session;" thus limiting the time for which an appointment made during the recess of the Senate shall continue, in the same office of superintendent of public instruction, as it is an office to which "he may appoint," and is therefore included in the phrase "all vacancies." If full force and effect be given to the language of the first clause, the term of an appointment to fill a vacancy made during the recess must be limited to the end of the next session, while if the second clause be taken literally and given full effect, the whole vacancy is to be filled. And if the second is not taken literally, it is, so far as the office of superintendent of public instruction is concerned, entirely superfluous, and must be

wholly disregarded, as it does not add anything whatever to the provision made in the first clause for filling a vacancy in the office.

It will be observed that all the offices mentioned in the second clause, except that of superintendent of public instruction, are elective offices, and it has been suggested that the office of superintendent of public instruction was inserted in the second clause because, and at a time in the course of the proceedings in the Constitutional Convention when it was intended to make that office an elective office, and that the failure afterwards to strike it out was a mere inadvertence; and some color is given to this suggestion by the contents of the Journal and the debates of the Convention.

Be that as it may, it is there, and the question remains whether it can be ignored. But we cannot give any force to it without ignoring the provisions of the first clause limiting the time for which appointments can be made to fill vacancies, happening during the recess, to the end of the next session.

The only construction we are able to suggest that might give force to both clauses, would be to hold that there was given to the governor alternate power to appoint at his discretion for the one term or for the other. But it is not probable that the framers of the Constitution would have intentionally done this.

We do not consider the proper construction of these clauses free from doubt, but assuming the spirit of the Constitution to be that appointments should not be made by the governor alone when there is opportunity to consult the Senate, we are not prepared to hold that the second clause weakens the force of the first.

We may remark, by the way, that there is the same variance between the language of sec. 8, Art. IV., and sec. 25, Art. V., with respect to filling vacancies which may happen in judicial offices. Section 8, Art. IV., as we have seen, provides that the governor "shall have power to fill any vacancy that may happen during the recess of the Senate . . . in a judicial office; . . . if the vacancy shall happen during the session of the Senate the governor shall nominate to the Senate before their final adjournment a proper person to fill said vacancy;" while sec. 25, Art. V., provides that "Any vacancy happening by death, resignation, or otherwise, in any court of record, shall be filled by appointment by the governor . . ." The first of these requires the nomination to be made to the Senate if the vacancy occurs during the session, while the last directs that the vacancy shall be filled simply by appointment by the governor.

It is contended, in the second place, on behalf of the respondent, as stated in the brief of counsel, that—

"Even if the governor, in the appointment of Mr. Waller, could only appoint to the expiration of the next session of the Senate, the subsequent nomination of Mr. Waller, January 6th, 1891, and his confirmation January 20, 1891, constitute, in the light of the facts, a full and complete appointment for the full term."

This involves a question which has not often arisen, for the reason that in most cases the power of removal exists in the power that appoints; and, therefore, the question when an appointment became complete is of little consequence, as in any event a second appointment would be held to revoke the first. There have been, however, cases in which the question has been more or less directly involved, and the decisions have not been uniform. In *Dyer v. Bayne* (54 Md. 87) the question was, "when an appointment took effect," and the Court held that it dated from the confirmation, and related back to the time of the nomination. The Court said:—

"The Senate was under no restriction as to time within which it should act upon the nomination; and having confirmed the nomination during the regular session, the appointment was complete from the time of such confirmation (*United States v. Bradley*, 10 Pet. 364). The governor had no discretionary power over the appointment after confirmation, nor had he power to withhold the commission; for the issuing of the commission was a mere ministerial act. The efficient and only discretionary act of the governor in making the appointment was in making the nomination; and the Senate having no other power over the nomination than to concur or non-concur in it, the act of the governor became complete and effective with the concurrence of the Senate, and it related back to the time of the nomination. The act of the Senate, and the subsequent ministerial act of the governor in issuing the commission, both related to the principal act of the governor in making the nomination, the commission being evidence only of the appointment."

The language of the Constitution of the State of Maryland is the same as that of this State: "He shall nominate, and by and with the advice of the Senate appoint." It has also the further clause: "All civil officers appointed by the governor and Senate shall be nominated to the Senate."

In *Johnston v. Wilson* (2 N. H. 203; 9 Am. Dec. 50) it is said by *WOODBURY, J.*: "On general principles the choice of a person to fill an office constitutes the essence of his appointment. After the choice, if there be a commission, an oath of office, or any ceremony of inauguration, these are forms only, which may or may not be necessary to the validity of any acts

under the appointment, according as usage and positive statute may or may not render them indispensable."

The question was discussed in *Marbury v. Madison* (1 Cranch, 138), but the point expressly decided was that under the Constitution of the United States, which requires the President to commission all officers of the United States, the appointment to an office was complete when the commission was signed by the President, although withheld and not delivered to the appointee. The Constitution of Pennsylvania does not in terms require the issuing of a commission except in special cases, and certainly, so far as elective offices are concerned, the title to the office does not in any degree depend upon the existence of a commission. The chief justice of the Supreme Court is such by virtue of a provision in the Constitution itself, and would be such if no commission were issued to him.

Several other cases have been cited, on behalf of respondent, in support of the position that the appointment is complete when confirmed by the Senate, but we do not think it necessary to refer to them in detail. Attention has been called to the fact that the language of sec. 8, Art. IV., is "in *confirming* or rejecting the nominations of the governor, the vote shall be taken by yeas and nays and shall be entered on the journal." On the other hand, a number of cases, and several opinions of attorneys-general of the United States, have been cited on behalf of the Commonwealth to show that an appointment is not complete until a commission is signed by the appointing power.

The Commonwealth, however, relies principally upon *Lane v. Commonwealth* (103 Pa. 481). The question in this case was, whether the governor alone had power to remove the recorder of the city of Philadelphia, who was conceded to be one of the officers whom he was authorized by the Constitution and the law to appoint by and with the advice and consent of the Senate, the Constitution providing: "Appointed officers, other than judges of the courts of record and the superintendent of public instruction, may be removed at the pleasure of the power by which they shall have been appointed." On behalf of Lane, it was contended that the appointment was the joint act of the governor and the Senate, and that, therefore, the governor alone could not remove him. In answer to this position, and as tending to show that the power of appointment was in the governor alone, MERCUR, C. J., delivering the opinion of the Court, said:—

"As already shown, the Constitution declares, in section 8 cited, the governor shall *nominate* and he shall *appoint*. Before he completes the

appointment the Senate shall consent to his appointing the person whom he has named. It may prevent an appointment by the governor, but it cannot appoint. It may either consent or dissent. That is the extent of its power. There its action ends. It cannot suggest the name of another. If it dissent, the governor cannot appoint the person named. If it consent, he may or may not, at his option, make the appointment. If for any reason his views as to the propriety of the proposed appointment change, he may decline to make it. That option is not subject to the will of the Senate. Until the governor executes the commission, the appointment is not made. Prior to that time at his mere will he may supersede all action had in the case (*Marbury v. Madison*, 1 Cranch, 137; *Story's Con.*, sec. 1540)."

It is contended by the counsel for respondent that what is here said as to the option of the governor to appoint after the nomination has been confirmed is merely *dictum*. It is true that was not the precise point decided, for it might well be said that the governor is the sole appointing power, even if the appointment were complete as soon as confirmed, especially in view of the additional reason given in the next paragraph of the opinion from other language in section 8. But in using the language quoted the chief justice was speaking for the Court and making what is there said to be one of the grounds of the decision, and therefore, however it might be in the same Court, we consider the conclusion to which it leads binding on us, and therefore adopt it.

It is averred in the third paragraph of the suggestion filed by the attorney-general "that during the recess of the Senate, to wit, on the 29th day of May, A. D. 1891, the Hon. Robert E. Pattison, then Governor of the State of Pennsylvania, by virtue of the power vested in him by the constitution and laws of this Commonwealth, commissioned Z. X. Snyder as superintendent of public instruction in and for the Commonwealth of Pennsylvania, the commission to compute from the 29th day of May, 1891, and to continue until the end of the next session of the Senate of the Commonwealth of Pennsylvania, which session has not yet convened; that the said Z. X. Snyder accepted his said commission and qualified for the duties of said office, and on the 3d day of June, A. D. 1891, demanded possession of the said office of superintendent of public instruction in and for the Commonwealth of Pennsylvania from said D. J. Waller, Jr., who refused and still refuses to deliver the same to him."

This is admitted in paragraph 12 of the plea of respondent, wherein it is further averred "that the said Robert E. Pattison, governor as

aforesaid, had previously, during the session of the Senate immediately preceding said last-mentioned appointment, to wit, upon the 27th day of May, A. D. 1891, nominated to the Senate the said Z. X. Snyder to the said office of superintendent of public instruction, for the term of four years, to be computed from the 1st day of June, A. D. 1891, and on the 28th day of May, A. D. 1891, the Senate, then in session, and having considered the same, refused to advise or consent to the nomination and appointment so made, and the said nomination was thereupon rejected by the Senate."

The matters of fact alleged by this plea are admitted by the demurrer, and the validity of the appointment of Z. X. Snyder is thus put in issue, and respondent contends, as set forth in paragraph 13 of his plea, "that by reason of the said nomination by the said governor, and the rejection thereof by the Senate, the Senate having refused to advise or consent to said nomination, the said Z. X. Snyder was not eligible to appointment as such superintendent of public instruction, nor was the governor legally authorized to make any appointment to said office, after the adjournment of the Senate and during the succeeding recess thereof, under the Constitution and laws of this Commonwealth." On the other hand, the learned counsel for the Commonwealth claim, as stated in their brief, that "after the Senate adjourns the governor has undoubted right to commission the person rejected by the Senate, and there is no intimation anywhere in the Constitution restricting his right in this matter."

The only case cited to sustain this position is Strobach's Case (*In re* Marshalship, 20 Fed. Rep. 379).

The facts in that case were that during the recess of the Senate, the President, as he had the right to do, suspended a United States marshal named Osborn and appointed one Strobach to fill the vacancy caused by this suspension, until the end of the next session of the Senate. After the Senate met he nominated Strobach for permanent appointment to the office, but the Senate rejected the nomination. Thereupon it was claimed on behalf of Osborn that this rejection annulled his suspension and the temporary appointment of Strobach, and, therefore, that he, Osborn, was entitled to retake possession of the office. But the Court held that the nomination and rejection of Strobach by the Senate had no relation whatever to Strobach's temporary appointment, by virtue of which he was entitled to hold the office until the end of the current session of the Senate. The Court said: "The statute authorizes the President to suspend and make a temporary appointment,

until the end of the next session of the Senate, and he has done so, Mr. Strobach being that appointee, and he holds the office now under such appointment. The Senate has not acted upon that temporary appointment, nor does it appear that the Senate has any power or authority under existing law to act indirectly upon such temporary appointment or designation."

It is, therefore, manifest that this case is not an authority for the position which it is cited to sustain, and we have not been referred to any case which decides that the governor has power to appoint one who has been rejected by the Senate to the same office and for the same period for which he was nominated and rejected, or any part of such period, and in the absence of authority we think the spirit and intent of the Constitution forbids this to be done.

It has been argued, on behalf of the respondent, that the governor has no power within the meaning and spirit of the Constitution to make a second temporary appointment during a second recess of the Senate, after a vacancy has occurred which was temporarily filled by an appointaent made when the vacancy occurred during the first recess.

It cannot be doubted that it is understood and implied in the provisions of the Constitution on this subject, contained in Art. IV., sec. 8, that when a vacancy occurs during a recess of the Senate, which is temporarily filled by an appointment to expire at the end of the next session, a permanent appointment shall be made during such session, by and with the advice and consent of the Senate; but whether, when this has not been done, another temporary appointment can be made without the advice and consent of the Senate, to continue until the end of the next recess—in this case for two years—is a question which, as we understand, is not now squarely before us, and which we, therefore, do not decide.

It is further contended, on behalf of respondent, that it is a general principle of the common law that an officer whose term has expired may hold over until his successor has been legally appointed and qualified, and that, therefore, if, as we have seen, no successor to respondent has been thus appointed and qualified, he still rightfully holds the office, even if the term for which he was appointed expired at the end of the succeeding session of the Senate, and his nomination and confirmation during the session conferred no additional title.

We think it cannot be questioned that respondent, who is in by color of right, which consists in a valid appointment, and who is holding over after the expiration of his term, is an officer *de facto*, whose official acts, from considerations of

public policy, are legal, valid, and binding as to the public and third persons who have an interest in them, and that they cannot be questioned collaterally. (State v. Carroll, 38 Conn. 449; 9 Am. Rep. 409; Hamlin v. Kassafier, 15 Oreg. 456; 3 Am. St. Rep. 176; and notes to these cases.)

But if this be all respondent has to rely upon in the present case, it will avail him nothing. This is a proceeding on behalf of the Commonwealth to test his title to the office, and in order to retain it, he must show not only that he is in possession of the office *de facto*, but also that he has a title to it *de jure*, which he cannot do unless he can show that he is in during a term for which he was legally appointed and qualified, or, if the term have expired, with the legal right to hold until his successor has been legally appointed and qualified, and we understand his learned counsel to claim that he was, when these proceedings began, and is now, thus holding on the general principle of the common law above stated.

In State v. Harrison (113 Ind. 434; 3 Am. St. Rep. 663) it is said: "Whether or not, as a general principle of the common law, officers are entitled to hold over beyond their prescribed terms without some express provision, is not settled upon authority, although the view adopted by the American courts seems to be that in the absence of any restrictive provision the officer is entitled to hold until he is superseded by the election of another person in his place." Citing a number of cases, to most of which we have been referred by respondent's counsel in their brief.

We have carefully examined these authorities, but have been unable to come to the conclusion that they sustain the position for which they were cited by counsel. As is said in People v. Bull (46 N. Y. 57; 7 Am. Rep. 308), speaking of the same cases cited in People v. Oulton (28 Cal. 44), as authority for the same position: "The authorities cited to sustain it do not fully bear it out. It is to be questioned whether they go further than that one holding an office, the incumbent of which is, by its tenure, to be annually or periodically appointed or elected, and with no restrictive provision as to the term, may hold over as stated."

This seems to be to the effect of the cases cited. Thus, in People v. Runkle (9 Johns. 147), the point decided was that where the charter of a *private religious* corporation provided that the annual election for trustees should be held at least six days before vacancies should happen, an election held less than that number of days before the happening of the vacancies was valid; the Court say: "It is unnecessary to contend in this case that the trustees held over

after the expiration of the year. Perhaps the language of the statute is too peremptory, that the seats of one-third are to be 'vacated at the expiration of every year.' But the corporation is not thereby dissolved;" citing Queen v. Corporation of Durham (10 Mod. 146), where it is said: "That though the town clerk be *annuatim eligibilis*, he remains the town clerk, after the year, and until another was chosen; but if he had been *eligibilis pro uno anno tantum*, his office would have expired at the end of the year."

All that was decided in Trustees v. Hills (6 Cowen, 23; 16 Am. Dec. 429), another case cited on behalf of respondent, was that the title of the plaintiffs, who claimed to be trustees of a religious corporation, but who were elected after the regular period, could not be collaterally questioned by defendants. Chandler v. Bradish (23 Vt. 416) decides only, that there being no statute to the contrary, and such having been the practice, school officers elected at the annual meeting hold over till others are elected at another annual meeting, whether more or less than a year from the time of their election; and McCall v. Byram Manfg. Co. (6 Conn. 428); Cong. Soc. v. Sperry (10 Id. 200), and State v. Fagan (42 Id. 32), are to the same effect.

Chancellor KENT (2 Comm. § 295), says: "It is a question not definitely settled whether officers of a corporation, who are directed to be annually elected, can continue in office after the year and until others are duly elected in cases where the time of election under the charter has elapsed either through mistake, accident, or misfortune; and there is no provision in the charter for the case." He adds that the acts of all public officers who are such *de facto*, acting under color of office by election or appointment "are held valid as respects the rights of third persons who have an interest in them and as concerns the public in order to prevent a failure of justice."

Dillon, in 1 Mun. Corp., sec. 158, says: "The American Courts have not adopted the strict rule of the English corporations, which disables the mayor or chief officer from holding beyond the charter or election day, but rather the analogy of the other corporate officers, who hold over until their successors are elected, unless the legislative intent to the contrary be manifested." And in sec. 159, he says: "The law on this subject has been thus stated by a learned American Judge (PERKINS, J., in Tuley v. State, 1 Ind. 500), 'Where, in the charter or organic law of a corporation, there is an express or implied restriction upon the time of holding office, as that the officers shall be annually elected on a particular day, and that they shall hold from one charter (election) day till the next, or that

they shall be elected for the year ensuing only, in such case they cannot hold over beyond the next election day or the end of the year."

The above are practically all the cases cited by the counsel for the respondent on this branch of the case, and our examination of them leads us to the conclusion thus expressed by Chancellor WALWORTH in *Phillips v. Wickham* (1 Paige, 594): "There are undoubtedly some common-law officers who are to be elected or appointed periodically, who, from the necessity of the case, continue to exercise their functions until others are elected or appointed to fill their places." I am not aware of any general principle of the common law which authorizes all civil or corporate officers to hold over after the expiration of the time for which they were elected until their places are supplied by others.

On the other hand, in *Kroh v. Smoot* (62 Md. 172), where, by the Constitution, it is provided that the commission issued on the appointment made during the recess of the Senate: "Shall continue in force until the end of the next session of the Legislature, or until some other person is appointed to the same office, whichever shall first occur;" the Court said, "We are not justified in totally disregarding the express limitation that the commission to the party appointed by the governor during the recess to fill the vacancy 'shall continue in force until the end of the next session of the Legislature, or until some other person is appointed to the same office, whichever shall first occur.' These terms are imperative, and they must have accorded to them their full force and effect. And as by this limitation the appointment and commission of the appellee terminated with the end of the last Legislature, it follows that from that time there was a vacancy in the office until a successor was appointed as provided by the Constitution to fill such vacancy."

In *Badger v. United States* (93 U. S. 599), Justice HUNT, delivering the opinion of the Court, said: "By the common law, as well as by the statutes of the United States and the laws of most of the States, when the term of office, to which one is elected or appointed, expires, his power to perform its duties ceases. This is the general rule. The term of office of a district attorney of the United States is fixed by statute at four years. When this four years comes round, his right or power to perform the duties of the office is at an end as completely as if he had never held the office (Rev. Stat., sec. 769). A Judge of the Court of Appeals of the State of New York or a Justice of the Supreme Court is elected for a term of fourteen years and takes his seat on the first day of January following his election. When the four-

teenth of January thereafter is reached, he ceases to be a judicial officer, and can perform no one duty pertaining to the office. Whether a successor has been elected or whether he has qualified does not enter into the question."

Section 769 of the Revised Statutes, cited in the above extract is as follows: "District attorneys shall be appointed for a term of four years, and their commissions shall cease and expire at the expiration of four years from their respective dates." This, it will be observed, is practically the same language as is used in sec. 8, Art. IV., providing that the governor may fill vacancies "by granting commissions which shall expire at the end of the next session."

We feel ourselves obliged to hold, on this review of the cases, that respondent has not shown a valid title as against the State to the office in question now held by him.

This case was heard by both members of the Court, and they concur in the following

CONCLUSIONS OF LAW.

(1) The provisions of sec. 8, Art. IV., of the Constitution would not have authorized the governor to appoint respondent during the recess of the Senate to the vacancy which occurred during such recess for a longer period than until the end of the next session of the Senate.

(2) No title to the office of superintendent of public instruction was vested in respondent by his nomination by the governor to the Senate, January 6, 1891, and the confirmation of said nomination by the Senate, January 20, 1891, no further action having been taken thereon by the governor, and no commission having issued.

(3) The only appointment by which a title to said office was conferred upon respondent being a commission which by its terms and by the provisions of the Constitution was to expire at the end of the next session of the Senate, and such next session having ended, respondent has no legal title to said office.

(4) Judgment of ouster, in favor of the Commonwealth and against respondent, is therefore directed to be entered unless exceptions be filed within the time limited by law.

C. P. No. 4.

June 8, 1891.

Vann, to use, v. Downing.

Principal and agent—Insurance broker—Practice—Addition of new plaintiff without re-swearing jury.

An insurance broker who is employed to place an insurance, and who delivers a paper purporting to be a

policy of a company named therein, when, in fact, there is not any such company in existence, is responsible to his principal for any loss which occurs and which should have been covered by a valid insurance.

When use plaintiffs are added at the trial, the jury should be resworn, but an omission to reswear the jury, in the absence of any request, is not ground for a new trial.

Rule for a new trial.

Trespass. On the trial it appeared that the plaintiff wrote to Warren, Quarles & Talley, insurance brokers, to effect for him an insurance of \$2000; they in turn employed the defendant, a Philadelphia insurance broker. The defendant obtained, on behalf of the plaintiff, two papers, one a valid policy in the German Insurance Co., the other a paper purporting to be a policy of the "Sheffield Insurance Company of Sheffield, Ala.," which papers were delivered to the plaintiff. In point of fact no such company as the Sheffield existed. A fire occurred, and the facts with reference to the Sheffield were discovered upon inquiry. The plaintiff claimed to recover the amount of loss against which he would have been indemnified had the insurance nominally represented by the Sheffield policy been in an existing company.

The defendant alleged that the Sheffield policy was obtained through a man named Stewart, of Nashville, Tenn., and that the defendant acted in good faith.

During the trial, on motion of the plaintiff, the names of Messrs. Warren, Quarles & Talley were added as use plaintiffs, but the jury were not resworn.

The instructions of the Court are recited in the opinion.

Verdict for plaintiff.

A rule nisi having been obtained,

David C. Harrington (J. Ring with him),
showed cause.

Lewin W. Barringer, contra.

C. A. V.

June 20, 1891. **ARNOLD, J.** The plaintiff is a merchant in Franklinton, North Carolina. In October, 1889, he wrote to Messrs. Warren, Quarles & Talley, insurance brokers, of Richmond, Virginia, for an insurance of \$2000 on his store. They wrote to the defendant, who is an insurance broker in this city. He placed two policies on the plaintiff's property, one in the German Insurance Company of this city, which was good, and the other in the Sheffield Insurance Company of Sheffield, Alabama, which did not exist. A fire occurred in which there was a total loss. On inquiry for the Sheffield Insurance Company, it was found that there was no such company, and never had been any.

Thereupon the plaintiff brought this suit against the defendant for fraudulently, deceitfully, recklessly, wilfully, and knowingly issuing a policy purporting to be a fire insurance policy.

The defendant alleged that he placed the insurance in the Sheffield company through a man named William S. Stewart, of Nashville, Tennessee, to which the plaintiff replied by depositions showing that Stewart was a man of shady reputation, who had decamped. After a fair and careful trial, in which the jury were told that the defendant was not liable if he placed the insurance in an existing company which turned out to be insolvent, unless he knew or had reason to believe it to be insolvent; but that he was liable if there was no such company, because by representing there was such a company he made himself responsible if there was none such, the jury found for the plaintiff.

It is now argued that he is not liable if he placed the insurance in good faith. Very little was said on the subject at the trial, beyond a point for charge to that effect, which was affirmed. No proof of payment of the premium to Stewart was given except the statement of the defendant, and that the jury did not believe. On the contrary, they found that he fraudulently, deceitfully, recklessly, wilfully, and knowingly issued the policy, and on the evidence their verdict is correct.

At the trial the record was amended by adding the names of Messrs. Warren, Quarles & Talley as use plaintiffs. It is objected now that the jury were not resworn. No request was made at the trial that the jury should be resworn, or perhaps it would have been done. I say perhaps, because it is not essential. When additional plaintiffs are added, it is the most regular practice to reswear the jury, but the omission to do so is not error, at least when there is no request to do it. (*Maffitt's Adm'r v. Rynd*, 69 Pa. 380.)

The case was fairly tried upon the merits, and a verdict found for the plaintiff, which is just. An attack is now made on the statement, the argument being that there is no *scienter* alleged. The plaintiff alleged that the defendant fraudulently, deceitfully, recklessly, wilfully, and knowingly represented to the plaintiff that he was insured in a *bona fide* and existing insurance company, and the evidence showed and the jury found this allegation to be true. What could be added or taken out we cannot see.

Rule discharged.

H. B.

WEEKLY NOTES OF CASES.

Vol. XXVIII.] FRIDAY, AUG. 14, 1891. [No. 17.]

Supreme Court.

Oct. '91, 13.

January 5, 1891.

Commonwealth v. Gerade.

Capital cases—Burden of proof—Insanity as a defence—How proven.

The burden is on the Commonwealth to prove beyond a reasonable doubt the presence of every ingredient necessary to constitute the crime charged; this burden is always on the prosecution and never shifts. On the other hand, every man is presumed to be sane, and that presumption holds good until successfully rebutted. It is incumbent upon the defendant to rebut the ordinary presumption of sanity and to show by fairly (not clearly) preponderating evidence that he was insane at the time of committing the alleged crime.

Where the defence to an indictment for murder is insanity, it is error to charge the jury that "it (insanity) must be clearly proved."

Where the jury are given two measures of proof, one erroneous and the other substantially correct, that is sufficient ground for reversal, especially in a capital case.

Appeal of Frank Gerade, defendant, from the judgment and sentence of the Oyer and Terminer of Allegheny County, upon an indictment for the murder of his step-daughter.

On the trial, before MAGEE and WHITE, JJ., it appeared from the evidence that no one saw the killing, but the body of the child was found near a crib in defendant's house, and to all appearances she had been killed by having her head struck against the crib. Defendant was found in the cellar with blood on his sleeves and forehead. The defence relied upon by counsel was the insanity of the prisoner, and they called a number of witnesses to prove this.

In the direct examination of James Shipman, a witness produced on behalf of the defendant, the following question was asked by Mr. Dicken: Q. Was his manner upon that occasion different from what it had been? Objected to by the Commonwealth.

THE COURT. Let him tell the actions of the man if he can.

Mr. Dicken. The defendant proposes to prove by the witness on the stand that the manner which has been described by the witness, his conduct and language, were wholly different from what he (the witness) had known of him previously. Objected to by the Commonwealth as

incompetent, irrelevant, and immaterial. Objection sustained. Exception. (Sixth assignment of error.)

Dr. McCord, a witness for defendant, being on the stand, was asked on direct examination: Q. I am going to repeat a question that has been overruled once, but I am going to repeat it again. As an expert, will you please state whether, as a result of your examination, he was insane or sane at that time? Objected to by the Commonwealth. Objection sustained. Exception. (Eighth assignment of error.)

Dr. McCord then testified as follows: Q. Will you state what examination you made of this man, and describe his symptoms and his behavior, everything necessary to make up an opinion, and then give us your opinion at the end? A. Dr. Chessrown accompanied me to the cell. The cell door was opened by the ranganman; I passed into the cell and spoke to the man. He glared at me in a wild manner and walked off to the far corner of the cell, and there half crouched in the corner, and turned his head around sideways and looked at me in a glaring, contemptible manner. I spoke to him kindly and he refused to answer me. I told him I was a physician and wanted to know whether he was sick or not, in order to doctor him. He scowled at me and refused to answer, and during the entire examination of him I never got a word from him. From his manner, his conduct, and his personal appearance, I readily decided that the man was crazy. Q. Did you see him afterwards; did you see him again? A. Yes, sir; I examined him again yesterday afternoon in the cell. Q. At what time afterwards? A. In the afternoon, after court adjourned here; I think it was probably five o'clock. Q. Of the same day? A. Yesterday. Above testimony objected to by Commonwealth. Objection sustained. Exception. (Ninth assignment of error.)

Dr. Ayers, a witness on behalf of defendant, testified that he had examined defendant, and was asked the following questions: Q. What was the result of that examination, doctor? A. I formed the opinion that he was of unsound mind. Q. And your recent examination, has it changed your opinion? Objected to by Commonwealth. Objection sustained. Exception. (Tenth assignment of error.)

The defendant requested the Court to charge, *inter alia*, as follows:—

(1) That the burden of proof never shifts from the Commonwealth to the defendant, and that the Commonwealth must show, beyond a reasonable doubt, that the defendant was of sound mind, memory, and discretion at the time of the killing. Answer. This point is refused. As I understand the point, it is intended to say that the defence of insanity shall be established be-

yond a reasonable doubt, and that unless it is established beyond a reasonable doubt, that it would be your duty to acquit. I do not understand the law to go to that extent, and the matter will be referred to in my general charge, wherein the law, as I understand it, is correctly stated on the subject. (Thirteenth assignment of error.)

(2) That if, at any stage of the trial, by the evidence, a reasonable doubt of this condition of the defendant arises, it is the duty of the jury to acquit. *Answer.* This point is refused. Substantially it is the same point; that is, if insanity is the ground of defence, that you must be satisfied beyond a reasonable doubt of its existence; that is not, as I said in reference to the first point, the law as I understand it. (Fourteenth assignment of error.)

(3) If the jury be satisfied by the evidence that at the time of the killing the defendant was insane, that he was under the control of a resistless, homicidal impulse that led to the commission of the act, then their verdict should be, "By reason of insanity, not guilty." *Answer.* As counsel for defendant have already informed me that this point is intended to involve the same question as the two preceding points, it is refused for the reasons given above. (Fifteenth assignment of error.)

(5) That one of the essential characteristics of murder being that defendant, at the time of killing, was of sound memory and discretion, if the jury have any reasonable doubt of this fact they ought to acquit. *Answer.* This point is refused, as it embodies the same principle that is suggested in the first point, that is, that insanity has to be established beyond a reasonable doubt, whereas the law, as I understand it, is, that that being a defence, you are only required to determine that question of insanity by a preponderance of testimony. (Seventeenth assignment of error.)

The Court charged the jury, *inter alia*, as follows:—

"Afterwards he was brought to jail, and there commences another history of the man. When he is put in the cell he does not talk; he doesn't talk very much when anybody talked to him, from the time he was arrested. You will observe that there were not many questions that were answered, but there were here and there, along the line, answers to questions, but there wasn't a general talk. They say that is an indication, and so it can be an indication, of insanity, that a man won't talk, but it is not every man that won't talk that can be charged with insanity, because there are reasons why a man doesn't talk. There may be forty reasons that produce this same condition, and I am only calling your attention to it, not to show that these acts are not acts of insanity when established in connection

with conduct that indicates that a man is insane, but these are conditions of things that can be attributed to other causes than that of insanity. So when you get a man over here in the jail, and he gets into the hands of the physicians, and they want to talk to him, and want him to tell how he killed this child, and he is imprisoned—a man knows, if he knows anything, that he is in prison—perhaps his refusal to talk could be accounted for on different theories; it could be accounted for on the ground that he is insane, and it could be accounted for on the ground that it is the safer thing not to talk. Those are two grounds.

"Now to illustrate, when you come to consider the acts, and I am only giving you this illustration, not with the view to your finding anything, but to enable you, as the judges of the facts in the case, to determine how you ought to take into consideration everything connected with the case to satisfy yourselves whether or not these acts are insane acts, and indicate insanity on the part of the man, or whether they can be reasonably attributed, and more reasonably attributed, to other grounds. You may remember that it was stated, as evidence of the insanity of the man, that he was in the habit of lying upon his face in his cell; that is given as an indication of insanity, you may remember that. But Mr. Price says that he was not allowed to have his bed made, and if the man wanted to lie down at all he would have to lie down on the floor, and he would have to lie down the easiest way that would suit him. This evidence must be taken in connection with the fact that this conduct is presented to you as an indication of insanity. We put ourselves very much in the hands of the physicians, and we take comfort and consolation in having them around when in sickness, although sometimes we know that their diagnosis of our case is not correct, but we accept it. When a physician is testifying to things that belong strictly to the profession, and are matters not of theory, or of inference drawn from what might be, and may be under certain circumstances, but that the medical facts are established, not as inferences or guesses, but as facts known to the profession, then you take those as established facts; but when you ask a physician who is a non-expert on insanity whether he can say, by looking at a man and being acquainted with him, and talking to him, whether he is sane or not, he may give his opinion on the subject for your consideration. He can do more, he can take and examine a man, and he can from his medical knowledge of certain conditions in his case, his pulse, for instance, his circulation, his eyes, perhaps, and many characteristics that accompany the man under examination, he can say, and give it as his opinion, that that man is insane. You do not necessarily accept it as a conclusion

of fact, however, if the physician says that he is insane: that does not find the fact for you, because you can say that the facts, when he details them, as the basis of his opinion, are not satisfactory to you as evidence of insanity. If he should say, for instance, when he examines this man, to you or in your presence, that this man is insane, and the district-attorney or the Court should ask him, 'Why do you say he is insane?' and he says, 'Why, I say every man who commits a crime of this character is insane,' will you take that as conclusive? You are not bound to take it as such. There is a distinction between the testimony of experts and those who are not. You are not bound to take their conclusions; you are bound to assume the facts that they give as the true facts of the case in reference to that man, but you are not bound to draw the conclusion that he does, if you are not satisfied in your own mind that that is the result. Now I'll tell you why this is so, and I am not the only man on the bench that says the same thing about expert testimony; it is the common statement of the judiciary, as far as I know, in a great many cases, where the same thing is indicated. Some very harsh things are said about expert testimony, and again some very commendable things said about it; but where a man undertakes to say, if you ask him, 'Is this man insane?' and he looks at him for a minute, and says, 'Yes,' and does not give reasons satisfactory to you, you are not bound to accept his conclusion. In the Criminal Court that is not the rule; it may be the rule in medical science, but it is not the rule in criminal administration; I am not saying anything against the testimony of these men, medical men and experts, because they are reputable people, and were called into the case for their opinions; the only thing that I say, and with me it gives great force to their judgments, in their statements not one of them said, so far as I recall their testimony, 'Will I undertake to say from my examination of the man, at the time that I examined him, a month or two months after the occurrence,' not one of them will say, from that examination, that this man was insane on the 15th of March. I consider that commendable in them to so say. Some Judge has said this, 'The testimony of experts is competent testimony, but it is regarded as unsatisfactory testimony. Where the opinion of experts is speculative, theoretical, and states only the belief of the witness, while yet some other opinion is consistent with the facts stated, it is entitled to but little weight in the minds of the jury.'

"Now, there is a difference of opinion, of course, upon these questions. The first thing that I think, and it is only a suggestion, that a jury ought to do, in determining the question of insanity, is to take the occurrence as it is detailed at the time, and see if you find anything

there that indicates insanity, incapacity in the defendant to know that he is doing wrong. If you can find anything there that indicates insanity, incapacity in the defendant to know that he is doing wrong; if you can find anything there you have got the identical moment or time when the law says you must determine the question of the insanity of the man. I think it would next be proper in a jury to take the conditions that are shown of the prisoner's conduct prior to the commission of the act, as indicated in the evidence. I am speaking now of acts indicating the mental condition of the man at the time that the offence was committed, because you have testimony of that character; and assuming that the witnesses testified truthfully as to the occurrences before, do they, as they say, indicate insanity? What I do to-day before any crime is committed may be very potent to indicate my mental condition to-morrow; but to-morrow, when the deed is done, then there may be inducement for making testimony. Now you have before you all that testimony; you have the testimony of what occurred at Mr. Donch's and elsewhere, indicating a strange and changed mental condition, according to the testimony of this and other witnesses. They detailed in what it consisted. They say that they believe the man was insane. That testimony is not conclusive, their belief that he was insane, but if it is supplemented by the evidence that satisfies your mind that they were insane acts, and of the character and degree that would relieve him from responsibility for his acts, then the testimony is fully entitled to the consideration that would naturally lead to an acquittal. If you say the man is all right, but his conclusions are all wrong, then the weight of his testimony is affected; that is the character of testimony called, and I need not go over it. The Commonwealth rebutted it to a certain extent, by showing that defendant was sane. Men who saw and talked to him, from everything they saw, said he was sane. If they did not see insane acts, and others did, then their testimony is overcome. So that you see how your conclusions are to be based for yourselves upon the testimony, not upon mere opinion only, but upon all the testimony given in the case, opinions supplemented and supported by facts, where their opinion can be legitimately presented. There was some question how far back we ought to go to show insanity. The only question with me was how far after the occurrence evidence should be allowed to go, to the present time or not; I thought under the rules of law that evidence of insanity on or about the time of the occurrence was the testimony upon which the insanity should be established. Doctor Chess-rown was the first physician to see the defendant after the killing, with one exception; he is the jail physician. He is the nearest man to the

commission of the crime in his examination, except Dr. Woodburn. Dr. Woodburn said he saw nothing wrong with him, but he would not, under the examination made, pass upon him as an insane man, for commitment to an asylum. He was giving his opinion just as the other doctor did, who says he was insane. Dr. Chessrown said from the time he saw him that he believed he was insane. That is testimony that ought to be considered, and ought to be weighed. He says he continued the examination down to the present time, and defendant would not talk to him; that he didn't eat for a little while, drank two quarts of water, etc.; these are some of the circumstances upon which he based his opinion. These are things which you might attribute to insanity, that he drank water in large quantities, or that he wouldn't eat, or was filthy, or wouldn't talk; they may be indicative of insanity, but not necessarily, unless you find them accompanied by such evidence as satisfies you that that is what they indicate. Now dementia must be acute, I take it, to exempt from responsibility. Something more than the ordinary conditions of dementia must exist. That a person is lazy and listless, forgetful, and cannot follow a train of thought, is indifferent to passing events, conditions which characterize dementia, are not sufficient to render one irresponsible for his acts; it must have assumed an acute form to produce that result.

"Many men have all the ordinary characteristics of dementia and yet are responsible for their acts; the dementia must have reached that stage when it is liable to sudden insane outbreaks."

Verdict, guilty of murder in the first degree and sentence accordingly. Defendant appealed, assigning for error, *inter alia*, the rulings on the evidence, the answers to the points, as above, and the portion of the charge quoted.

J. C. Dicken and W. D. Moore, for appellant.

W. D. Porter and R. H. Johnston, district attorney, for appellee.

May 27, 1891. STERRETT, J. As stated in appellant's history of the case, "the defence upon which his counsel chiefly relied was insanity." In view of that fact, several points for charge, bearing more or less directly on the subject, were submitted. One of these is, "That under the plea of 'Not guilty,' the defendant has a right to show, by way of defence, the insanity of the defendant at the time of the killing, and that the jury must pass upon the question of defendant's sanity or insanity, and if they find him insane at the time of the killing, acquit him by reason of insanity." This point was rightly affirmed without any qualification, and, of course, it is not assigned for error. Other points recited in the 13th, 14th, 15th, and 17th specifications respectively were

answered in the negative, and therein it is alleged there was error. In the first of these, the Court was requested to charge; "That the burden of proof never shifts from the Commonwealth to the defendant, and the Commonwealth must show, beyond a reasonable doubt, that the defendant was of sound mind, memory and discretion at the time of the killing." The learned Judge's answer was: "This point is refused. As I understand the point, it is intended to say that the defence of insanity shall be established beyond a reasonable doubt; that unless it is established beyond a reasonable doubt, it would be your duty to acquit. I do not understand the law to go to that extent, and the matter will be referred to in my general charge, wherein the law, as I understand it, is correctly stated on that subject." If this answer was intended to be responsive to the point, its meaning is not very clear. The Court was not requested to charge "that the defence of insanity shall be established beyond a reasonable doubt." On the contrary, the last clause of the point is, in substance, that the burden of proving, affirmatively, and beyond a reasonable doubt, the sanity of the defendant, at the time of the killing, was on the Commonwealth. But, whatever impression this and other answers to defendant's points may have made on the minds of the jury, it may be safely assumed that in considering the evidence bearing on the defence of insanity, they were governed by what the learned Judge afterwards said in that portion of his general charge, to which they were specially referred for a correct statement of the law on the subject. After speaking particularly of insanity as a defence, etc., he there said, *inter alia*, "It is my duty to say to you, as the law governing the responsibility of men for their acts, that in all cases every man is presumed to be sane and possess a sufficient degree of reason to be responsible for his crimes until the contrary is proved to the satisfaction of the jury; and to establish a defence on the ground of insanity it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason from disease of the mind as not to know the nature of the act he was doing, or if he did know it, that he did not know he was doing what was wrong. This looks like a fair definition of what insanity is. That is what is required to relieve him of responsibility for his acts."

Without questioning the general correctness of what was said, in that connection, as to the kind of insanity that constitutes a defence to an act, which would otherwise be punishable as criminal, we think the degree of proof necessary to sustain such a defence was too strongly stated in saying "it must be clearly proved." This was imposing on the defendant a greater burden than the law requires.

In harmony with the humane principle of the criminal law, that every person accused of crime shall be presumed innocent until his guilt is clearly established, it is incumbent on the Commonwealth to prove, not only to the satisfaction of the jury, but beyond a reasonable doubt, the presence of every ingredient necessary to constitute the crime charged in the indictment. That burden, as was said in *Turner v. Commonwealth* (86 Pa. 74), never shifts, but rests on the prosecution throughout; so that, in all cases, a conviction can be had only after the jury has been convinced, beyond a reasonable doubt, of the defendant's guilt. It necessarily follows that if the evidence is such as to leave a reasonable doubt in the minds of the jury as to the existence of any necessary ingredient of the crime charged, they should give the defendant the benefit of that doubt. But presumptions of fact sometimes stand for full and express proof until the contrary is shown. For example, inasmuch as sanity is the normal condition of man, every one is presumed to be sane, and that presumption holds good, and is the full equivalent of express proof, until it is successfully rebutted. Where insanity of the defendant is set up as a defence, it is incumbent on him to rebut the ordinary presumption of sanity, and show beyond a reasonable doubt, not either clearly or conclusively, but by fairly preponderating evidence, such as is ordinarily required to prove a fact in civil issues, that he was insane at the time of committing the alleged crime. In *Lynch v. Commonwealth* (77 Pa. 205, 213,) the trial Judge refused to charge "that if the jury have a reasonable doubt as to the condition of the defendant's mind, at the time the act was done, he is entitled to the benefit of such doubt and they cannot convict;" and, for further answer to the point, said, "the law of this State is that where the killing is admitted and sanity or want of legal responsibility is alleged as an excuse, it is the duty of the defendant to satisfy the jury that insanity actually existed at the time of the act; a mere doubt as to such insanity will not justify the jury in acquitting on that ground." That instruction was approved by this Court; and substantially the same instruction was afterwards sanctioned in *Ortwein v. Commonwealth* (76 Pa. 421, 425), and other cases. In *Coyle v. Commonwealth* (100 Pa. 573), the same rule of evidence was again recognized. It was further held to be error, in that case, to instruct the jury that the defence of insanity should be proved by clearly preponderating evidence. The instruction should have been "fairly preponderating" instead of "clearly preponderating evidence." Speaking of the degree of proof required by the words employed in that case, Mr. Justice MERCUR said: "It is demanding a higher degree of proof than the authorities require. It may be satisfactorily proved by evidence which fairly preponderates. To re-

quire it to clearly preponderate is practically saying it must be proved beyond all doubt or uncertainty. Nothing less than this will make it clear to the jury." As applied to the degree of proof required to rebut the presumption of sanity and sufficiently prove the existence of insanity, there is no appreciable difference between the expressions "clearly proved" and "proved by clearly preponderating evidence." If there is any difference, the former calls for the higher degree of proof. It is almost equivalent to saying "proved beyond a reasonable doubt," because if any doubt as to the existence of a particular fact exists, it cannot be said to be "clearly proved."

It is true that the learned Judge, in another part of his somewhat lengthy charge, said to the jury, "you have to be satisfied of his insanity by the preponderance of the evidence. He has to establish, in other words, his insanity, not by the rule of a reasonable doubt, but by the testimony, what the preponderance of the evidence shows." But, with two measures of proof before them, one substantially correct and the other erroneous, how is it possible for us to determine which the jury adopted? There should be nothing left to conjecture, especially in a capital case. It is enough to know that the jury may have been misled by erroneous instructions on a point vital to the defence.

The testimony referred to in the sixth, eighth, ninth and tenth specifications appears to have been neither incompetent nor irrelevant, and we think it should have been admitted.

Neither of the remaining specifications of error requires special notice. That part of the charge embraced in the eighteenth specification of error contains some expressions of opinion, etc., that might have been profitably omitted, but we are not prepared to say that they are positively erroneous.

Judgment reversed, and a venire facias de novo awarded.

W. M. S., Jr.

Orphans' Court.

June 15, 1891.

Knight's Estate.

Will—Legacy—Charity—Bequest for charitable uses—What constitutes—Latent ambiguity—Act of April 26, 1855.

A society formed to aid by means of lectures, music, debates, etc., in establishing the rights of every person to entertain and express his cherished opinions, to promote just principles, to disseminate scientific truth, and to aid human progress, in pursuance of which meetings were

held to which the public were invited by published advertisements, is a charity; and a bequest made to it within thirty days of the death of a testator is void.

A bequest to the editor and proprietor of a paper, managed for private profit, but intended "to assist in promoting the cause of freedom and humanity and opposing superstition, priestcraft, bigotry, and every kind of mental tyranny," is not for a charitable use, but is merely a personal bequest.

Where the context of a will raises an obstacle to construing in its strict sense the term which is descriptive of the object of a gift, or where more than one subject or object exists, to which the description is equally apposite, extrinsic evidence may be called in to remove the obscurity.

Sur exceptions to adjudication.

The facts, as they appeared upon the audit of the account of the Fidelity Insurance, Trust and Safe Deposit Company, executor of the will of Joshua L. Knight, deceased, are sufficiently set forth in the adjudication of *ASHMAN, J.*, of which the following is the material portion:—

"The testator made certain specific gifts of household goods, books, and a burial lot, and gave \$1000 to the Friendship Liberal League, and \$1000 to the editor and proprietor of the 'Boston Investigator.' He directed his executor to invest \$200 and pay the income yearly to the Odd Fellows' Cemetery Company to keep in repair his burial lot. He also authorized his executor to sell his real estate, and he gave his residuary estate in equal shares to Elizabeth J. Jackson, Margaret L. Taxis, and the Pennsylvania Society to Prevent Cruelty to Animals. His will was dated March 19, 1890. He died March 28, 1890.

"The question to be determined is whether the gifts to the Liberal League and the 'Boston Investigator' answer to the description of a charitable or religious use. The Friendship Liberal League was incorporated by the Common Pleas, May 1, 1885.

"The National Liberal League, of which this organization is a branch, by Article V. of its Constitution, declares one of its objects to be 'to promote by all peaceable and orderly means active propagandism of the great principles of religious liberty, etc.' Much research is not needed to ascertain the character of this gift as a bequest to a charity. The definition adopted in *Price v. Maxwell* (4 Cas. 23) still holds good, that 'whatever is given . . . for the love of our neighbor in the catholic and universal sense, . . . free from the stain of everything that is personal, private, or selfish, is a gift for charitable uses.'

"It was argued that the statute recognized literary and scientific societies as contradistinguished from charitable and religious; and when it avoided certain bequests for charitable or religious uses, it did not intend to affect gifts for

scientific or literary purposes. Hence, the gift to the Liberal League, as an organization purely scientific, did not come within the class of gifts which were subject to the calendar-month rule. The answer to this is:—

"1st. That the primary purpose of the League is 'to promote just principles,' or, as the Constitution of its parent organization expresses it, 'to promote . . . the great principles of religious liberty,' and to this end the dissemination of scientific truth is a mere incident.

"The Supreme Court say, in *Price v. Maxwell* (*supra*), 'they were intended to embrace objects of a religious, literary, and scientific character. . . . To hold that the Legislature intended to lay a heavy hand only on gifts for the relief of the destitute, the afflicted, and the helpless, while donations for objects of a merely literary and scientific character were to be exempted from the restriction, would be doing great injustice to the benevolence and common sense of our law-makers.' This reasoning, whether satisfactory or not, has passed into law, and binds us.

"These remarks dispose of both of the pecuniary legacies. That to the editor and proprietor of the 'Boston Investigator' was not to the legatee as an individual, but as the representative of an enterprise which was charitable and religious, in the sense in which those words are used in the statute. In the copy of the paper produced at the audit, the editorial article announcing that a new volume would begin with the next issue, stated the mission of the publication to be 'to assist in promoting the cause of freedom and humanity, and opposing superstition, priestcraft, bigotry, and every kind of mental tyranny.' It is evident that this crusade against religion constituted the religion of the proprietor of the paper, and presumably of its patrons."

To this adjudication both the "Friendship Liberal League" and Lemuel K. Washburn, the editor, and Ernest Mendum, executor of Josiah P. Mendum, late the proprietor of the "Boston Investigator," excepted.

Charles S. Keyser, for exceptants.

William F. Johnson, contra.

July 3, 1891. *ASHMAN, J.* The will in this case was executed within a month of the testator's death, and this circumstance gives rise to the inquiry whether the legacies to the Friendship Liberal League and to the editor and proprietor of "The Boston Investigator," were for charitable uses, and therefore void under the Act of 1855. The object of the League, as defined by the preamble to its charter, was to aid by means of lectures, music, debates, etc., in establishing the right of every person to entertain and express his cherished opinions, to promote just

principles, to disseminate scientific truth, and to aid human progress. The evidence showed with distinctness that this purpose did not end with inculcating these principles among the members of the society, but that it comprehended their dissemination among the masses. To this end public meetings were held at stated hours, principally on Sundays, at which addresses were delivered and debates were indulged in. Invitations to the public to attend these gatherings were advertised in the newspapers; and the audiences included persons who were not associated with the society. The society had also its social side, as evidenced by its private festivals; but the public meetings were as much in pursuance of the objects of its charter as the latter assemblages. Its character as a charity was seated in this publicity of teaching. Lord HARDWICKE, in *Attorney-General v. Pearce* (2 Atk. 88), said, that it was not permanence but extensiveness which constituted a public charity; a principle which was recognized in *Jones v. Williams* (Amb. 651); *Howse v. Chapman* (4 Ves. 542), and *Johnston v. Swann* (3 Mad. 464). These lectures apparently covered a wide field, one of them being described as an invective against the Christian religion, and another as a dissertation upon the tariff. The secretary of the society, however, who was also one of its original corporators, and who presumably knew about what he was speaking of, gave a compendious statement of its aims in one sentence: "It was opposed to all 'isms.'" This statement suits our purpose, but while it explains the philanthropic sentiment which led the organization to enlighten society upon the duty on pig-iron, and at the same time to warn it against the errors of theology, it does not explain why the society itself was not a charity. It was certainly, by its constitution and its practice, a public school; and "every school of public instruction," says BELL, J., "of every grade, is embraced within the notion of a charity." (*Wright v. Linn*, 9 Barr, p. 436.) Under that decision, an anti-ism society is as much a charity as an anti-tobacco society, or an anti-meat diet brotherhood, or an anti-chewing gum circle, or even as the famous "United Metropolitan Improved Hot Muffin and Crumpet Baking and Punctual Delivery Company," immortalized by Charles Dickens, would have been if it had devoted itself to teaching the English people how to bake. It is somewhat to be regretted that an institution possessing a charter to perform such an elevated service to mankind as the establishment of the rights of free speech and free thought, should now claim that it is only a scientific body, dispensing scientific truths primarily to its members and incidentally to the community. It gains nothing, however, by the change of base. Whether purely literary and

scientific, or purely benevolent, it is still a charity, which is subject to the disability imposed by the eleventh section of the Act. The argument that the charitable uses, gifts to which were avoided by that section, cover only such charities as fall within the popular meaning of the word, and have in them a philanthropic or religious element, and not charities in the legal sense, embracing secular objects as well, was fully answered in *Price v. Maxwell* (4 Cas. 23). The charity in that case was under the control of the Society of Friends, but the Court declared that this fact had nothing to do with the description of the legacy as a gift to charitable uses; in other words, that a free school is a charity; and therefore within the inhibition of the Act, whether it be religious or secular, or whether it be run by Presbyterians, or Catholics, or Liberal Leaguers. The exact point was decided later in *Miller v. Porter* (3 P. F. S. 292), where the gift was to found a college wholly secular in its teachings, and owing no allegiance to any sect or religious body whatever. The gift was held to be a charity within the purview of the statute. It is unnecessary to say more on this point.

In throwing out the legacy to the editor and proprietor of the "Boston Investigator," the Auditing Judge was in error. The paper was a purely private undertaking, managed for private profit; and a gift to it, or to its owners was like any other personal bequest. It is true that the objects advocated by the journal were kindred to those of the League: "to assist in promoting the cause of freedom and humanity, and opposing superstition, priestcraft, bigotry, and every kind of mental tyranny." It is also highly probable that sympathy for the movement represented by both enterprises, prompted to both legacies; and that in giving to those who conducted the publication, the testator supposed that he was giving to the cause itself, of which the "Investigator" was the exponent. This likelihood is enhanced by the circumstance that he did not know the name of his beneficiary, nor that the editor and proprietor were really different persons. But the only ambiguity in his language, and as to which explanatory evidence is admissible, is in his omission to say whether he intended the editor and proprietor, who were in charge of the paper at the date of the will, or the person or persons who should control it at his death. The proof was that no change took place in the interval, in the editorship or proprietorship. What is such a latent ambiguity as will permit of parol evidence to clear it, is fully discussed by Mr. Jarman (1 Jar. Wills, ch. 14, 2d ed.), and it is enough to say as the result of the cases cited by him, that where the context raises an obstacle to construing in

its strict sense the term which is descriptive of the object of the gift, or where more than one subject or object exists, to which the description is equally apposite, extrinsic evidence may be called in to remove the obscurity. We may not, however, go behind the testator's words, which are positive in their literalness. They certainly fastened no trust upon the legatees, which a charity, supposing the Act of 1835 was not in existence, could have enforced. (Schultz's Appeal, 30 P. F. S. 396.)

Proof was made that Lemuel K. Washburn was editor at the date of the will and of the death, and that Josiah P. Mendum was proprietor; and that Mr. Mendum died on January 11, 1891, leaving a will, of which Ernest Mendum is executor. The legacy of \$1000 is awarded in equal shares to said legatees.

The exceptions of these legatees are sustained; and the other exceptions are dismissed.

H. C. O.

June, 1891.

Weir's Estate.

Widow's and children's exemption—Such exemption takes precedence of claim for funeral expenses—Appraisement not necessary where exemption is claimed in cash—In such case a delay of eleven months in making claim is not laches.

Sur exceptions to petition for allowance of exemption.

The decedent and his wife both died on the same day, leaving surviving an only child, on whose behalf the benefit of the \$300 exemption was claimed by his guardian. The claim was not made until eleven months after the death of the decedent, but the demand was for cash, to be retained out of the personal estate.

Exceptions were taken to the allowance of the claim on behalf of Robert McKnight, the undertaker who buried decedent, upon the ground that if the exemption should be allowed there would not be any money left in his estate to pay funeral expenses to claimant, who, under the Act of February 24, 1834, is a preferred creditor and entitled to be first paid.

D. J. Callaghan, for exceptant.

Robert W. Finletter, contra.

June 27, 1891. ASHMAN, J. Under the Act of April 14, 1851, the right of the widow or children of a decedent to retain three hundred dollars in value out of his estate, is so far absolute that its only qualification is that it shall not impair the lien for purchase-money. The retained property "shall not be sold, but suffered to remain for the use of the widow and family." The exception in favor of the vendor is in itself

a legislative declaration that the exemption privilege is paramount to the rights of all creditors except the vendor. It is true that there is a class of debts which the decedent did not contract, and for which, nevertheless, his estate is liable, and that some of these debts are in a sense as justly liens upon his estate as the debt for purchase-money. The expenses of settlement belong to this class, and of necessity are payable in advance of all others, because they are incurred in the ascertainment of the estate itself, without which the estate itself can scarcely be said to have a legal existence. But the debt for funeral expenses ranks with these liabilities only in the circumstance that it arose after his death, and out of the duty of his legal representatives to bury the decedent, and not out of their duty to settle his estate. Compared with other debts, it has in motives of public policy as well as by statute, a high claim to priority; but compared with the exemption for the widow and children it has none; not by statute, because the exemption expressly precedes it, and not by public policy, because it is just as imperative that the widow and children shall not starve as that the decedent shall have a respectable funeral. The Legislature has not recognized the distinction between the debts of the decedent and those of his estate, but has classed his funeral expenses among the debts owing by him at the time of his death. (Act of February 24, 1834, sect. 21.) These are awarded preference in common with expenses of medicine and medical attendance, and servants' wages, so that the undertaker can no more claim against the widow and children than can the apothecary, or doctor or servant. If this class of preferred creditors may outrank these beneficiaries, so may the landlord, who comprises the second class; and so, indeed, may the general creditors, who make up the third class; because these several sets of claimants are to be paid in their order, and if the exemption does not precede them all, it does not precede any of them singly. That all creditors are, however, postponed, is clear from the latest Act on the subject (Act of June 4, 1883), which permits the Orphans' Court to set aside the property of the decedent for the widow or children, where the estate does not exceed three hundred dollars in value, without raising an administration. The point has also been decided in Groome's Estate (7 C. C. Rep. 519).

The objection is invalid that the guardian was guilty of laches in delaying the claim for eleven months after the death. The demand was to retain the exemption in cash, which required no appraisement; and it was made before any expenses had been incurred or any rights had intervened, with which it interfered.

The petition is granted.

E. F. H.

WEEKLY NOTES OF CASES.

VOL. XXVIII.] FRIDAY, AUG. 21, 1891. [No. 18.

Supreme Court.

Jan. '91, 204.

February 26, 1891.

Kelly v. Sun Fire Office.

Fire insurance—Insured may waive benefits in policy by his course of dealing—Where insured agrees to procure a certificate from the nearest magistrate or notary public, that is a condition precedent to his recovery on the policy—Election to rebuild, effect of.

Where the holder of a policy of fire insurance does not elect to stand upon his original proofs, but proceeds to furnish additional matters, he cannot afterwards claim that the original proofs were sufficient, and thus debar the company from exercising their option to rebuild within sixty days after proofs of loss are complete.

While an insurance company has no right to require a public officer to act in the adjustment of its risks, there is no rule of law or public policy which forbids the parties to a policy from contracting that the insured shall procure a certificate of loss from the nearest magistrate, notary, or other public officer.

Insurance Co. v. Block, 109 Pa. 535, and Davis Shoe Co. v. Kittanning Ins. Co., 27 WEEKLY NOTES, 108, overruled.

Where a policy-holder begins suit, the company is relieved from carrying out its election to rebuild during the progress of the suit.

Appeal of the Sun Fire Office, defendant, from the judgment of the Common Pleas of Wayne County, in an action of assumpsit, brought by S. A. Kelly, upon a policy of fire insurance.

The facts, as they appeared at the trial, before SEELEY, P. J., are substantially as follows: On April 5, 1887, the Sun Fire Office issued to S. A. Kelly a policy of insurance to indemnify him against loss or damage by fire to the extent of \$1800. The property insured was a dwelling-house and drug store combined.

The policy contained, *inter alia*, the following stipulations as to the proceedings in case of loss:—

1. Persons sustaining loss or damage by fire shall forthwith give notice of said loss in writing to the society, and as soon thereafter as possible render a particular account of such loss, signed and sworn to by them, stating whether any and what other insurance has been made on the same property, giving copies of the written portions of all policies thereon; also the

actual cash value of the property and their interest therein, for what purpose and by whom the building insured, or containing the property insured, and the several parts thereof, was used at the time of the loss; when and how the fire originated; and shall also produce a certificate, under the hand and seal of a magistrate or notary public nearest to the place of the fire, not concerned in the loss as a creditor or otherwise, nor related to the insured, stating that he has examined the circumstances attending the loss, knows the character and circumstances of the insured, and verily believes that the insured has, without fraud or evil practice, sustained loss on the property insured to the amount which such magistrate or notary shall certify. The insured shall, if required, submit to an examination or examinations, under oath, by any person appointed by the society, and subscribe to such examinations when reduced to writing; and shall also produce their book of account and other vouchers, and exhibit the same for examination at the office of the society, and permit extracts and copies thereof to be made. The insured shall also produce certified copies of all bills and invoices, the originals of which have been lost, and shall exhibit all that remains of the property which was covered by this policy, damaged and not damaged, for examination to any person or persons named by the society. No profit or advantage of any kind is to be included in the claim.

3. If the loss sustained be upon a building, fixtures or machinery, the insured shall, if required, furnish duly verified plans and specifications of such property destroyed or damaged. . . . If the claim be for building, machinery, and fixtures destroyed by fire, the insured shall procure the duly verified certificate of some reliable and responsible builder, and also of a reliable and responsible engineer, and also of a carpenter or other competent person, which certificate shall give in detail the actual cash value of such building, machinery, and fixtures immediately before said fire, and said certificate shall be attached to and form a part of the proofs.

4. . . . It shall be optional with the society to take the whole or any part of the articles at their appraised value, and also to repair, rebuild, or replace the property lost or damaged, with other of the like kind and quality, within a reasonable time, giving notice of its intentions so to do within thirty days after completion of the proofs herein required.

11. Loss money will be payable at the expiration of 60 days from the date of the adjustment of a claim, unless the society shall have replaced the property damaged or destroyed, or have given notice of its intention to rebuild or repair the damaged premises.

On October 27, 1889, the property was destroyed by fire. The proofs of loss were forwarded to the adjuster about December 2, and were received by him two days later. On December 5, they were returned to the plaintiff, who sent them to the company with the corrections asked for on January 30, 1890; they were received by the adjuster on February 1st. On February 28, the company served notice on Kelly of their intention to rebuild, and called upon him to furnish plans and specifications for that purpose in accordance with the terms of the policy. On March 19, 1890, Kelly sent the plans and specifications as requested, together with a letter in which he denied the right of the

company to replace the property and said that he would forthwith bring suit unless the claim was paid, and on April 4, 1890, began this suit.

Defendant requested the Court to charge the jury as follows: Under the undisputed evidence in the case, the verdict of the jury must be for the defendant. *Answer.* We decline that, because we think that this fact that we submit to you is one that must go before the jury. You have the evidence of Mr. Lundy, the evidence of Mr. McCarty, the evidence of Dr. Kelly, I think they are the three witnesses bearing on the fact, and Mr. Fellows, and the evidence as it stands we think forbids that the Court should pass upon that question, and for that reason we must submit the question to you. Take the case, gentlemen, and dispose of it according to the evidence. (First assignment of error.)

The Court charged the jury, *inter alia*, as follows: "If you find, under the terms of this policy, with the instructions we have given you as to the rights of the parties, that the company had not lost this right of option by its negligence, then, having notified the plaintiff of their determination to rebuild, they could not be held liable upon this policy; they could be required to rebuild, but not in this proceeding, and your verdict would necessarily be for the defendant. But, if by their negligence and delay you find that they have lost their right of option, then they would be liable upon this policy for such sum not exceeding the amount named in the policy as would compensate the plaintiff for the loss sustained by the destruction of the building. . . .

"So far as the certificate of the magistrate is concerned we are inclined, gentlemen, to relieve you of all consideration of that question. We think the case that has been presented to us here, in the 109th State Reports, the Supreme Court have intended to say—we understand them to say—that no insurance company has the right to require the production of such certificate from a magistrate or a notary public. We hope they have meant to say this, for although this in former years was held to be a condition precedent to recovery, it required sometimes of an insured that which was impossible for him to render, and no insurance company has any power over a magistrate or notary public to require him to render such certificate. We think so far as that certificate is concerned that the proofs of loss were sufficient."

Verdict for plaintiff for \$1874.70, and judgment thereon. Defendant appealed, assigning for error, the answer to the point presented and the portions of the charge quoted.

Edvard N. Willard (Everett Warren and C. E. Mumford with him), for appellant.

George S. Purdy, for appellee.

March 9, 1891. *PAXSON, C. J.* The policy of insurance on which this suit was brought in the Court below, gave the defendant company the option to re-build, or pay the amount of loss sustained, in case the property insured was destroyed by fire. The learned Judge below conceded its right of option, but left it to the jury to find whether the company had lost its right by its delay in exercising it. The jury found the delay, and if there was evidence upon this point sufficient to submit the verdict must stand.

I do not understand the facts to be disputed. Those that are important are substantially as follows: The proofs of loss were forwarded to the adjuster about December 2, and were received by him two days thereafter. On December 5, they were returned to the plaintiff, who sent them to the company with the corrections asked for on the 30th of January. I find no contradiction of this testimony, and one of the papers which made up the corrections bears that date. They were received by Mr. Fellows, the adjuster, on February 1. On February 28, 1890, the company served notice on the plaintiff of its intention to rebuild, and called upon him, under the terms of the policy, to furnish plans and specifications for that purpose. The plans and specifications were furnished, but the plaintiff alleged that the option of the company had not been exercised in time, and brought this suit, not upon a contract to rebuild, but for the loss under the policy.

I do not understand the ruling of the Court below, or the argument of plaintiff's counsel, to be based upon a denial of any of the foregoing facts. On the contrary, it is assumed that the original proofs of loss were complete, and a full compliance with the conditions of the policy; that the additional proofs required by the company were unreasonable, and that the time limited for the option of the company commenced to run not later than December 5. If they are right in this the company has no defence.

There would have been more force in this position had the plaintiff elected to stand upon his original proofs. He did not do so, but proceeded to furnish the additional matters required. Granted, that as to any of these matters he had a right to decline further information, he waived such right by furnishing it. We have repeatedly held that insurance companies may waive the benefit of provisions in their policies by this course of dealing, and it is only fair that we should hold the assured to the same rule. The company, by the terms of its policy, had thirty days within which to exercise its option, after the completion of the proofs of loss. The proofs cannot be said to have been completed until the thirtieth of January. This conclusively appears from the act of the plaintiff himself. Had he notified the company in December that he re-

garded his proofs as complete, and would furnish no other, the company would not have been misled, but would have been put to its option, assuming that the proofs were sufficient.

We have not entered into the details of the proofs of loss for the reason that we do not consider it necessary under our view of the case. There is one matter, however, to which we will refer. It is not absolutely necessary to our decision, yet it is fairly raised and assigned as error. We do so that the profession may not be misled.

The third assignment alleges that the Court erred in the following portion of its charge. "So far as the certificate of the magistrate is concerned, we are inclined, gentlemen, to relieve you of all consideration of that question. We think the case that has been presented to us here, in the 109th State Reports, the Supreme Court have intended to say—we understand them to say—that no insurance company has the right to require the production of such a certificate from a magistrate or a notary public. We hope they have meant to say this, for although this in former years was held to be a condition precedent to recovery, it required sometimes of an insured that which was impossible for him to render, and no insurance company has any power over a magistrate or notary public to require him to render such certificate. We think so far as that certificate is concerned that the proofs of loss were sufficient."

The case above referred to by the learned Judge was *Insurance Company v. Block* (109 Pa. 535.) The precise language in the opinion of the Court in that case is as follows: "The company had no right to require a public officer to act in the adjustment of its risks, and the neglect of the assured to even ask a certificate from that officer would have been no default."

If the learned Judge below was misled by the foregoing, he has the consolation of knowing that the writer was equally misled in the recent case of *Davis Shoe Company v. Kittanning Insurance Company* (27 WEEKLY NOTES, 108), where he adopted the language referred to without much reflection and in the stress of business. Fortunately, whether right or wrong, it has done no injury. As each of those cases was decided upon other sufficient grounds, and the remark may be regarded as dictum, the present seems a fitting time to examine the question and see if the dictum is law. If not, it is our plain duty, as it is our pleasure, to say so promptly.

We do not think it was error to say that an insurance company "had no right to require a public officer to act in the adjustment of its risks." No such officer could be compelled to do so. This is plain enough. It does not follow that the parties to a policy of insurance may not contract that the insured shall procure a certi-

ficate from the nearest magistrate, notary, or other officer. Such contract is not forbidden by any law or rule of public policy. It may be a foolish contract on the part of the assured, but we do not reform men's contracts because of their folly. In the case in hand the plaintiff did not complain of this clause; on the contrary, he complied with it.

While the right of a company to compel a public officer to adjust its loss cannot be successfully claimed, yet, where such a clause exists in a policy, by the agreement of the parties, we are not prepared to adopt the expression in *Insurance Company v. Block*, that "the neglect of the assured to even ask a certificate from that officer would have been no default." We are not dealing with the case of an attempt on the part of the assured to obtain such a certificate, and the refusal of the officer to give it.

This is not a new question, and we are, therefore, spared an extended discussion of it. It is sufficient to refer to the authorities. In *Phillips on Insurance* (Vol. 2, page 472), the rule is thus stated: "Fire policies generally have a provision that the assured shall produce certain certificates respecting the loss, which vary considerably, as will appear from the instances to be given. It is, like all express conditions, always to be complied with, unless the right to demand the certificate is expressly or impliedly waived by the insurers." This, I believe, is the rule in all the best books on insurance; it is certainly so in *Flanders on Fire Insurance* (page 586 of second edition), and in *Wood on Fire Insurance* (at page 710). It was also declared in the Court of King's Bench by Lord KENTON, Chief Justice, nearly a century ago, in *Worsley v. Wood* (6 T. R. 710), and has continued to be the law of England to this day. In *Columbian Insurance Company v. Lawrence* (2 Peters, 25), Chief Justice MARSHALL sustained a similar provision, and when the same case came before the same Court seven years later, the principle was affirmed by Mr. Justice STORY. (See 10 Peters, 507.) The doctrine was equally affirmed in *Gilligan v. Commercial Fire Insurance Company* (87 N. Y. 626); *Johnson v. Phoenix Insurance Company* (112 Mass. 49); *Daniels v. Equitable Fire Insurance Company* (50 Conn. 551). In our own cases of *Commonwealth Insurance Company v. Sennett et al.* (41 Pa. 161), and *Mueller v. South Side Fire Insurance Company* (87 Id. 399), the same rule is recognized, and in the former case, the opinion of Lord KENTON in *Worsley v. Wood*, *supra*, is referred to with approval.

The only cases cited against this overwhelming weight of authority were *Fire Insurance Company v. Block* and *Davis Shoe Company v. Kittanning Insurance Company*, *supra*. The dictum of those cases must give way before such an unbroken line of decisions.

The moral to be drawn from this is, that in every instance it is wise to study a case with sufficient care to ascertain the very point decided, and not place too much reliance upon the illustrations of the Judge who writes the opinion. They are sometimes drawn hastily from the means conveniently at hand, and necessarily, in our great pressure of business, without the examination and reflection which we give to the question decided. I may be allowed to point this moral, for the reason, that it is, in part, at least, pointed at myself.

It was urged on behalf of the plaintiff that the defendant company merely announced its election to rebuild, and has not in point of fact done so, nor has it attempted to do so. The answer to this is, that its right to rebuild was denied by the plaintiff, and such denial promptly followed by a suit. The company could not be required to pay and rebuild also.

Our conclusion is, that the option to rebuild was exercised in time, and that this suit cannot be sustained.

Judgment reversed. W. M. S., JR.

Common Pleas.

C. P. No. 2.

Bloomington v. Victor et al.

Interpleader—Nonsuit—Possession as evidence of ownership of goods—Proof of possession—Evidence.

Sur rule to take off nonsuit.

The facts sufficiently appear in the opinion of the Court.

John C. Bullitt (Richard C. Dale with him), for plaintiff.

William A. Manderson, contra.

August 6, 1891. PENNYPACKER, J. Charles Bloomington, the claimant in the interpleader, testified that he was the owner of the store-house No. 332 Market Street at the time of the levy; that the firm of Bloomington & Co., consisting of himself, B. F. Bloomington and Bernard Kohn, occupied the third story of the building, and that the goods levied upon were in that room. He further said, "they were in my store-house, 332 Market Street, among other goods belonging to Bloomington & Co. These goods were separate. They were under my control just as the other goods were. Of course

I had my boy there to take care of them. . . . These goods were entirely under my control. Q. Did any one else have control or give directions about these goods? A. No one else had control, and I gave my boy sometimes directions." This constitutes all of the material testimony. After the plaintiff had closed, the Court granted a nonsuit.

The plaintiff had the affirmative of the issue and it is difficult to understand why, when he was upon the stand, he did not give the facts upon which he rested his claim of title so that the case could have been determined on its merits. He preferred, however, to rest upon the meagre evidence presented, and it is necessary to meet the question raised by it. The issue to be tried was whether or not the right of property in the goods was in the plaintiff. It is contended in his behalf that upon proof of possession the law raises a presumption of ownership and that consequently he had shown enough to make out a *prima facie* case in his favor. Assuming that proof of exclusive possession without other qualifying facts is some evidence of ownership, what is there in this case to show that he had such possession? He does not say that he was in possession, and he leaves it to be inferred from a state of facts, to say the least, capable of an entirely different interpretation. The goods were in that story of the building occupied by Bloomington & Co., among other goods of the firm, though separate, and were entirely in his control just as the other goods of the firm were. The reasonable inference is, that they were in the possession of the firm, and that his control was because of the fact that he was a member of the firm, and acted as agent for it. If he had made a claim on behalf of the firm, or for an interest in the goods arising out of his membership in that firm, a different question would be before us, but he has asserted, and is required to prove a right of property not in the firm, but in himself. In the event of a claim made on behalf of the firm a bond upon which they would have been responsible would have been required and the goods would have been delivered to them or to some one for them. No amendment with a view to putting the pleadings in a shape to raise this question was suggested. It has been held that upon a claim of a right of property, another and limited interest cannot be proven. (*Meyers v. Prentzell*, 9 Casey, 482; *Stewart v. Wilson*, 6 Wright, 450.) The evidence in this case is too slight and uncertain to justify a verdict in favor of the plaintiff.

The rule is discharged.

C. P. No. 2.

Brock v. Watson.

Evidence—Written instrument—Subscribing witnesses—Necessity of calling subscribing witness—Written agreement set forth in the statement filed and the execution not denied—Admissions—New trial—When not granted.

Sur rule for a new trial.

The facts necessary for an understanding of the case sufficiently appear in the opinion of the Court.

William Hopple, Jr., for the rule.

William W. Smithers, contra.

August 11, 1891. PENNYPACKER, J. This suit was brought to recover the sum of one hundred and twenty-five dollars advances paid by the plaintiff to the defendant upon a written agreement for the purchase of real estate. It was alleged upon the part of the plaintiff and denied by the defendant that the latter had failed to comply with the terms of the agreement. Upon the trial of the cause the written agreement was offered in evidence after having been identified by the plaintiff without the production of the subscribing witness and was admitted by the Court under objection. It is contended for the defendant, that in so doing, the Court erred. Whether or not the rule requiring the proof of written instruments by the production of the subscribing witnesses ought to be adhered to, since the passage of the Act of Assembly making the parties to the suit competent to testify, we do not think that this is a case for its enforcement. Rule 1, of the Rules of Court, provides that, "In all actions brought in this Court upon any deed, bond, bill, note, or other instrument of writing, a copy of which shall have been filed within two weeks from the return day to which the action is brought, it shall not be necessary for the plaintiff, on the trial, to prove the execution thereof, but the same shall be taken to be admitted" unless the execution is denied by affidavit filed. The return day of the summons was the first Monday of July, 1889, and on the 9th of July the plaintiff filed a statement of his claim containing as an exhibit, a copy of the written agreement. The defendant thereupon filed an affidavit of defence setting forth, *inter alia*, "It is true that on the 4th day of May, 1889, an agreement was made between the plaintiff and defendant, of which exhibit A, attached to the plaintiff's statement, is a copy." So far from denying the execution of the agreement, he made an affidavit to the fact, and the plaintiff might well therefore assume that he would not be required to produce the technical proof. Moreover, when the defendant was called to the stand, the written agreement was

shown to him, and he testified: "I signed the contract," so that the fact was in evidence in his own part of the case, and the admission of the agreement in that of the plaintiff would have done him no harm had it been irregular.

The real question to be determined was, whether or not there had been a failure on the part of the defendant to comply with the terms of the contract, and this question was properly submitted to the jury, who have found in favor of the plaintiff. The result of the verdict is that the plaintiff recovers the money he had paid and the defendant retains the land.

The rule for a new trial is discharged.

Orphans' Court.

July, 1891.

Howell's Estate.

Decedents' estates—Collateral inheritance tax—Legacies under \$250 liable for tax if the gross amount of such legacies amounts to \$250—Act of May 6, 1887—Meaning of the word "estates" as used therein.

Where the clear value of an estate passing to persons or bodies corporate, not exempt from the collateral inheritance tax, under the provisions of the Act of May 6, 1887, exceeds \$250, the several legacies of which such an estate consists are liable to the tax, even though one or all such legacies are "valued" at a less sum than \$250.

Com. v. Boyle, 2 Del. Co. Rep. 335, and *Mixer's Estate*, 28 WEEKLY NOTES, 182, followed; *Com. v. Kerchner*, 24 Id. 260, distinguished.

Sur exception to adjudication.

The facts of the case are sufficiently set forth in the opinion of the Court.

The Auditing Judge, PENROSE, J., awarded the tax to the Commonwealth. To this finding an exception was filed on behalf of certain charities as legatees.

John Marshall Gest, for exceptants.

The word "estates" as used in the Act of April 7, 1826, and also in the Act of May 6, 1887, refers to the estate of the legatee and not to the estate of the decedent.

Com. v. Kerchner, 24 WEEKLY NOTES, 260.

The New York Act, which is almost a verbatim copy of the Pennsylvania Act, has been so construed.

In re Cager, 111 N. Y. 343.

In re Howe, 112 Id. 100; 48 Hun, 235.

In re Hopkins, 6 Demarest, 1.

In re McCready, Id. 292.

In re Smith, 5 Id. 90.

The only case where the Surrogate Court in New York has decided the contrary is the matter of *Miller* (5 Demarest, 132), where it held that the word "estate" in the exempting clause referred to the estate of the testator, but that case was never followed and was expressly overruled.

McVean v. Sheldon, 48 Hun, 163.

S. Davis Page, Edward P. Allinson, and Boies Penrose, contra.

July 11, 1891. HANNA, P. J. Testator bequeathed the bulk of his large estate, amounting to over \$400,000, for the use of his wife and children. He also bequeathed other legacies, and an annuity which, it is conceded, is subject to the collateral tax, which has been paid; and in addition he gave to each of seven charitable institutions or societies the sum of \$200, in the aggregate \$1400. The Auditing Judge directed the tax to be deducted from the legacies respectively, and awarded the amount, \$70, to the Commonwealth. On behalf of the charities an exception to the award has been filed. And it is contended that the legacies, each being less than \$250, are not liable for the tax. The question therefore is whether these legacies are subject to the collateral inheritance tax imposed by the Act of May 6, 1887 (Purd. 2148, pl. 1).

Upon a reference to the Act we find that "all estates, real, personal, and mixed, of every kind whatsoever, situated within this State . . . passing from any person who may die seized or possessed of such estates, either by will or under the intestate laws of this State . . . other than to or for the use of father, mother, husband, wife, children, and lineal descendants born in lawful wedlock, or the wife or widow of the son of the person dying seized or possessed thereof, shall be and they are hereby made subject to a tax of five dollars on every hundred dollars of the clear value of such estate or estates, and at and after the same rate for any less amount, to be paid to the use of the Commonwealth."

By the first section of the Act of April 7, 1826, the original Act providing for the collection of the collateral inheritance tax, the amount of the tax was fixed at 2½ per cent., which was increased to 5 per cent. by the Act of April 22, 1846; and the first section of the Act of 1887, above quoted, combines therein the provisions of the first section of the Act of 1826, the fourth section of the Act of April 22, 1846, and the eleventh section of the Act of April 10, 1849 (P. L. 571). Thus we have in the Act of 1887, section 1, the provision for the tax, its amount, and the persons who take the property of the testator or decedent exempt from the tax.

In the absence therefore of any further provision, "all estates, real, personal, and mixed, of every kind whatsoever . . . passing from any person who may die seized or possessed of

such estates, either by will or under the intestate laws of this State, or any part of such estate or estates, or interest therein, transferred by deed . . . made or intended to take effect . . . after the death of the grantor . . . to any person or persons, or to bodies corporate or politic, in trust or otherwise," other than to the persons exempt from the tax, would be liable therefor.

But the Legislature, believing the tax a hardship, and onerous upon estates of inconsiderable amount, excepted from its payment those of less than \$250 in value. This is provided in the original Act of 1826, was never afterwards disturbed, and was re-enacted in the Act of 1887, by the third section of which it is expressly declared that "No estate which may be valued at a less sum than \$250 shall be subject to the duty or tax." Thus all estates, with the proviso mentioned, passing to persons or bodies corporate other than those exempt, are liable for the tax.

What then is intended by the use of the phrase "all estates?" It is strongly urged that by it is meant legacies, and of course both pecuniary and specific, with annuities, and distributive shares in case of intestacy, and if they be less than \$250 they are exempt from the tax. But such has never been our understanding of the meaning of the Act, and is contrary to the undisputed interpretation and uniform practice of this Court since the passage of the Act of 1826, now more than sixty-five years. When the Legislature said "all estates" shall be liable, it meant that which a person shall die seized or possessed of, and shall leave either by will or through intestacy, to be administered according to the laws of the Commonwealth; in other words, his property, real or personal. This, we think, is clear, from an examination of all the statutes passed upon the subject. The Act of 1887, which is merely a compilation of the prior Acts, and declaratory of the law as found therein, as well as in decisions of the Supreme Court, and in effect intended to provide for the better collection of the tax, as shown by our brother PENROSE, in *Del Busto's Estate* (23 WEEKLY NOTES, 111), indicates throughout by the word "estate" that the property of the decedent was contemplated, and not the interest therein of the legatee or distributee.

In the same first section of the Act of 1887, *estates*, whether situated within this State or any other State, are spoken of. Any part of such *estate* or *estates*, or interest therein transferred by deed, etc., is rendered liable to the tax. Again, the clear value of such *estate* or *estates* is made the criterion. By the fourth section of the Act, where, from claims upon the *estate*, litigation or other unavoidable cause of delay, the *estate* cannot be settled up at the end of the

year, six per cent. interest only upon the tax shall be charged, etc. And by the fifth section, any executor or administrator, or other trustee, paying any legacy or share in the distribution of any *estate*, subject to the tax, shall deduct therefrom the tax, etc. By the ninth section, the register's receipt, when countersigned by the auditor-general, shall be a proper voucher for the payment of the tax in the settlement of the *estate*. By the eleventh section, if debts be proven against the *estate* of the decedent after payment of the tax, and a legatee is required to refund a proportion, the tax shall be repaid by the county treasurer, etc. And finally, the twelfth section provides for the appointment of an appraiser to "fix the valuation of *estates* which are or shall be subject to collateral inheritance tax," who shall "make a fair and conscientious appraisement of such *estates*," etc.

Indeed, a laborious analysis of the Acts of Assembly referred to is unnecessary. The intention of the Legislature is clear, that the liability to the tax is to be determined, not by the amount of the legacy, but by the clear value of the estate passing to persons or bodies corporate not exempt from taxation. If the net value of the estate to be distributed exceeds \$250, it follows therefore that legacies or distributive shares passing to collateral, strangers in blood, etc., are liable to the tax.

This is the view taken by CLAYTON, P. J., in *Commonwealth v. Boyle et al.* (2 Del. Co. Reports, 335), where it is held that the word "estate" in the Act of April 7, 1826, applies to the property possessed by the decedent, and not to the individual legacies; and therefore where the estate exceeds \$250 in value, the tax must be levied upon all legacies other than those exempt by the Act, regardless of the amount of the legacy. And since the argument before us, we find that WICKHAM, P. J., reached the same conclusion in *Mixer's Estate* (28 WEEKLY NOTES, 182), where he also holds that the exemption section in the Act of 1887 "refers to the whole estate, and not to legacies, devises, or distributive shares carved therefrom."

It is thought that *Commonwealth v. Kerchner* (24 WEEKLY NOTES, 260) is in conflict with the view we take; but an examination of that case shows that no opinion is given by the Court, and the facts reported do not sustain the syllabus by the reporter. There the gross amount of the legacies passing collaterally was less than \$250, the greater part of the estate being given to lineal heirs; and therefore the legacies were held exempt from the tax. It does not decide that if the amount of the legacies passing collaterally exceed \$250, those less than that sum are exempt from the tax. In fact, that case is in harmony with our conclusion.

We have been referred to several cases by the

Courts of New York, wherein it has been held, under the statute of June 25, 1887, which exempts an "estate" valued at less than \$500 from the duty or tax, that legacies to that amount or less are not subject to the tax. (In the *Matter of Cager*, 111 N. Y. 343; *Matter of Howe*, 112 Id. 100; *Matter of Smith*, 5 Demarest, 90; *Matter of Hopkins*, 6 Id. 1, and *Matter of McCready*, Id. 292.) But, as remarked by Mr. Dos Passos, in his valuable treatise on the Law of Collateral Inheritance Taxes, etc., this "seems contrary to the general practice of the different surrogates," and a rule "as to which there is much doubt."

But, however it may be in New York, we prefer to follow that which has been the settled construction of our statutes upon the subject. For the reasons given, the legacies to the charities, amounting in the aggregate to an estate exceeding \$250, are chargeable with the tax.

The exceptions are dismissed, and adjudication confirmed. . S. H. T.

June 15, 1891.

Meaher's Estate.

Presumption of death—Parties absent and unheard from upwards of seven years disregarded in distribution—Yet Court may require security from distributees to refund in case such absentees or their representatives subsequently appear—Court in exercise of its equity powers follows the analogy of the Act of June 24, 1885.

Sur exceptions to the adjudication of the account of Margaret Meaher, administratrix of the estate of Matthew Meaher, deceased.

At the audit, before PENROSE, J., it appeared that decedent died October 10, 1889, intestate, without issue, father or mother, leaving a widow, a brother, and a nephew and three nieces, children of a deceased brother. It was also shown that he had had three other brothers; one had died without issue in the lifetime of decedent, and two had left their home in Ireland at an early age, and had not subsequently been heard from. This was in one case for a period of fifty, and in the other case of forty years. Inquiries had been made for them by decedent in 1852, 1857, and 1874-75, and at the last date advertisement had been made by posting at various churches in Ireland. Distribution was awarded among the parties before the Court, with the proviso that security be entered by the brother and the nephew and nieces respectively for the return of so much of the share awarded, not exceeding one-half of the said share, as might be required for payment of the shares of the two brothers unaccounted for, if their claims should subsequently be established.

Exceptions were filed to the order for security on behalf of Michael Meaher, the surviving brother.

Robert H. Neilson, for exceptant.

The policy of the Act of June 24, 1885 (P. L. 155), was to prevent the violent divesting of an estate from one in whom it was known to have vested. It has no application except to one who had "his last place of abode within this Commonwealth."

The Auditing Judge should have found that the legal presumption was that these brothers died (1) in the lifetime of the decedent; (2) in the years 1847 and 1859 respectively; (3) without issue.

Innis v. Campbell, 1 Rawle, 373.

Holmes v. Johnson, 42 Pa. 159.

Miller v. Beates, 3 S. & R. 490.

Whiteside's Appeal, 23 Pa. 114.

Campbell v. Reed, 24 Id. 498.

Esterly's Appeal, 109 Id. 222.

The administratrix would be fully protected by the decree asked, entered, as it would be, by "a Court of competent jurisdiction."

Devlin v. Commonwealth, 12 WEEKLY NOTES, 299.

In the event of any one having a better right to the fund, (1) being in life and knowing (2) that the decedent came to Philadelphia, (3) died there (4) leaving an estate (5) and no lineal descendants, such person could sue the exceptant, which is ample remedy for so very vague a chance of right.

Even if a bond might be ordered it was error to make its obligation unlimited as to time, because a claimant to the fund would be barred by the lapse of seven years.

Act of April 8, 1833, *Purd. Dig.* 934.

And in making it conditional for the return of the money *with interest*. If the fund remained with the administratrix awaiting a claimant, she would not be chargeable with interest.

The obtaining of such a bond is practically impossible. No surety could protect himself even by taking the whole fund and retaining all the interest it earns, which at the current rates would not reach the legal rate.

Leonard R. Fletcher, contra.

June 27, 1891. FERGUSON, J. In this case a presumption of the death of the two brothers of the decedent arose by reason of their having been absent and unheard of for many years, and the Auditing Judge distributed the estate among the others entitled, but directed that they should enter security to refund so much of their respective distributive shares as might be necessary to pay to the absent brothers their shares in the event of them or their representatives hereafter appearing and demanding the same. This direction to enter security is the subject of the exceptions.

While it is undoubtedly true that when a per-

son has been absent and unheard of by those who should know his whereabouts for a period of upwards of seven years, the law presumes he is dead, yet our experience in this Court has taught us that, while this may be one of the presumptions of the law, it is not always justified by the facts, as we have had numerous cases where presumptively dead people have unexpectedly turned up in time to prevent their estates from being divided among those who were only too anxious to invoke this presumption in order to secure it to themselves. (*Wolff's Estate*, 12 WEEKLY NOTES, 535.)

In this case, on account of the long absence of the decedent's brothers, their death might well be presumed, yet, in order to warrant the distribution of their shares in this estate among others, we must go a step further, and not only presume them dead, but that they died intestate, unmarried, and without issue.

While there is no Act of Assembly that requires security in such a case as this, yet we think that it is within the sound discretion of the Auditing Judge, sitting as a Court of equity, to demand it in a case where he thinks it necessary in order to protect all possible interests. (*Duval's Appeal*, 38 Pa. 120.) The Act of June 24, 1885 (P. L. 155), in reference to the granting of letters of administration upon the estate of a person supposed to be dead on account of absence of seven years or more, provides that there shall first be an advertisement for four weeks of the fact that application for letters has been made, then a hearing by the Orphans' Court having jurisdiction at least two weeks afterwards, and if at this hearing the presumption of death is established, then there shall be another advertisement, and if the person does not appear in twelve weeks, a decree may be entered directing the register of wills to issue letters of administration to the party entitled thereto. Notwithstanding all these efforts to ascertain the fact of death, the Act provides that before there shall be any distribution of the estate the persons entitled shall give refunding bonds conditioned "that if the said supposed decedent shall be at the time alive, they will respectively refund the amounts received by each on demand."

By analogy with this Act, we think that when a case is presented in which distribution of a decedent's estate is claimed, upon the ground that there is a presumption of death as to some of the distributees, the Court ought in its discretion to demand security for refunding. If this security is demandable as a right, under the Act above referred to, after all the efforts have been made to find the alleged decedent, that it requires *a fortiori*, where there has been little or no effort made, as in this present case, and in most cases of the kind that come before us.

The exceptions are dismissed. J. D. B., Jr.

WEEKLY NOTES OF CASES.

VOL. XXVIII.] FRIDAY, AUG. 28, 1891. [No. 19.]

Supreme Court.

Jan. '91, 201.

March 5, 1891.

Close v. Zell.

Contracts—Deeds—Merger—Evidence.

A preceding independent parol contract by a grantor of indemnity against a defective title to real estate conveyed, which contract was the operative inducement to the grantee to purchase the land, is not merged in a deed subsequently executed, but survives the deed and confers a cause of action which may be enforced upon a failure of the title.

When land has been conveyed by a deed with a special warranty, and the title subsequently proves defective from a cause not included in the said covenant, and the grantee brings suit upon a preceding independent parol contract of indemnity against a defective title, which contract was the operative inducement to him to purchase the land, the action is not in any sense a proceeding to change, alter, modify, or reform the deed, but is an action upon a contract, and the plaintiff is entitled to recover if the evidence of the contract is of a clear and satisfactory character.

Appeal of Josephine P. Zell, T. Burd Zell, and William T. Zell, executors of Thomas Zell, deceased, defendants, from the judgment of the Common Pleas of Berks County, in an action of assumpsit brought by Solomon Close and George W. Kershner upon an alleged contract made by said decedent.

On the trial, before ERMENTROUT, P. J., it appeared that Thomas Zell, having procured a verdict for \$2700 against H. D. Benjamin, judgment was entered thereon. Benjamin appealed to the Supreme Court. Pending the disposition of the appeal, Zell levied upon lands formerly of Benjamin, but which he had conveyed to another, and sold the same at sheriff's sale, and bought the lands for \$5, not enough to pay the costs. Zell gained the appeal; the judgment was affirmed, and then H. D. Benjamin paid the debt, treating the sale as a nullity. Subsequently Zell executed and delivered to plaintiffs a deed conveying the above land. This deed contained only a covenant of special warranty "against the said parties of the first part and their heirs, and against all and every other person or persons whomsoever lawfully claiming or to claim the same, or any part thereof, by, from, or under them, or any of them;" and no covenants whatsoever, for the plaintiffs' protection, if the title failed. Plaintiffs then brought several

ejectments against those in possession of the land claiming under Benjamin, but failed to recover. Thereafter, in December, 1888, they brought this action against the executors of Zell (who died in February, 1885) to recover the purchase-money which they had paid for the property, together with all costs and counsel fees which they had incurred in the actions of ejectment.

The plaintiffs offered to prove by George E. Smith that Thomas Zell, holding the title acquired by virtue of his judgment and the sheriff's deed, offered the property to the witness, and as an inducement for him to take it, said to him, the witness, that if the title should fail he would repay him what he paid, together with his costs and expenses; that subsequently, and at or about the time of the conveyance of the property to Close and Kershner, the plaintiffs, or shortly thereafter, the witness had a conversation with Zell, in which Zell said that he had lost a good bargain, that he had sold the property to Close and Kershner for a sum of money, and that in reply to the interrogation of the witness, Mr. Zell said that he had promised the plaintiffs, Close and Kershner, that if in the litigation that would follow the title to the plaintiffs should fail, he would reimburse the plaintiffs for the \$1300 paid, together with their costs and expenses."

Mr. Bland. The offer is objected to, first, that the contract between Thomas Zell and Close and Kershner is contained in their deed, and the deed is the only evidence of their contract; second, the evidence now proposed does not support any averment in the declaration; third, the evidence is irrelevant, immaterial, and incompetent.

THE COURT. The objection as to the first portion of the offer, as to the conversation that took place between Smith and Zell concerning the offer of the property to Smith, is sustained. We will overrule the objection as to the conversation held with Mr. Smith by Zell with reference to the sale to Close and Kershner. Exception for plaintiffs, and exception for defendants.

The plaintiffs further offered to prove by Judge George W. Bruckman that he heard Mr. Zell say in the presence of Mr. Close, one of the plaintiffs, to the witness and to Close, that in selling this property he had entered into an agreement with the plaintiffs that they should lose nothing under any circumstances, and in case of failure of title he would return them their money, together with their costs and expenses.

Mr. Bland. Objected to, first, that the deed in evidence on the part of the plaintiffs contains the contract between Thomas Zell and George W. Kershner and Solomon Close, and the legal effect of that deed cannot be altered or varied by parol evidence such as is now offered; second, the offer is to contradict a deed, and is in conflict with the Statute of Frauds, and for that reason is incompe-

tent; third, the offer does not support any theory set forth in the declaration; fourth, the offer is irrelevant, immaterial, and incompetent.

THE COURT. The offer is admitted. Exception.

The defendants presented numerous points requesting the Court to charge, substantially, that the deed was the contract between the parties in the absence of fraud, accident or mistake, that the evidence was not sufficient to cause the Court to reform the deed, that the evidence admitted under the above offers should be disregarded, that plaintiffs having paid the \$1300 with knowledge of the outstanding title could not recover, and that under all the evidence the verdict should be for the defendants. All these requests were refused by the Court, who charged the jury, *inter alia*, as follows:—

"Now, first as to the position of the defendants on the law. The defendants take the position that when these people came together, all their contracts, bargains, and agreements merged, that is, passed into and were made part of the deed, and that outside of the deed nothing can be said to render the defendants liable to pay anything.

"[Now, the law presumes, takes it for granted, accepts it as a fact, that when a deed is taken in pursuance of an agreement, that the deed is in satisfaction of all previous bargains, covenants, and arrangements, and where the conveyance contains none of the usual covenants the law supposes that the grantee, that is the man who takes the deed, agreed to take the title at his risk, or else that he would have rejected the deed altogether; that if a purchaser knows about a defect in a title or an incumbrance when he takes his deed, and he fails to expressly stipulate for a covenant, agreement, bargain, promise, or other security against it, the presumption is that he assumes the risk of any defect in the title, and that therefore nothing can be gainsaid. Now that is the position of the defendants, and the law is correct with the exception of the latter part. The law says that whilst that is all true, that whilst the deed is supposed to contain the bargain of the parties, yet it is only a presumption of law, and that that presumption can be overruled or set aside by testimony, and that when this is done the presumption is overcome and an intention to the contrary made to appear, that they can show a promise, agreement, or bargain, that survives the deed and upon which the plaintiffs would have the right to sue. In other words, that whilst that is the presumption of the law, it can be rebutted by competent and proper testimony. The law says that the evidence to overcome the presumption raised by the deed must be clear, satisfactory, and manifest. It must satisfy the jury that such

is the fact. It must be clear, satisfactory, and manifest.]

"[In order to show the case of the plaintiffs they first proceed to show the delivery of the deed, the actions of ejectment, the failure to recover, and the fact that the verdict determined that the title which was conveyed to the plaintiffs, Close and Kershner, was of no avail, that they were not enabled to obtain the possession of this property, and that the consideration money for that deed was fully paid by them. In order to show that the contract of the parties was not merged into this deed, but there was a contract made by and between the parties at the time of the delivery of this deed which survived the deed and stood out independent of it, without being made a part of it, they call George Smith as a witness. What is his testimony? Mr. Zell is dead. Close and Kershner cannot testify because he is dead. The law desires to even up matters, and where one party is dead and cannot testify as to the facts of the case, the law says that the other party to the contract cannot testify. So that the parties to the deed cannot give any testimony themselves, the one being dead and the other two incompetent.] No witness is produced who was present at the time of the bargain and the delivery of the deed, but they rely upon the alleged admissions of Mr. Zell made to George Smith and Judge Bruckman."

The Court then referred at length to the testimony of Smith and Judge Bruckman, quoted *infra*, in the opinion of the Supreme Court, and then concluded as follows:—

"[Now, Mr. Bruckman's testimony standing alone, unsupported, would not be sufficient to grant a verdict; but that testimony is submitted to corroborate the testimony of George Smith with reference to what was the contract or bargain made between the parties, and it is submitted to the jury in connection with the testimony of Mr. Smith to enable them to ascertain the truth and credibility of Mr. Smith's testimony; and they point to this affirmation on the part of Mr. Zell as a corroboration of what Mr. Smith said, and that the bargain indicated in the testimony of Mr. Bruckman is essentially the terms of the bargain as indicated in the testimony of George Smith.]

"I have already said that the evidence must be clear, satisfactory, manifest. It is the duty of the jury to weigh the evidence, to consider the circumstances and relations of the parties, the contents of the deed, the legal presumptions contained in the deed, and to balance that over and against the testimony of George Smith, and the alleged corroborating features of the testimony of George Bruckman, and thus ascertain what was the true state of facts, whether in point of

fact there was such a contract as the plaintiffs allege. If there was not, if the testimony is not clear and manifest, if the witnesses are not credited, if the testimony does not satisfy the minds of the jury over and against the deed that the promise was made as alleged, then your verdict will be for the defendants; but if the testimony does satisfy you over and against the deed, if it is made clear and manifest that such a promise was made as detailed here and as is contended for by the plaintiffs, then you would render a verdict in favor of the plaintiffs.

["Ordinarily, when there is a breach of guaranty, warranty, or indemnity, the measure of damages would be the value of the land, and, therefore, the ordinary measure of damages would be the consideration-money paid, to wit, thirteen hundred dollars, with interest thereto added. But the plaintiffs contend that the circumstances and the evidence in this case show that there was, in addition to that, a promise made that there should be no risk run, that the party should be made whole, that they should lose nothing, and if the jury find that that is the contract, then they could add to that consideration-money and the interest thereon, the reasonable costs and legal fees expended by the plaintiffs in their attempts to maintain the title. That would be the verdict if the jury find the theory of the plaintiffs to be maintained. If the jury find that the theory of the defendants is correct, the verdict will be simply for the defendants. The evidence as to the costs paid is \$39.10, \$18.70, and the estimate of attorney fees \$150. This would make the total consideration-money \$1300, costs paid amounting to \$57.80, and the evidence as to fees was \$100 and \$50, making \$150."]

Verdict for plaintiffs for \$1976.12 and judgment thereon; whereupon the defendants took this appeal, assigning as error the admission of the above offers of evidence, the refusal of their points, the portions of the charge included in brackets, and the submission of the case to the jury.

Josiah Funck and H. Willis Bland, for appellants.

The plaintiffs' action was founded on their deed, but that contained only a covenant of special warranty.

The most clear, precise, and indubitable testimony should be required before a writing like this can be subverted, and that should be of what occurred at the time the conveyance was consummated.

Sidney Co. v. Warsaw District, 130 Pa. 76.

Walker v. France, 112 Id. 203.

Ferguson v. Rafferty, 128 Id. 337.

Fisher v. Witham, 132 Id. 488.

D. E. Schroeder (Garrett B. Stevens with him), for appellees.

April 6, 1891. *GREEN, J.* In the second count of the plaintiffs' statement their cause of action is substantially set out as a parol contract of indemnity against a defective title to certain real estate conveyed to the plaintiffs by the defendants' testator, which was the operative inducement to the plaintiffs to purchase the title from their vendor. The deed contained the usual covenant of special warranty but no covenant of title, and as there is no breach of any covenants of the deed no cause of action arises under it.

This proceeding is, therefore, not in any sense a proceeding to change, alter, modify, or reform the deed in question in any respect. It is not alleged or claimed that any covenant or stipulation was omitted from the deed by fraud, mistake, or accident, but the deed, just as it is, is set forth in the statement in substance, together with an allegation that the grantor agreed with the plaintiffs at the time of the sale and the delivery of the deed, that he would refund to them the whole of the consideration-money paid by the grantees to the grantor, and all interest thereon, and all costs and expenses incurred, in the event that the grantees should not acquire under the deed a good title to the premises sold.

The question arises whether such a contract is merged in the deed subsequently executed, or whether it survives the deed and confers a cause of action which may be enforced upon a failure of the title. It will be observed that the contract, which in this case was verbal, precedes and is independent of the deed. It stipulates for indemnity against the consequences of the taking of the title conveyed by the deed. If, notwithstanding the deed, and the title thereby sought to be conveyed, the grantees subsequently sustain loss by reason of the fact that they acquired no title by the deed, is there any legal reason why they cannot recover from the grantor the money which he had received from them, and which he promised he would refund to them in case the title failed? This is a question which has been several times adjudged by this Court.

In *Drinker v. Byers* (2 P. & W. 528), we held that a guaranty of title executed and delivered by a vendor to a vendee, is not merged in a subsequent deed of conveyance which contains only a special warranty. The facts there were that Henry Drinker having sold two tracts of land to Jacob Byers, before the deed was executed, signed and delivered to Byers a statement or stipulation in these words: "It being represented to me by John Nisely and Jacob Byers, who have purchased two tracts of land of me situate on Bald Eagle Creek, that a certain Derrick Gonsalus makes some pretensions to part of the said two tracts, although I am well persuaded he has no just claims or rights to any part of the

said land; yet for the satisfaction of the said Nisely and Byers, I hereby engage that I will be answerable to them for any claim or demand of the said Gonsalus; that if it should appear hereafter there is any justice in his claim, I will indemnify and save harmless the said Nisely and Byers on that account." Byers accepted a few days later an executed deed for the premises from Drinker, and gave him a mortgage for part of the purchase-money, and upon a scire facias on the mortgage made defence that Gonsalus had recovered on his title a large part of the land conveyed by the deed, and sought to defeat the mortgage on the ground that the part of the land that was lost was of more value than the whole amount of the mortgage. Objection was made to the agreement for indemnity that it was merged in the deed and conferred no right of action, but the Court below and this Court decided otherwise, and judgment was entered for the defendant. Mr. Justice KENNEDY in delivering the opinion said: "In the next place it has been insisted on that the execution and acceptance of the deed of conveyance was a consummation of all previous agreements between the parties relating to the purchase of the lands. That this collateral promise of indemnity was thereby waived, and that the vendor was discharged from his obligation under it. It is certainly true that when articles of agreement for the sale of land are carried into execution by a conveyance from the vendor and bonds from the vendee, the contract in general is considered as closed, unless in extreme cases showing gross misapprehension or fraud (citing several authorities). This however is but a general rule, to which there are exceptions (see *Brown v. Moorhead*, 8 S. & R. 569), and is founded merely on presumption, which may, as I apprehend, be rebutted by circumstances or parol evidence. In the case of *Frederick v. Campbell* (13 Id. 136), parol evidence was held admissible to show that at the time the deed was executed the vendor declared to the vendee that he had a good title to 225 acres, and would warrant that quantity of land, the deed containing no such covenant or warranty. In the present case, although the promise of indemnity does not appear to have been made at the time of executing the deed of conveyance, yet its date is only three weeks anterior, and would appear from its terms to have been made some time after the agreement for the sale of the land. . . . It might perhaps therefore be reasonably inferred that the vendee having received this promise of indemnity but a few days before the deed of conveyance, relied upon both as his security, and was induced thereby to give his bonds and mortgage for the payment of the balance of the purchase-money."

In the case of *Richardson v. Gosser* (26 Pa.

335), we held that where a vendor who conveys to his vendee by deed of general warranty, promises to indemnify him for any improvements he may make upon the premises in the event of the title proving worthless, such promise is not *nudum pactum*, but will support an action of assumpsit. The deed did not alter the situation of the parties in this respect, being entirely distinct from the contract sued on. BLACK, J., after stating the facts of the case said: "This suit is brought by B. (the vendee) against A. (the vendor) for the expense of improvements put on the land by the plaintiff, both before and after the date of the conveyance. It was proved on the trial that A. promised to pay B. for the improvements in case the title failed. This promise was often repeated before the improvements were made, at the time they were in progress, and after they were finished, and as well previous to the deed as subsequently. The plaintiff knew the title to be doubtful, and it is apparent that he would not have expended his labor and money as he did, except on the faith of the defendant's promise to keep him harmless. It is hard to see how we could deny the plaintiff's right to recover, and at the same time satisfy the demands of common justice. The transaction between these parties was a plain contract on a subject-matter which no law forbade them to bargain about in any way they pleased. We can scarcely conceive of another case in which more palpable wrong would be wrought or a worse example set, by suffering an agreement to be broken with impunity. The defendant's promise was not *nudum pactum*. The consideration was sufficient. It is true that as things turned out neither of the parties received any benefit from the improvements; but that was not the plaintiff's fault. . . . Here was a person making a purchase of land. He had so little faith in the title that he would neither pay the purchase-money nor make improvements which were necessary to its profitable use without some guaranty against the ultimate loss of his whole outlay. But he had confidence in his vendor and was willing to accept his personal warranty in place of a good title. The vendor gave him that by his covenant in the deed and by his parol promise that he should not lose a dollar. When the title failed, the vendee had a right to fall back on the retreat which both had agreed to provide for him. . . . The deed did not alter the situation of the parties or make any change in the title, for the grantor had no title to convey. At all events it was a totally distinct thing from the bargain on which this suit is founded. . . . It is urged that this contract about improvements was merged in the deed. . . . But to us it appears that the contract on which this suit is founded has no such

relation to the deed referred to. It does not concern the sale or the transfer of the title. It is a promise to do another thing."

The foregoing cases have been extensively quoted because they fully illustrate everything necessary to be considered in disposing of the present case. In both of them the contract, as in this, was for indemnity against a defective title. In the last there was a special, verbal agreement to compensate for the cost of improvements in case the title failed, and although there was a general warranty of title that covenant would not carry a right of recovery for the cost of improvements. Hence there could be no action for that particular loss founded on that covenant, and this Court upheld an action of assumpsit on the verbal agreement, holding that it was not merged in the subsequent deed. In the case of *Drinker v. Byers* (*supra*) there was a special warranty only, and as there could be no recovery upon that covenant, we upheld the prior agreement for indemnity which was the equivalent of a general warranty.

In *Cox's Adm'r's v. Henry* (32 Pa. 18) LEWIS, C. J., said in delivering the opinion: "Two repugnant measures of damages cannot exist in the same action between the same parties relative to the same subject-matter. (*Seitzinger v. Weaver*, 1 Rawle, 385.) It follows that where there is a covenant of warranty entered into at the time of the contract for the sale of land, and a similar covenant is embodied in the deed afterwards accepted, the first covenant is merged in the last, so far as regards the measure of damages. (*Drinker v. Byers*, 2 Penn. Rep. 528.) But where, at the time of the contract of sale, a special covenant is entered into, with security, to indemnify the vendee 'against all costs, charges, and damages, on account of any and every lawsuit that may be brought against him to recover the land, by any and every claimant,' and this instrument is retained in the possession of the vendee after receiving the conveyance (in which there is no covenant relative to the same matter), the deed is not an extinguishment or a merger of the covenant for such indemnity."

In this case there was a sufficient covenant of warranty in the deed to relieve against a failure of title, but not sufficient to justify a recovery for "all the costs, charges, and damages" caused by the suit which produced the eviction, and hence it was decided that an action might be maintained on the special agreement for indemnity on that account. That agreement was held not to be merged in the deed.

In *Anderson's Adm'r's v. Washabaugh* (43 Pa. 115) the deed for the premises was executed and delivered in March, 1854, and contained a clause of general warranty. Subsequently, in December, 1855, some doubts about the title having

arisen the grantor gave a bond of indemnity to the grantee to keep him "clear and indemnified," and "to make him secure and safe in the title" to the land. Afterwards there was an ejectment against the grantee, in which about five-sixths of the land was recovered from him, and then an action on the bond and a recovery, not only of the proportionate part of the value of the land, but also of counsel fees and costs incurred in defending the title, and that judgment was sustained by this Court. STRONG, J., said: "The plaintiffs in error mistake in treating this case as if it were an action to recover damages for a breach of some one of the five ordinary 'covenants for title.' The extent of the liability of Anderson's estate is to be measured by the conditions of his bond. They imposed upon him greater obligations than he would have assumed had he merely covenanted for the quiet enjoyment of the land conveyed."

In this case the agreement contained in the bond of indemnity was not made until nearly two years after the deed for the land was delivered, and the deed itself contained a covenant of general warranty. Notwithstanding this a recovery was sustained on the bond, and included all counsel fees, costs, and charges incurred in defending the title. It thus appears from the cases now cited that whether the agreement for indemnity was made before or at the time of the sale, or afterwards, the right to recover indemnity in an action on the special agreement is sustained, and that whether the agreement was by writing or in spoken words is a matter of indifference. Such an agreement is not merged in the deed if made before or at the time of the deed, and is not destroyed by a covenant of general warranty in the deed if made thereafter.

The same doctrine was applied in the case of *Robinson v. Bakewell* (25 Pa. 424) in an action upon a similar bond given one day after the deed, and although the deed contained a covenant of general warranty, and a recovery was had for all costs, charges, and expenses including counsel fees incurred in defending the title.

We again enforced the same doctrine in the case of *Walker v. France* (112 Pa. 203), where the warranty set up was entirely in parol, and preceded the execution of the written agreement for the sale of the land, from which this part of the contract was omitted. We held the proof sufficiently clear to be submitted to the jury, and sustained a recovery for the breach of the verbal stipulation. GORDON, J., said: "That a written agreement may be modified, explained, reformed, or altogether set aside by parol evidence of an oral promise or undertaking material to the subject-matter of the contract, made by one of the parties at the time of the execution of the writing, and which induced the other party to put his

name to it, must now be regarded as a principle of law so well settled as to preclude discussion."

It is not at all necessary to invoke the support of this principle to sustain the present proceeding. There is no question here of altering the deed for the lots in question by inserting a clause left out of it by mistake, fraud, or accident. The case is only cited to show that where the parol stipulation is the inducing cause to the execution of the written instrument, the law is sufficiently flexible to give relief in this manner if the evidence is of a perfectly clear and satisfactory character. But the case is of authority on the point that a contract in the nature of a guaranty as to the quality of the land conveyed is not merged in the conveyance and may be enforced independently of it.

In the present case Zell, the grantor in the deed, was dead at the trial, and the plaintiffs could not testify. But the proof was very clear that the sale had been made to Close and Kershner upon the express condition that Zell would refund them the money if the title failed. Judge Bruckman testified as to what was said by Zell to Close in a conversation, some time after the deed was delivered, as follows: "He said in the presence of Mr. Close and myself that if they—meaning Close and Kershner—should fail in holding on to this property at Thirteenth and Cotton, which they had bought from him, that he would refund to them the money that they had paid for it, that they should lose nothing. I think that Mr. Zell drew my attention to what he was saying, at least he looked at me when he said to Mr. Close that he should lose nothing. I was sitting by, and the conversation was more particularly carried on between Mr. Close and Mr. Zell."

George E. Smith to whom Zell had offered the property for \$800, but was refused, said he saw a good deal of the parties, and knew about the negotiations going on between Zell and Close and Kershner, for the sale of the property both before and just after the sale. He was asked: Q. Did you have any conversation with Mr. Zell afterwards? A. Yes, sir. Q. In which he said to you that he had entered into this agreement? A. Yes; after this sale was consummated, after they had bought, Mr. Zell said he had sold; he twitted me, and said I had missed a bargain in not buying, and I told him that I did not want to buy a lawsuit. He said there would be no trouble about that. He said we offered to give you back your money, and make you whole in every respect; we gave it to these people in the same way; I promised the same, and I will do it. He said you see what makes it necessary is, it is better for them to fight if there is to be a fight about it, it is better for me; they stand in a better light. Mr. Bland

said that to me too. They were trying to sell it to me. He also said this conversation took place a few days after the sale, probably not more than three. He was also asked: Q. What else did he say besides what you have said? A. He said that they had no risk to run, that they would make it whole, that he would stand everything. Q. Is that what he said—that they had no risk to run, and that he would make it whole? A. Yes, sir; that they had it the same as he offered it to me. He said he would do it. Q. That they would have no risk to run, and he would make them whole? A. Yes, sir. Q. Is that all that he said? A. It was probably repeated two or three times for all I know, in different words; I do not know that they were the exact words, but that was the way he said it. He said that what he had promised me he had promised them, and he would do so.

The other circumstances in the case were strongly corroborative of the foregoing testimony, and it was not contradicted. All of the testimony was carefully submitted to the jury by the learned Court below, with instructions as to the character of the testimony required in such cases, that it should be clear, satisfactory, and manifest. The testimony was believed by the jury, who found a verdict for the plaintiffs. We do not see how they could have done otherwise. The assignments of error are all dismissed, as we find no error in any of them. The principles and authorities relied upon on behalf of the defendants are quite inapplicable to a case and a question of the character involved here.

Judgment affirmed.

C. K. Z.

Common Pleas.

C. P. No. 1.

April, 1891.

Williams v. Delaware, Lackawanna, and Western R. R. Co.

Practice—Process—Service of—Corporations—Foreign and domestic—Act of April 8, 1851—The Act of April 8, 1851, only applies to foreign corporations—In the case of domestic corporations service must be made either on a director, manager, or other officer.

Sur rule to set aside sheriff's return.

This was an action of trespass against the Delaware, Lackawanna and Western R. R. Co., in which the sheriff's return set forth that the writ was served on R. W. Smith, treasurer of the Pennsylvania R. R. Co., at the office of the company on Fourth Street, and on W. R. Taylor, secretary of the Philadelphia and Reading

R. R. Co., the said Pennsylvania and Reading Railroad companies being the agents of the defendants for selling tickets and issuing bills of lading for passengers and freight to be carried on its road.

The depositions in support of the rule showed that the Delaware, Lackawanna and Western R. R. Co. was a domestic corporation, and that neither R. W. Smith nor W. R. Taylor was an officer, director, or manager of defendant company.

J. Bayard Henry and *George Wharton Pepper*, for the rule.

The Act of Assembly in relation to domestic corporations which have their principal offices out of the State, is plain and specific, and in order to obtain service, the writ in such cases must be served upon a director, manager, or other officer.

Act of March 15, 1847, P. L. 361.

George H. Earle (*Richard P. White* with him), contra.

The Act of April 8, 1851 (P. L. 354), authorizes the service of process as to any corporation, whether foreign or domestic, upon its agent.

April 11, 1891. *ALLISON, P. J.* The Act of April 8, 1851 (P. L. 354), refers only to foreign corporations. This was decided by Judge SHARSWOOD in *Cochran v. Library Company* (6 Phila. 492). The question whether a railroad which sells tickets and receives freight for a foreign railroad corporation is such an agent as is contemplated by the Acts of March 21, 1849 (P. L. 216), and April 8, 1851 (P. L. 354), does not arise in this case.

Rule absolute.

[See *Williams v. Del., Lack. & West. R. R. Co.*, 27 WEEKLY NOTES, 511.]

F. F. K.

C. P. No. 4.

June, 1891.

Marshall et al. v. Insurance Company of North America.

Fire insurance—Void or voidable policy—“Other insurance.”

A provision in a policy that if the insured shall insure the property in another company, the policy shall be considered sunk, avoids the policy the instant the other insurance is put on the property. Such policy does not, therefore, constitute “other insurance” within the meaning of policies which provide for an apportionment of loss amongst all the companies concerned in the risk.

Exceptions to report of Master.

The facts appearing were as follows:—

The plaintiffs, on October 13, 1885, insured

their factory in the Independent Mutual Fire Insurance Company. The policy contained this clause:—

“Any member insuring in other companies, covered in part by this company, his or her policy shall be considered sunk, provided the same is not approved by this company, and indorsed on his, her, or their policy, in which case the company shall be only liable to the payment of a ratable proportion of any loss or damage which may be sustained.”

On October 10, 1886, they effected additional insurance in nine stock companies, defendants in this suit. The approval by the Independent Mutual Fire Insurance Company of the additional insurance was not obtained, and notice of it was not given to that company until after a fire occurred on the insured premises, which happened on June 9, 1888.

All of the stock companies' policies contained a provision, expressed in different language, but all to the effect that the company, in case of a loss, if there was other insurance on the property, should be liable only for a ratable proportion of the loss, without regard to the solvency of the other insurance companies, and some contained a provision that the company should not be liable whether the other insurance was valid or not, valid or invalid, or without reference to the liability of the other insurers.

The policies of the stock companies differed from that of the mutual company, as they permitted other insurance without notice, until required; so that the plaintiffs were not bound to keep up other insurance.

George P. Rich, for plaintiffs.

Russell T. Boswell and *George Tucker Bispham*, for defendants.

June 20, 1891. *ARNOLD, J.* (After stating the facts, *ut supra*.) On this statement of facts the question is, whether the insurance in the mutual company was other insurance, and argument was made to show that there is a difference between void and voidable, valid and invalid insurance. If the insurance in the mutual company was merely voidable and not void, it is contended that it should be taken into account in adjusting the proportion of loss which the stock companies should pay, although the mutual company stood on its policy and refused to pay, as it had the right to do. But if the other insurance is void, it is treated as no insurance, and is not to be taken into consideration in apportioning the loss. We consider the question whether it is void or voidable, settled by authority in this State by the case of *Stacey v. The Franklin Fire Insurance Co.* (2 W. & S. 506), in which it was decided, that although a policy is actually issued, yet if it contains a clause that notice of other insurance must be given, and such notice

is not given, the policy is void. In that case the notice was withheld when effecting a second insurance, and the Court said that the policy was void *ab initio*; and added that the condition applies to a subsequent as well as to a prior insurance. Failure to give notice puts an end to the insurance at once, or, as in the case before us, on the mutual policy, it shall be considered sunk, that is, ended instantly. Subsequent approval would revive it, but without such approval it came to an end the moment the second insurance was placed, without any action whatever by the first company. No action was required by the mutual company to sink the policy, but action was required to revive it. That being wanted, the insurance was sunk, and, so far as that policy was concerned, there was no other insurance.

In *Mitchell v. The Lycoming Mutual Ins. Co.* (51 Pa. 402), the difference between acts which make a policy void or voidable, was carefully discussed, and it was held that when a forbidden act (as over-insurance) is done, it is a forfeiture of the policy, and there is no insurance. It is a case of no other insurance. Other insurance valid at the time of the fire may become invalid by failure to give notice or furnish proofs of loss, but neither notice after the fire nor proofs of loss can revive an insurance which was void or sunk, as in this case, before the fire. Hence we are of opinion that so far as the policy of the Independent Mutual Fire Insurance Company was concerned, the plaintiffs had no other insurance within the meaning of the policies of the stock companies, and that the question whether the mutual policy was valid or not valid, has nothing to do with the case. The principle decided in *Parks v. Hartford Insurance Co.* (100 Missouri, 373), that "those words (valid or invalid, or without regard to liability of other insurers), refer to valid insurance, which, though in force at the time of the loss, may not constitute legal liability, because of some breach of the terms of the policy or otherwise," applies with equal force in this case.

As the learned Master has exempted the companies, the policies of which contain the words valid or not valid, or without regard to the liability of the other insurance companies, we think in that respect he erred. We therefore sustain the exceptions which raise this question, and refer the case back to the Master to apportion the unpaid loss among all the stock companies, according to the amount insured by them.

It is creditable to the defendants that they did not object to the bill on the ground of multifariousness, but joined issue and settled all questions in one suit, to the great saving of further litigation, delay, and costs.

H. B.

Orphans' Court.

July 6, 1891.

Kingston's Estate.

French spoliation claims—Not subject to collateral inheritance tax when paid to the heirs of a claimant—Right of representation does not extend beyond brothers' and sisters' grandchildren—Acts of April 8, 1833, and April 27, 1855.

The Auditing Judge (HANNA, P. J.), in his adjudication filed in this estate, found as follows:—

"The funds in the hands of the accountant arose from an appropriation by Congress to pay what is called a French spoliation claim, for the loss of the brig George Washington, owned by the decedent.

"The decedent died about the year 1836, and his heirs and next of kin now living are S. Kingston McCay, grandnephew; Harriet K. McCay, grandniece; Strickland G. McCay, grandnephew; Rebecca R. Turner, grandniece; and two great-grandnieces, viz.: Virginia B. Calley and Mary E. Barton.

"The questions submitted to the Auditing Judge are—

"First. Whether the fund is subject to the collateral tax, and second, whether the fund should be awarded to the grandnephews and nieces to the exclusion of the great-grandnieces, or whether the latter should participate therein.

"As to the first question, the Auditing Judge is clearly of opinion that the fund is not subject to the tax, for the reason that it never formed part of the estate of decedent, and therefore does not pass from him to his collateral kindred. On the contrary, it is a gift or gratuity from Congress to the heirs and next of kin, and the administrator is only the conduit or agent through whom the gift passes to those persons whom Congress intends to benefit. Creditors have no claim upon the fund, it is clear, nor has an assignee in bankruptcy. This appears from the Act of Congress. Accordingly no collateral tax is awarded.

"As to the second question, the Auditing Judge is of opinion that the grandnephews and nieces are alone entitled as next of kin. The Act of April 8, 1833, provides that there shall be no representation amongst collaterals after brothers' and sisters' children—that is, nephews and nieces of the decedent, and it required the Act of April 27, 1855, to entitle grandchildren of brothers and sisters of the decedent to inherit by representation—that is, grandnephews and grandnieces. And there is no statute providing that great-grandnephews and nieces shall take by representation."

The fund was therefore awarded to the grandnephews and grandnieces, share and share alike.

W. C. S.

WEEKLY NOTES OF CASES.

VOL. XXVIII.] FRIDAY, SEPT. 4, 1891. [No. 20.

Supreme Court.

Jan. '90, 264.

February 2, 1891.

Guest v. Lower Merion Water Co.

Corporations — Water companies — Mechanics' liens — Liability of corporations to — Acts of April 29, 1874, and April 7, 1870.

A water company incorporated under the Act of April 29, 1874 (P. L. 93), is a public corporation, and the structures necessary to the operations of such a company are not subject to mechanics' liens.

The above rule is not suspended by the provisions of the Act of April 7, 1870 (P. L. 58), which allows the personal, real, and mixed property, rights and franchises of a corporation to be sold on a writ of fieri facias.

Appeal of George Guest, A. G. Grater, and Samuel Roberts, trading as Guest, Grater & Co., plaintiffs, from an order of the Common Pleas of Montgomery County striking from the record a mechanic's lien filed by said plaintiffs against the Lower Merion Water Company, owner, and Comegys & Lewis, contractors, and setting aside a judgment entered upon a scire facias sur said mechanic's lien.

Plaintiffs having filed their lien, issued a scire facias thereon on September 14, 1889, which writ was served by posting a copy on the premises and return made of *nilhil habet* as to owner and contractors. On October 2, 1889, the plaintiffs filed their statement, and on November 5, 1889, entered judgment for want of an appearance for \$285.18. On December 2, 1889, the defendants obtained a rule to show cause why the lien should not be stricken off, and all proceedings thereunder quashed. After argument, this rule was made absolute, the Court, WEAND, J., filing the following opinion:—

"The lien in this case is filed against a two-story brick pumping-station with additions, etc., owned by the Lower Merion Water Co., a corporation chartered under the provisions of the Act of 29th April, 1874, sec. 34 (P. L. 93, P. D. 852).

"A motion has been made to strike off the lien because the defendant, being a corporation chartered for public purposes, its building, etc., necessary for carrying on its operations, are not subject to a mechanic's lien, and the case of *Foster & Co. v. Fowler & Co.* (10 P. F. S. 27) is

cited as directly ruling the point. On the part of the lien creditors it is urged, however, that the reasoning of this and kindred cases is no longer applicable since the passage of the Act of 7th April, 1870 (P. L. 58), which gives a remedy by *fi. fa.* instead of sequestration, as with the Act of 16th June, 1836, sec. 72 (P. L. 774).

"It is undoubtedly true that the franchises and corporate property of a corporation, not being a county, township, or other public corporate body, can now be sold under a *fi. fa.*, and that a creditor need no longer apply for a sequestration; but the difficulty in the plaintiff's way in this case is that there is no execution process to which he can resort under either of the above-cited Acts, and hence his lien is of no avail.

"Prior to the Act of 1836, a creditor had no remedy to enforce his claim against the franchises or property of a corporation, in its nature public, and necessary to its corporate existence, as was shown by C. J. TILGHMAN in *Ammant v. Turnpike Co.* (13 S. & R. 210), in which case he expressed his regret that such was the law, and recommended some mode of sequestration. No doubt his remarks led to the passage of the Act of 1836, by which a proper remedy was provided. Under that Act, when an execution against a corporation has been returned unsatisfied, in part or in the whole, the plaintiff in the judgment could petition for a writ to sequester the goods, etc., of a corporation.

"By the Act of 1870, sec. 1 (P. L. 58), it was provided that in addition to the provisions of the 72d section of the Act of 16th June, 1836, and in lieu of the provisions or proceedings by sequestration under said Act, the plaintiff might have execution by *feri facias*, etc., by which the property, franchises, rights, etc., of a corporation could be sold.

"It has, however, been held by Judge McCANDLESS, of the United States Circuit Court, in *Fox v. The Hempfield R. R. Co.* (8 Phila. 639); by Judge MITCHELL, in *Flagg v. Farnsworth et al.* (12 WEEKLY NOTES, 500), and by Judge McDERMITT, in *Bank v. Gibbs & Sterrett Mfg. Co.* (13 Id. 174), that the provisions of the Act of 1870 are only in addition to the provisions of the 72d section of the Act of 1836, and that therefore there can be no writ to sell the franchises or corporate property until after a return under the first *fi. fa.* This view of the case seems also to have been adopted by C. J. THOMPSON, in *Phila. and Balt. C. R. R. Co.'s Appeal* (20 P. F. S. 355), and by Judge SIMONSON, in *Com. v. Susq. and Del. River R. R. Co.* (7 Crumrine, 306). As opposed to this view we have the decision of Judge WHITE, in *Williams v. Lawrenceville Ry. Co.* (21 Pitts. L. J. 187), and in *Lusk's Appeal* (108 Pa. 152, 156), Judge PAXSON said 'the sale was made upon an ordinary writ of *feri facias*.

There appears to have been no attempt to comply with the provisions of the Act of April 7th, 1870,' and then adds 'we need not discuss the question whether a return of *nulla bona* should have preceded the levy and sale upon the fieri facias. If necessary, which we do not assert, it was but an irregularity,' etc.

"After a careful reading of these apparently conflicting decisions, we agree with Judge McDERMITT, that 'as this *fi. fa.* is in lieu of sequestration, it is but reasonable to presume that the Legislature intended its aid should be called into action by the same precedent return of *nulla bona*, which was absolutely necessary before a writ of sequestration could be obtained by any creditor under the Act of 1836.' If this position is correct then this lien cannot be sustained, for, as was said by Judge LOWRIE, in *Williams v. The Controllers, etc.* (6 H. 277): 'Where there can be no execution there can be no action, and as a *levari facias* is the only execution proper on a judgment on a mechanic's lien,' there cannot be a return of *nulla bona* on a *fi. fa.*, and, therefore, nothing upon which to base the *fi. fa.* allowed by the Act of 1870. The principle laid down in *Foster & Co. v. Fowler & Co., supra*, was recognized in *Girard Point Storage Co. v. Southwark Foundry* (15 WEEKLY NOTES, 25), and is still therefore the law governing this case. As before the passage of the Act of 1870, this lien would not have been good, and as it is not helped by that Act, the plaintiffs must resort to some other remedy to enforce their claim.

"And now, January 6th, 1890, the mechanic's lien, No. 22 June T., 1889, is stricken from the record, and the judgment thereon, by default for want of an appearance, is set aside."

Whereupon the plaintiffs took this appeal, assigning as error the action of the Court in striking off the mechanic's lien and setting aside the judgment.

F. G. Hobson (John W. Bickel with him), for appellants.

The reason for the exception to the general rule made in *Foster v. Fowler* (60 Pa. 27) having ceased to exist, the exception should cease.

The reasoning and spirit of the Act of 1870 tend to show that this Act was passed to make corporate property liable for its debts the same as any other property.

There was a final judgment in this case, and the property was already offered for sale. The defendants having had their day in Court and allowed judgment to go against them, should not now be allowed to complain.

Henry C. Boyer (Charles E. Morgan, Jr., and Francis D. Lewis with him), for appellees.

May 27, 1891. McCOLLUM, J. The Lower Merion Water Company was incorporated under

the Act of 29th April, 1874 (P. L. 93), and its powers, privileges, and duties are defined by the 34th section thereof. It is clothed with the right of eminent domain, and it is protected from competition until it "shall have, from its earnings, realized and divided among its stockholders, during five years, a dividend equal to eight per centum per annum upon its capital stock." It is bound to furnish a sufficient quantity of pure water at reasonable rates, and the Court of Common Pleas of the proper county may on the petition of any citizen using the same, make such order in the premises as may seem just and equitable, and enforce its decrees by the usual process. It may at the expiration of twenty years from its introduction of the water, be required to transfer to the municipality in which it is located, its works at their cost with ten per cent. thereon less the dividends it has received. This partial summary of its powers and duties clearly stamps it as a public corporation. It was decided in *Foster v. Fowler* (60 Pa. 27), that the structures necessary to the operations of such a company are not subject to a mechanic's lien, and the present case is ruled by it if the Act of 7th April, 1870 (P. L. 58), which allows the personal, real, and mixed property, rights and franchises of a corporation to be sold on a writ of fieri facias, does not supersede it. It is contended that the Act referred to has rendered the reasoning on which the decision in *Foster v. Fowler (supra)*, rests, and which is undoubtedly sound, inapplicable, and our sole inquiry is whether this contention is well founded. It should be noted at the outset that the principle of the case cited was distinctly approved in *Girard Point Storage Company v. Southwark Foundry Company* (105 Pa. 248), where a mechanic's lien was sustained on the ground that the public was not directly interested in the business of the defendant corporation. In that case it was conceded that if the Girard Point Storage Company was in the nature of a public corporation its works would be protected from the incumbrance of a mechanic's lien. The case was heard in 1884, and this concession is evidence at least, that it was not then suggested or supposed that the Act of 1870 could have any part in the decision of it, nor can we now see how that Act affects the claim of the appellants to a lien for their work and materials. The only execution process allowed for the enforcement of a mechanic's lien is a writ of *levari facias* to sell the building and curtilage bound by it, and the form of the writ is prescribed by the statute, which gives the lien. The levy and sale of the writ of fieri facias allowed by the Act of 1870 may embrace the property, franchises and rights of the corporation in any and every county of the Commonwealth and pass the title thereto as effectually as

if "said property, franchises and rights were located, used, levied upon, and sold in the county wherein said writ of execution was issued." It is obvious that such comprehensive process was not designed for the collection of a judgment founded on a mechanic's lien. This lien is statutory and in the procedure for its enforcement the judgment and execution are restricted to the property bound by it. It is the policy of the law to keep intact the property belonging to and essential to the operations of a public corporation, and hence its creditors will not be permitted to divide such property and sell a part of it. It would by a signal abandonment of this policy, and it would invite a division of the property to allow it to be sold on mechanic's lien process. This could not be done prior to the Act of 1870, and we discover nothing in that which authorizes it. The fieri facias allowed by that Act is not a substitute for the ordinary fi. fa. under the 72d section of the Act of 16th June, 1836, but it is in lieu of sequestration under the 73d section of it. The process and procedure provided by the 72d section remain, and the process provided by the 73d section is superseded by the special fi. fa. given by the Act of 1870. The condition precedent to sequestration was an ordinary fi. fa. returned unsatisfied in whole or in part, and this must precede the writ which takes its place. By this precedent return on the ordinary fi. fa. the insolvency of the corporation is discovered, and the necessity of recourse to a sale for the benefit of its creditors, of its franchises and property essential to its operation, is demonstrated. It was decided in Bayard's Appeal (72 Pa. 453), that a sale on the fi. fa. given in lieu of sequestration did not change the rule of distribution, but that its proceeds were for the benefit of all its creditors, and on the footing of moneys made by a sequestrator under the Act of 1836. The proceeds of a sale of real and personal property under the 72d section of that Act were applicable to the liens in their order.

The view that we have taken of the Act of 1870, and its effect upon the established practice in the appropriation of the property of a corporation to the payment of its debts, is sustained in an opinion by our brother MITCHELL in Flagg v. Farnsworth (12 WEEKLY NOTES, 500), and adopted by Judge McDERMOTT in Bank v. Mig. Co. (13 Id. 174). These were Common Pleas decisions, but the reasoning which supports them is clear, satisfactory, and, in our opinion, fully vindicated the judgments. While the precise question has not heretofore arisen in this Court, it is plain that this was the view entertained by Chief Justice THOMPSON, in Railroad Co.'s Appeal (70 Pa. 355), and by Justice WILLIAMS, in Bayard's Appeal (*supra*). As the property described in the claim in this case is essen-

tial to the operations, and is part of the works of the corporation, Foster v. Fowler (*supra*) sustains the action of the Court in striking off the lien.

Judgment affirmed.

C. K. Z.

Common Pleas.

C. P. No. 1.

March 4, 1891.

Lanahan v. Collins.

Corporation—Fi. fa.—Garnishee—Judgment creditor—Set off—A corporation garnishee cannot set off a debt due from a stockholder to the corporation against a judgment creditor of stockholder who has issued fi. fa. to sell his stock.

Rule to show cause why judgment should not be entered against garnishee and execution issue.

The property against which the plaintiff proceeded by fi. fa. was certain shares of stock of the Bellefonte Furnace Company, which company was summoned as garnishee. By its answer to the interrogatories the garnishee admitted that the said stock stood in defendant's name on the books of the company. The garnishee, however, set up that the defendant was indebted to it in a certain sum, and asked that the plaintiff's execution should extend only to so much of the stock as remained after the garnishee had taken out the amount of its claim against the defendant.

Charles Biddle, for the rule.

A corporation has no lien on stock for a debt due it by a stockholder.

Steamship Co. v. Heron, 52 Pa. 280.

Merchants' Bank v. Shouse, 102 Id. 492.

Theodore M. Etting, contra, cited—

Myers v. Baltzell, 37 Pa. 491.

April 8, 1891. Rule absolute. H. W., Jr.

C. P. No. 1.

June 9, 1891.

Esterly Machine Co. v. Spencer.

Landlord and tenant—Rent in arrear—Distress—Goods in possession of tenant for sale on commission are not liable to distress—Trespass—Lien for goods unlawfully distrained—Damages—The value of the goods and not the price they sell for is the measure of damages for unlawful distraint.

Sur exceptions to report of referee.

Trespass for goods unlawfully distrained.

The referee to whom the case was referred, found for the plaintiff on the following facts:—

The defendant, who was the owner of the premises, leased to one Harbut, and the rent being in arrear, distrained certain goods belonging to the plaintiff and in the tenant's possession for sale on commission. Notice of plaintiff's ownership was given to defendant, and also at the sale. Prior to the sale counsel for defendant requested plaintiff to give security for goods and take them under replevin, which was declined. The goods were valued at \$1543.84, and were bought for \$65 by defendant. An agent of plaintiff bid \$50 at the sale for the goods.

Exceptions were filed on behalf of defendant to the report, on account of form of action, and to amount of damages.

Joseph M. Pile, for exceptions.

Plaintiff cannot recover in an action of trespass, having failed to bring replevin as requested.

Caldcleugh v. Hollingsworth, 8 W. & S. 302.

Howe Sewing Machine Co. v. Sloan, 87 Pa. 438.

Sassman v. Brisbane, 7 Phila. 159.

Even if plaintiff is entitled to recover, the judgment should be for \$65 only, with interest, that being the amount which the goods brought at the constable's sale, which was a fair criterion of their market value.

Charles A. Chase and *Charles C. Lister*, contra.

Trespass, or trover and replevin, are concurrent or cumulative remedies under the facts proven in this case, and the plaintiff could select any of them.

Jackson & Gross on L. & T., 77. 354. note.

Power v. Howard, 22 WEEKLY NOTES, 475.

Bonsall v. Comly, 44 Pa. 442.

Rees v. Emeric, 6 S. & R. 286.

As to measure of damages, they cited—

McInroy v. Dyer, 47 Pa. 118.

Brown v. Riddle, 2 WEEKLY NOTES, 362.

June 12, 1891. Exceptions dismissed, and report confirmed.

H. W., Jr.

C. P. No. 1.

June 27, 1891.

Park v. Holmes.

Costs—Landlord and tenant—Distress—Replevin—Act of March 21, 1772—Double costs—Costs will not be allowed where the verdict is partly in favor of the plaintiff in the replevin—Double costs not given where the plaintiff is not the tenant.

This was an appeal from the taxation of costs by the prothonotary.

The lease was replevin for goods distrained on the leased premises. The landlord avowed for \$561 rent in arrear. The plaintiff replevied the entire distress, and pleaded that no rent was due and that she owned the goods as a boarder.

The jury found "that the defendant was entitled to \$561 rent in arrear, that the value of the

goods liable to said rent was \$300;" and as to the rest of the goods they found for plaintiff.

The landlord filed his bill of costs amounting to \$51.20, and asked that the same be doubled under the Act of Assembly, which the prothonotary allowed, and the plaintiff excepted.

E. Hunn, Jr., for exceptant, objected to all costs.

Harry S. Hopper, for landlord.

That a successful defendant in replevin is entitled to costs is decided by—

McLean v. McCaffrey, 16 Phila. 35.

The double costs were allowed under authority of the Act of March 21, 1772.

Where a defendant obtains a verdict for the full amount of rent claimed in his avowry he is entitled to double costs.

Prescott v. Otterstatter, 85 Pa. 535.

The object of the Act was to prevent vexatious resistance to the collection of rent, and when the jury find in favor of the defendant for the full amount specified in the avowry he is entitled to double costs.

In this case the verdict was against the plaintiff and in favor of the landlord for the full amount of rent claimed, \$561, and for the value of the goods subject to the distress, \$300. These two findings are according to the established practice. The concluding clause does not indicate whether there was one or one hundred dollars' worth of goods exempt from distress.

The clause is indefinite, and the only meaning it can have is that the rest of the goods, if any, were found for plaintiff.

The plaintiff did not replevy for certain goods alleged to belong to her as boarder, but for all the goods distrained. She failed in her case, and judgment has been given against her; according to the statute she is liable to the penalty of double costs.

If double costs are refused in this case the object of the Act will be avoided by making any third party the plaintiff, behind whom the tenant can take refuge and delay the cause without fear of the penalty.

THE COURT. The exceptions are sustained, and all costs are disallowed.

W. W. W., Jr.

C. P. No. 4.

March, 1891.

Wodock v. Robinson.

Landlord and tenant—Written agreements of lease—Covenants contained therein—Parol evidence to contradict is not admissible except under an allegation of fraud, accident, or mistake—Pleading.

A statement which alleges a promise by a lessor before the execution of a lease to put the demised premises in

repair, but does not allege that the lease contained such promise or that it was omitted therefrom by *fraud or mistake*, but nevertheless claims to recover for a breach of the promise, does not show a good cause of action and is demurrable.

Sur demurrer to statement.

The statement was to the following effect: On or about January 16, 1889, the plaintiff's husband, Charles Wodock, rented certain premises under a written lease from the defendant. At the time the lease was executed the defendant promised to put the premises in good, safe, and sound condition and repair, and it was in consequence of this promise that the plaintiff's husband was induced to rent the premises. On June 16, 1890, the plaintiff was injured by a fall occasioned by the rotten condition of the kitchen-floor, for which injury suit was brought. A copy of the lease was attached to the statement.

To this statement defendant demurred, because, *inter alia*, as appeared by the copy of the lease, there was no covenant therein that the landlord should make any repairs; but a covenant that the lessee would at the expiration of the term "deliver up the demised premises in like good order and condition as they now are," etc., and therefore the lessee was bound to make all repairs under the lease.

Samuel C. Perkins, for demurrer.

The relation of landlord and tenant being created by the written contract, the law attaches definite obligations to the relation which cannot be changed by a previous oral agreement.

Kabus v. Frost, 50 N. Y. Sup. Ct. 72.

The lessee of a building who sustains personal injuries occasioned by the defective condition of the building, cannot maintain an action of tort against the lessor upon an alleged promise of the lessor to repair whereby the lessee was induced to execute the lease. Such promise could not vary or add to the terms of the written agreement but is merged in it.

Tunlie v. Gilbert Manf. Co., 145 Mass. 169.

Steamboat Co. v. Mayor, 78 N. Y. 1.

Joseph A. Abrams, contra.

Where a landlord covenants to put the premises in good and tenantable repair, and the lessee covenants to keep them in such repair, the performance of the former covenant is a condition precedent to requiring performance of the latter.

Jackson & Gross, L. & T. § 1053.

And the landlord is in default after a sufficient time has been afforded him for the purpose.

Jackson & Gross, L. & T. § 1054.

Walker v. Gilbert, 2 Robt. (N. Y.) 214.

Lunn v. Gage, 37 Ill. 19.

Where the landlord has by an express agreement between the tenant and himself agreed to keep the premises in repair, in case of a recovery against the tenant by a stranger for injuries oc-

casioned by a defect in the condition of the premises, he would have his remedy over against the landlord, and in such cases it has been held that to prevent circuity of action the party injured by the defect and want of repair might have his action in the first instance against the landlord.

Gridley v. City, 68 Ill. 51.

City v. Spaulding, 4 Cash. 277.

Fisher v. Thirkell, 21 Mich. 1.

Nelson v. Brewery Co., L. R. 2 C. P. Div. 311.

The case of *Lehman v. Foelker* (Sep. T., 1889, No. 559), recently tried in this Court, and a verdict for plaintiff recovered, was a similar case to the one at bar.

April 4, 1891. *THAYER, P. J.* The defendant, in accordance with the reformed principles of pleading introduced into this State by the Procedure Act of 1887, was sued in an action of trespass in which the plaintiff seeks to recover consequential damages for a bodily injury resulting from the breach of an alleged contract. The plaintiff, Mary Wodock, is the wife of Charles Wodock, who on the 16th of January, 1889, rented from the defendant, Sarah Robinson, a farm situate in Abington Township, in Montgomery County. By the express terms of the lease, which is under seal, and which the plaintiff has properly made a part of her case by annexing the same to her statement filed, the lessee, the plaintiff's husband, expressly covenanted to keep the premises in good order and condition during the term, ordinary wear and tear and casualties by fire excepted, and to deliver up the premises in like good order and condition at the expiration of the term. It was also stipulated that if the lessee should hold over it should be deemed a renewal of the lease and of all its covenants, terms, and conditions. This lease was formally sealed and witnessed. It so happened that on the 16th of June, 1890, the plaintiff, while engaged in her household duties in the kitchen of the farm-house, was precipitated through the floor, in consequence of the floor and joists giving way by reason of their rotten and decayed condition, by which she alleges she was hurt and underwent much pain and suffering, for which she claims in this suit to recover five thousand dollars damages. By the terms of the demise it is plain enough that the defendant was under no obligation whatever to keep the premises in repair, but that, on the contrary, it was expressly covenanted by the lessee that he would keep the premises in repair himself. In the face, however, of this express agreement under the seals of the respective parties, it is averred by the plaintiff in her statement, that before, at the time, and after the execution of said lease, the said defendant by her authorized agent did faithfully promise and agree to and with the said Charles Wodock that she

would put said premises, particularly the dwelling or farm-house, in a good, safe, and sound condition and repair, and upon said promise and agreement the said Charles Wodock was induced to rent said premises and execute said lease. That at the time of the execution of said lease, and before and afterwards, the condition of said dwelling or farm-house was called to the notice of said defendant, and she, through her agent, then and there agreed to repair said house and put it and maintain it in a good and safe condition, and which agreement was part and portion of said lease. That defendant's attention and notice was frequently called to the unsafe and dangerous condition of said premises, and she was requested to repair and remedy the same, which she at all times refused to do after the said Charles Wodock and plaintiff entered into the possession of said premises.

It is nowhere alleged in the statement that the lessee was induced to sign the lease by any fraud, or that there was any accident or mistake in the drawing up of the instrument, or in the insertion of the covenant by which the lessee bound himself for the repairs necessary to keep the premises in good order and condition. There is only the bald statement that the defendant, when the lease was executed, promised, through her agent, that she would repair. The alleged promise is therefore in flat contradiction of the terms of the instrument signed and sealed by the parties, and in the absence of a distinct averment in the plaintiff's statement, of fraud, accident, or mistake, could not be proved at the trial, for it is as true now as it ever was, and is a rule too firmly rooted in justice and honesty to be easily eradicated from any system of wise laws, that all negotiations, all conversations, all oral promises, all verbal agreements, are forever merged in, superseded, and extinguished by the sealed instrument which is the final outcome and result of the bargaining of the parties. Unless you aver fraud or mistake, you can no more incorporate in it what does not there appear than you can make and seal a new bond for the parties without their consent. You can no more blot out a word which it contains than you can tear off the signatures and seals of the parties. *Manent litera scripta* is still the rule. The written instrument shall stand as the sole exponent of the minds of the parties. If it were not for this rule no man would be able to protect himself by the most solemn forms and attestations against falsehood, misrepresentation, and perjury. In this matter the common law and the civil law are fully agreed, for *contra scriptum testimonium non scriptum testimonium non fertur*, is the language of the code (Cod. B. iv, tit. 20). The cases upon this subject are myriad. Many of them, at first blush, seemingly inharmonious,

contradictory, and irreconcilable with the established rule and with other adjudications. But often the contradiction is only apparent and not real, and dependent upon special circumstances which clearly bring the case within the recognized exceptions of fraud, accident, or mistake. However Judges and Courts may have differed in the application of the rule, no Judge has had the hardihood to deny it, or to refuse to apply it in a clear case, free from the qualifying circumstances which bring it within the operation of the exceptions. It would be a day's journey to travel through the Pennsylvania cases alone, in order to substantiate this. I shall content myself at present with a selection of three cases from the more recent reports, which not only sufficiently justify the present ruling, but are conclusive upon the point raised by the demurrer.

In *Hunter v. McHose* (100 Pa. 38) it was deliberately determined after argument by able counsel that in order to enable a party to prove, in a suit upon a contract under seal, a parol contemporaneous agreement as a part of the contract he must aver in his declaration either fraud or mistake in omitting such agreement from the terms of the written contract. "Parol evidence," said SHARSWOOD, C. J., in that case, "is inadmissible to reform a written contract unless the declaration specially sets forth the fraud as a ground for such reformation. The same rule applies of course to the case of mistake." "Had the declaration," he further said, "contained the same averment as in *Gower v. Sterner* (2 Wh. 75), namely, that the contemporaneous parol agreement was intended by the parties to have been inserted in the covenant, but was omitted therefrom by the mistake of the scrivener, there would have been ground for holding that the offer should have been admitted. Such an averment if proved would have justified a reformation of the instrument. The plaintiffs however contented themselves with declaring without an averment either of fraud or mistake. This did not meet the exigency of the rule which requires that the defendant should have distinct notice of the ground upon which the reformation of the instrument is asked, that he may come prepared to meet it. I do not consider, said ROGERS, J., in *Clark v. Partridge* (2 Barr, 15), this as a mere technical objection. It is a matter of some moment to the defendant to have his cause tried on the only and true issue."

The case of *Jackson v. Payne* (114 Pa. 67), was a well-considered case. The old and wholesome rule, which maintains the inviolability of written instruments by parol proof, was there fully applied in an able opinion by GREEN, J., it being decided that parol evidence is not admissible to contradict or vary a written instru-

ment where there is no allegation of fraud, accident or mistake, nor any promise then made as to its use which was subsequently violated. There an attempt was made to reform a mortgage by parol evidence showing that it was given for an amount different from that expressed on its face, and the Court below was reversed for leaving it to the jury when it should have given a binding instruction that both the defendant and the jury were concluded by the sum mentioned in the instrument. "There was neither allegation nor proof of any fraud, accident, or mistake in the execution of the mortgage," said the learned Judge, "and we have several times held that in these circumstances parol evidence is not admissible to contradict or vary written instruments." And he then proceeds to marshal a goodly array of cases from recent decisions of the Court which fully maintain the opinion.

The case of *Eberle v. Bonafon's Executors* (17 WEEKLY NOTES, 335), is as near the present case as possible. It is indeed squarely on all fours with it. That was an action of replevin for rent. The lease contained the following clause: "The lessee promises the lessor to pay the rent punctually, and during the term to keep and at the end thereof peaceably deliver up the premises in good order and repair, reasonable wear and tear excepted." The plaintiff offered to show that at the time the lease was signed it was agreed between the landlord and tenant that the roof should be put in good repair, and other repairs made by the landlord, and only on that condition the lease was signed, and that it would not have been signed except for that agreement. The offer was overruled, and there was judgment for the landlord, which was affirmed by the Supreme Court, the Chief Justice saying: "There was no error in rejecting this evidence. It does not tend to establish fraud, accident, or mistake. Its purpose is to establish a contemporaneous parol agreement to change the effect of the written contract."

In the case now before us, as it is presented in the statement filed, the effort is, as it was in *Eberle v. Bonafon's Executors*, not only to strike out by parol a solemn covenant in a written and sealed instrument, but to write in its place another agreement flatly contradictory of it. No Court should lend its aid to such an experiment. The three cases which I have referred to should stand forever as perpetual landmarks and towers of defence in this State against all such attempts to overthrow the solemn agreements in writing of the parties, by substituting for them the uncertain and perishable recollection of parties or bystanders, or, what is perhaps more frequently the case, their prevaricating, dishonest, and fraudulent statements.

By the express words of the demise in the

present case the lessee, who was the plaintiff's husband, took upon himself the obligation of making all necessary repairs, to keep the premises in good order and condition. If in consequence of the neglect of that obligation the plaintiff has suffered an injury, she must look nearer home for that redress which she wrongfully claims from the defendant.

As the point now decided goes to the root of the plaintiff's case, it is not considered necessary to discuss the other causes of demurrer assigned by the defendant.

Demurrer sustained.

S. H. T.

Orphans' Court.

June, 1891.

Cardwell's Estate.

Escheat—Laches—Testamentary capacity.

A contest to set aside a will should not only be supported by sufficient evidence, but also prosecuted with diligence, especially where the contestant is the Commonwealth, claiming the estate by virtue of an escheat.

In order to establish testamentary capacity, it is not necessary that the intellect should be in a perfect state of integrity; all the law requires is a full and intelligent knowledge by the testator of the act he is engaged in, the property he possesses, the disposition he desires to make of it, and the persons or objects who are to be the recipients of his bounty.

Appeal by the Commonwealth of Pennsylvania from the decision of the register of wills, admitting to probate the will of Emma H. Cardwell, deceased.

The facts are fully stated in the opinion, *infra*. *D. Webster Dougherty* and *S. Edwin Meargees*, for appellants.

Andrew Zane and *George Junkin*, contra.

June 27, 1891. FERGUSON, J. The Commonwealth of Pennsylvania appeals from the decision of the register of wills, admitting the will of the said testatrix to probate, upon the ground that at the time of the making thereof she was not of sound and disposing mind, and was also unduly influenced. It is therefore claimed that her will is invalid, and as she died without kindred, her estate escheated to the Commonwealth.

A contest to set aside a will should not only be supported by sufficient evidence, but also prosecuted with diligence, especially where the contestant is the Commonwealth, claiming the estate by virtue of an escheat. What are the facts of this particular case? The testatrix made

her will on April 11th, 1881, and died on May 31st following. On November 19th, 1881, this appeal was taken, of which the executor received notice on the following day. Having had no notice of any contest, he had in the meantime been performing his duties as executor. He had paid the debts, the collateral inheritance tax, and almost all the legacies; so that when he received notice of this appeal, the estate was substantially distributed. While the executor may have been premature in thus distributing the estate before the expiration of a year from the time of the death of the testatrix, yet the fact remains that he did so, and, so far as anything appears, in good faith. If he was too prompt in performing his duty, on the other hand, the record shows corresponding dereliction of duty upon the part of the Commonwealth in prosecuting this appeal. As before stated, this appeal was taken in November, 1881. An examiner was appointed July 1, 1882, and it took him until March, 1887, nearly five years, to take the testimony of ten witnesses, and their evidence is very short for a case of this kind. After this, so little interest was manifested in the proceedings by the Commonwealth, or any one else, that the examiner's report was not filed until December 3, 1890, nearly four years after the last meeting before him, and the case first appeared upon the Argument List in this Court in May, 1891, just ten years after the death of the testatrix and the distribution of her estate. It must be conceded that this appeal has not been prosecuted with much diligence, and from the laches shown it might well be inferred that those intrusted with it did not have a great deal of confidence in the final result.

The will of the testatrix was written by an old friend, whom she appointed the executor thereof. He was not a legatee, but some of his relatives were. The testatrix went to the office of a respectable member of this bar to execute it, and the execution was witnessed by him and another member of the bar equally respectable. Both of these witnesses, as well as a third one who was present, testify that the testatrix was of sound and disposing mind and memory, and that there was nothing took place at the signing of the will to indicate the contrary, or that there was any undue influence being exercised over the testatrix.

On the part of the contestants, there is the testimony of several witnesses that, in their opinion, the testatrix was not of sound mind; but when we come to examine their testimony, we find that the witnesses are persons who are not competent to express an opinion upon such a subject, or, that their evidence is biased by their interest in the result of this litigation. Giving it all the credibility to which it

can be entitled, all it amounts to is this: that the testatrix was advanced in years and was suffering from the infirmities incident to old age, which, in her case, were aggravated by the fact that "she was as deaf as a post," and had just recovered from a severe spell of sickness. After this attack, according to the witnesses, "she was weak in mind and body." "Her questions and answers seemed to be at random." "She had a vacant, meaningless expression." "She did not seem to realize the death of her husband." "There was a vacancy in her eyes." "Would kick the covers off her bed and bellow out the window," etc. etc. This is the substance of the testimony, and there is certainly nothing very remarkable in the fact that a very deaf old lady, after a severe spell of sickness, followed by the death of her husband, to whom she had long been married, should manifest some of the symptoms detailed by the witnesses, and while all that they said may be true, it does not follow that she was thereby rendered incompetent to make a will. One of these witnesses testified, that the husband of the testatrix had told him, that "if it was not for her age, he would be better satisfied to have her in an institution for the insane." The answer to this is, that the husband had appointed his wife sole executrix of his will, and that he never changed this appointment, a circumstance entirely inconsistent with the thought that he considered her a proper subject for a lunatic asylum.

The proponents of this will called but one witness, Dr. Atlee, the physician who attended testatrix for four months preceding her death and during the time when this will was made. He visited her twenty-five times, and said "that her mind was clear; she was perfectly rational, and that he never saw anything to indicate that she was not of sound mind." On account of this witness's competency to give an opinion upon a question of this kind, his evidence is entitled to more weight than all the others put together, covering as it does the time when the will was made. But why pursue the subject further? It has been decided over and over again that to establish testamentary capacity, it is not necessary that the intellect should be in a perfect state of integrity, and possess all its original force and vigor; all the law requires is a full and intelligent knowledge by the testatrix of the acts she is engaged in, of the property she possesses, and the disposition she desires to make of it, and the persons or objects who are to be the recipients of her bounty. Neither age, nor sickness, nor extreme distress, nor debility of body, will affect the capacity to make a will if sufficient intelligence remains.

The appeal in this case is dismissed.

W. M. S., Jr.

WEEKLY NOTES OF CASES.

VOL. XXVIII.] FRIDAY, SEPT. 11, 1891. [No. 21.]

Supreme Court.

Jan. '91, 190.

April 27, 1891.

Eshelman's Estate.

Deeds—Receipts in deeds—Presumption of payment arising from—Rebuttal of—Evidence—Admissions and declarations—Competency of witnesses—Widow—Election—Feigned issue—Right of party taking under will to impeach it—Appeals—Supersedes—Auditors in the Orphans' Court—Demand of issue—Refusal by Court—Remittitur.

The presumption of actual payment arising from the receipt contained in a deed, and from releases executed by the grantor, is not a conclusive presumption, and may be rebutted by parol proof.

Before the Auditor making distribution of a decedent's estate, sisters of the decedent claimed to be creditors of the estate in an amount in excess of the amount of the estate. The indebtedness was denied by the decedent's widow. The claimants relied upon recitals of indebtedness to them contained in the decedent's will, and accompanied by directions to his executor to pay the same, and bonds executed by the decedent, the day before he made his will, to each sister in amounts corresponding to the recitals in the will. They claimed that the indebtedness was occasioned by an amicable partition of their father's real estate, made many years prior to the execution of the bonds; and, further, produced the parol evidence of a number of disinterested witnesses of admissions by decedent of indebtedness to them. The widow, in reply, relied upon a receipt for a part of the purchase-money in the deed of partition, and a release for the balance; and the parol testimony of the scrivener who drew the will, that decedent had declared he was not indebted to claimants, but wished to limit the amount his wife would receive from his estate. The claim having been allowed to the full amount of the bonds, on appeal:

Held, (1) That the presumption of payment arising from the receipt and release could be rebutted.

(2) That the evidence produced by claimants was sufficient to rebut the presumption; and—

(3) That as there are no precise data on the record from which a close calculation as to the exact amount due upon the bonds could be made, and as it appeared that the decedent had a large amount in his hands upon the settlement of his administration account, to which his sisters were equally entitled with himself, and as the sisters who could have told what they had received were objected to by the appellant, and as the mere accumulations of interest would constitute a large sum, no inference could be made that the whole amount of the bonds was not owing.

In the above case the claimants were permitted to testify as to the facts of the partition and the indebtedness of decedent to them:

Held, that the competency of these witnesses so to testify is at least doubtful; but as there was other testimony by disinterested witnesses sufficient to support the findings of the Auditor, the question was not decided.

Per STEWART, P. J. A widow who is a legatee under her husband's will, which will contains recitals of certain indebtedness by the testator to his sisters, cannot demand an issue to determine the existence of said indebtedness without having first made her election to take against her husband's will, and the request for an issue will not be accepted as equivalent to an election to take against the will.

In the present case an appeal from the decision of a register admitting a will to probate, taken more than three years after the will had been proved, and also a subsequent appeal from the decision of the Court refusing a feigned issue, as set forth in the preceding paragraph, were held not a supersedeas by the Auditor appointed prior to the taking of either appeal, to make distribution of the balance in the hands of the executor. The estate having been rendered insolvent by the distribution made by the Auditor, and that distribution having been confirmed by the Supreme Court, this question was not decided.

Appeal of Annie E. Eshelman, now Annie E. Keiver, from the decree of the Orphans' Court of Cumberland County confirming the report of an Auditor making distribution of the estate of John Eshelman, deceased.

The facts were as follows: John Eshelman died, without issue, October 6, 1885, leaving a widow, Annie E. Eshelman, and six sisters, viz., Susan R. Eshelman, Fanny Lantz, Ann R. Eshelman, Mary Eichelberger, Elizabeth R. May, and Catharine Wolf. By his will, dated June 20, 1885, and duly proved after his decease, he directed, *inter alia*, as follows:—

Item. I give and bequeath to my wife, Annie E. Eshelman, the sum of two thousand five hundred dollars, to be paid to her by my executor hereinafter named within two years after my death.

I owe my sister, Ann R. Eshelman, the sum of four thousand six hundred dollars.

I owe my sister Mary Eichelberger two thousand dollars. I owe my sister Fanny Lantz two thousand dollars. I owe my sister Elizabeth May two thousand dollars. I owe Catharine Wolf two thousand dollars. I owe Susan R. Eshelman two thousand dollars. My executor hereinafter named is directed to pay the several sums mentioned to my sisters within two years after my death.

The decedent's executor having filed his account, the same was referred to A. B. Sharpe, Esq., to make distribution of the balance in his hands. Before the Auditor, it appeared that on June 19, 1885, the decedent had executed bonds to each of his sisters, each for \$2000, and these bonds were relied upon as further evidence of indebtedness by the decedent to them, as set forth in his will. The existence of this indebtedness was denied by the widow, who claimed that the indebtedness never existed, and was alleged with intent to defraud her. The sisters claimed the indebtedness existed, and arose out of a certain

transaction between the decedent and his sisters, by which the farm which descended to them from their father had been conveyed in fee to the decedent. Upon this controversy the Auditor reported as follows:—

“In relation to the positions assumed by the counsel for Mrs. Eshelman:—

“1st. ‘That he had filed an appeal to the Supreme Court from the decision of the Court declining to recognize her request for an issue upon the proceedings before the Auditor, filed by her on the 2d of February, 1889; and that the meetings held since the decision of the Court were with a view to a compromise and settlement of the case without further proceedings, until it was found at the last meeting, on Monday, the 26th inst., that the parties could not come to terms.’

“2d. ‘That there was no remittitur of the record by the Court to the Auditor in their opinion dated the 18th of April, and filed the 1st of May, 1889, and that all the proceedings before the Auditor since that date were *coram non judice*, and that the proceedings before the Auditor up to the 2d of February, 1889, filed in Court on the 21st of March, 1889, are in a legal sense there yet, and beyond the control of the Auditor, until returned to him by a proper application to the Court.’

“Both these positions the Auditor thinks not well taken. In the opinion of Judge STEWART, filed the 1st day of May, 1889, he says: ‘The application for the issue is made on behalf of the widow, who alleges that the several bonds specifically set out in her motion and which were executed by the testator, were not delivered to the obligees in the testator’s lifetime; that they were without any consideration to support them, and that they were executed by the testator with directions for their delivery after his death for the purpose of injuriously affecting the interests of the widow in his estate. The testator by his will gives to his widow the sum of \$2500, and by his will he recognizes the bonds referred to as his proper debt, and directs their payment. We have not been furnished with a copy of the will, but these facts appear from the evidence submitted, as well also the further fact, which we regard as entirely controlling, viz: that the widow has not as yet made her election in regard to testator’s will.’

“‘It may be that the testator had no other purpose in executing these bonds and in directing their payment in his will than to reduce the share of his estate which otherwise the widow would be entitled to receive. But, however this was, the same will which directs the payment of these bonds gives to the widow a legacy of \$2500. If she accepts the provision made for her, she cannot be heard to assert a claim repugnant to the terms of the will from which she de-

sires a benefit—and until she makes her election how are we to know what her purpose in this regard is? She cannot accept the legacy of \$2500 and then contest the validity of the will with regard to the bonds. It is only by putting herself in opposition to the entire will so far as her own interests are concerned that she can have any standing to contest any part of it. If she takes under the will, she takes whatever benefit it confers, along with all the disadvantages which may result. If, on the other hand, she takes against the will, in such case she is not excluded by any of its terms. But until she does, she is not in position to ask for an issue respecting the validity of any of the provisions of the will.’

“‘It might be that under ordinary circumstances the Court would be warranted in accepting the request for an issue as an election to take against the will; but the evidence submitted shows an agreement between the parties that the exercise of her privilege of election is to be continued or postponed until a final settlement, and that her acts meanwhile are not to prejudice her rights in this regard. This agreement leaves the matter open and undetermined. Under existing circumstances the issue ought not to be awarded. But the rule must be discharged without prejudice to the right of the petitioner to renew the application upon her filing her election to take under the intestate laws of the Commonwealth.’

“Subsequent to the filing of this opinion the matter was called to the attention of the Auditor, and he fixed the 18th of May, 1889, to meet the parties at his office, and of this the counsel for the executor and creditors, and for Mrs. Eshelman, all accepted notice and attended on that day and at the subsequent meetings on the 18th, 23d, and 31st of May, and on the 22d, 26th, and 29th of August, 28th of November, and 16th of December, 1889, as also on the 24th of January, 1890, when the audit closed.

“Now the first question that arises is whether the Auditor should regard his duties at an end until the appeal taken on the 2d of February, 1889, by Mrs. Eshelman from the decree of the register, is determined by the Supreme Court.

“In the absence of any authorities cited by the counsel in this case on this point, the Auditor has failed to find any, assuring him that this appeal is a supersedeas. So far as his duties are concerned, his commission is as follows:—

“In re estate of John Eshelman, deceased; and now, September 20, 1887, it being represented by counsel for the executor that questions will arise in the distribution of the balance in his hands requiring the appointment of an Auditor, A. B. Sharpe, Esq., is hereby appointed Auditor to award distribution of the balance in the hands of David G. Beidleman, executor of John Eshelman, deceased, as shown by his account confirmed August 16, 1887.’

"After proceeding to take the evidence which appears anterior to the 2d of February, 1889, in the record of these proceedings, the counsel for Mrs. Eshelman asked for the issue set forth on pages 58, 59, and 60 of evidence, whereupon the proceedings were returned to the Court, and, after argument by counsel, the opinion of the Court (here before referred to) was delivered; from which it is perfectly manifest that the Court thought that the issue should not be granted.

"Mrs. Eshelman had not then, nor has she since, determined whether she will take under the will or against it, and until she does, can she indefinitely postpone the distribution of this estate? Her appeal is not only from the refusal to grant the issue asked for in the proceeding before the Auditor, but also from the decree of the register in admitting to probate the will of her husband, John Eshelman, deceased. That appeal states that his will was submitted to probate on the 12th day of October, 1885, which is conceded to be correct, but her appeal is not taken and filed until the 2d of February, 1889, three years and over three months after probate. The Act of the 15th of March, 1832, sec. 31 (Purd. 1476, pl. 18), called to the attention of the Auditor by counsel for creditors, provides as follows: 'From all the judicial acts and decisions of the several registers, appeals may be taken to a register's (Orphans') Court of the respective county, to be appointed and called by the respective register, in the manner prescribed by this Act: *Provided*, That such appeals be made within three years.'

"If cognizance of this Act of Assembly is taken, it is manifest that the appeal taken from the decree of the register is too late, and would be so regarded when called to the attention of the Court, as would also the appeal taken from the decree of the Court refusing her the issue demanded of the Auditor on the 2d of February, 1889.

"Now with regard to the latter, was it a definite decree from which the widow of testator had a right to appeal, and then stop the proceedings before the Auditor, or was the granting or refusal of it a matter in the discretion of the Court below, and that Court having refused it, does the matter end there?

"The counsel for Mrs. Eshelman has called the attention of the Auditor to the 59th sec. of the Act of 29th of March, 1832 (Purd. 1286, pl. 62), and the 55th sec. of same Act (p. 1285); and the 2d sec. of the Act of 20th of April, 1846 (Purd. 1285, pl. 58).

"A reference to the last Act cited shows that the right to an appeal or writ of error is expressly given in the distribution of money accruing from sales under execution or Orphans' Court sales, where the applicant for the issue makes affidavit

that there are material facts in dispute. And so under the 59th sec. of the Act of 29th of March, 1832 (Purd. 1286, pl. 62), any person aggrieved by a definitive decree of the Orphans' Court may appeal from the same to the Supreme Court; but under the 55th sec. of same Act (Purd. 1285, pl. 57), the provision is as follows: 'The Orphans' Court shall have power to send an issue to the Common Pleas, for the trial of facts by a jury, whenever they deem it expedient so to do;' but there is no appeal or writ of error to the Supreme Court provided for; and without this provision no such power can be presumed. Besides, it has been expressly decided that the granting or refusal of an issue is entirely within the discretion of the Court. See Baker's Appeal (9 Sm. 317, 318); and Thompson's Appeal (7 Out. 603), where it is held that 'The Act of March 29, 1832 (P. L. 190), confers on the Orphans' Court the power to direct an issue to the Common Pleas, but the exercise of this power is left to the discretion of the Court.'

"An appeal from the action of the Orphans' Court on the refusal of the motion for an issue cannot be maintained.

"Assuming that the appeals taken, as they stand, do not interfere with the distribution ordered by the Court, it must be noticed that the Court in their refusal of the issue also said, 'the rule must be discharged without prejudice to the right of the petitioner to renew the application upon her filing her election to take under the intestate laws of the Commonwealth;' and in the agreement between Mrs. Eshelman and her counsel of the one part, and the executor of decedent and his counsel of the 2d of October, 1887, it is stipulated 'that the right of the widow to elect to take under the will or the intestate law shall be postponed until such time as the exact amount of the estate could be determined.' To hold that this intimation of the Court and agreement of counsel would prevent his proceeding further, would leave the whole purpose of his appointment unfulfilled. He might proceed to suggest two modes of distribution, one including the contested bonds of the sisters of deceased, which would (as will hereafter appear) make his estate insolvent, paying a *pro ratio* of .6528 cents, and the other excluding them, leaving but \$6094.52 of debts, and taking it from the estate for distribution. \$12,556.87, would leave \$6462.35 in the hands of accountant, from which the widow might elect either to take under or against the will; but this would accomplish nothing.

"He feels it to be his duty to pass upon all the questions raised in the record and make distribution, and if he is in error, it can easily be corrected; whilst to do less, would leave the work of two years and four months of no present avail to either party.

"(1) If the Auditor were to assume that because the will of testator is proven, and there is no pretence of mental imbecility, nor of undue influence, and the widow has not yet elected to take against it, that, therefore, all the claims presented were valid, because those objected to by the widow were recognized by the will, there would be no trouble; but (2) as she has reserved the right to take under it or the intestate laws, may she not under the facts proved by the executor and H. N. Bowman ask the Auditor to find that the will was a fraud upon her marital rights, made for the purpose of compelling her to accept what he chose to give her under its terms; and if the bonds to his sisters executed contemporaneous with the will were made to carry out this purpose, that they shall be rejected, and the estate distributed regardless of them.

"There has been no lack of diligence to find a case like this one in its leading facts; but the leading feature of this case as thus suggested does not appear in any case that I can find in this State or elsewhere; but I see no reason why she should not, in case she declines to take under the will, show that what the testator calls debts are not debts, but trumped-up claims put into the shape of judgment-bonds to deprive her of her rights.

"It will be assumed, therefore, that she can do this and make her contest here, and now let us see what the facts are.

"The counsel for the executor and claimants, after offering the will of testator dated June 20, 1885, and proven October 12, 1885, offered the following bonds executed by testator on the 19th June, 1885, and witnessed by David G. Beidleman (the executor) and H. N. Bowman: They are as follows:—

"No. 1. Bond of testator to Susan R. Eshelman dated June 19, 1885, payable April 1, 1888, with interest at two per cent., for the sum of two thousand (\$2000.00) dollars.

"No. 2. Bond of same to Fanny Lantz for same amount and payable as the above.

"No. 3. Bond to Ann R. Eshelman, exactly like the preceding.

"No. 4. Bond of same to Mary Eichelberger, exactly like the preceding.

"No. 5. Bond of same to Elizabeth May, exactly like the preceding.

"No. 6. Bond of same to Catharine Wolf, like the preceding, except that no interest is payable before April 1, 1888.

"The counsel for Mrs. Eshelman presents in answer to these, or rather, in avoidance of them relies upon the evidence of H. N. Bowman, the scrivener, and that there may be no mistake about its purport, it is fully expressed here."

[The Auditor then refers at length to the parol and documentary evidence in the case, set

forth in the opinion of the Supreme Court, *infra*, and then concludes:—]

"The above is all the evidence of any moment on the record that relates to the question presented, viz: whether the bonds claimed by the sisters should enter into the distribution, in this singular, mixed case, in which there is this one fact, certainly, to wit, that the testator paltered with truth, and must have spoken falsely either to Beidleman and Bowman, or to the other witnesses in the case, and penned a falsehood when he wrote the will and the bonds. The veracity of all the witnesses called is above impeachment. They all, no doubt, tell what the testator told them. Now, to whom did he tell the truth? On the subject 'of the grounds of belief' (Greenleaf, vol. 1, sec. 7), it is said in a note taken from Dr. Reid's Inquiry into the Human Mind, 'The wise and beneficent Author of Nature . . . has implanted in our natures two principles that tally with each other. The first of these is a propensity to speak the truth and to use the signs of language so as to convey our real sentiments. This principle has a powerful operation, even in the greatest liars; for where they lie once they speak the truth a hundred times. Truth is always uppermost, and is the natural issue of the mind. It requires no art or training, no inducement or temptation, but only that we yield to a natural impulse.' If this principle can be invoked, is it not more probable that testator told the truth in his conversations with ten persons running over a series of years, than that he did, in the single instance mentioned by Messrs. Beidleman and Bowman, at which time by his will and by the bonds he contradicted his story to them, and confirmed the utterances of years?

"The objections to the competency of the sisters of testator and John Lantz as witnesses 'under the Act of Assembly—Act of 1887'—taken by the counsel for Mrs. Eshelman (see page 16 of notes) is overruled. This point was raised in a similar case, *In re estate of Henry Kenega*, deceased, and after argument before the Auditor, and in Court upon exceptions, was overruled. We know no case in which it has been ruled otherwise in the Supreme Court, and therefore abide by it. Unless the four sisters and the brother-in-law called are all telling gross falsehoods, the testator owed each of his sisters \$1000 from the day he agreed to purchase their interest in their father's farm, over and above what he paid them, which payment was not made until after the death of their mother, some years subsequent, and 'the other \$1000, that was to stand in the farm stays there yet,' in the language of Susan Eshelman; and he repeated his promise to pay it up to within two months of his death, and said they should have each their \$1000 with interest at that late day. To another, Annie R.

Eshelman, he repeated the same acknowledgment of indebtedness, and that witness in her cross-examination on page 24 of report says: 'It was a couple of months before he died that he told me he put the bonds in the hands of Bowman or Beidleman. He told Kate and me both, and he told me alone that now we were all right, that he had made them bonds. It was about two months before he died that he told Kate and me together.' The evidence of this witness showed that the testator talked with her and her sister Kate after the execution of the will and bonds, and the same is said by another of them, thus showing that he had communicated to them the fact that he had recognized his indebtedness to them. Besides this five other witnesses, strangers to the blood of the Eshelmans, all testify to John's acknowledgment of his indebtedness to his sisters, commencing with his declarations the year that his father died, and continuing on up to 1883 or later. The preponderance is so great in acknowledgment of the debt claimed by the sisters over that against its existence, after taking into consideration not only the testimony of Messrs. Beidleman and Bowman, but also the clauses in the deed, the release offered and the suggestions in the account of John Eshelman, administrator of his father, Jacob, that the Auditor has concluded to distribute the fund on hand admitting the bonds into the distribution."

To this report, Annie E. Eshelman, the widow, filed, *inter alia*, the following exceptions: That the Auditor erred:—

(1) In finding that the bonds were legitimate debts.

(2) In holding that the appeal was not a supersedeas.

(3) In holding that he had authority to proceed notwithstanding the appeal.

(4) In holding that attendance on the meetings after the decision of the Court upon the contest over the will, was an acquiescence in any manner in such decision.

(5) In overruling an objection to the competency of the claimants as witnesses.

(6) In not finding that the bonds were executed in fraud of the widow's rights.

(7) In not ruling that the parol evidence was insufficient to rebut the receipt and covenant of release contained in the deed.

(8) In not allowing the widow to take the \$2500 devised to her with interest, or her share under the intestate laws.

These exceptions were dismissed by the Auditor, and being renewed in Court were again dismissed, STEWART, P. J., of the Thirty-ninth district, specially presiding. Whereupon the said widow took this appeal, assigning as error the dismissal of the exceptions as above set forth.

John Hays (R. M. Henderson with him), for appellant.

Martin C. Herman (W. J. Shearer with him), for appellees.

May 27, 1891. GREEN, J. If the bonds given by the decedent to his sisters were founded upon an actual, *bona fide* indebtedness previously due by him to them, the estate of the decedent was insufficient for the payment of his debts, and all other questions raised upon the record become unimportant.

The Auditor has found in an elaborate and exhaustive opinion that the bonds are all legitimate debts of the testator and entitled to come in on the fund for distribution. In this finding the learned Court below has concurred and confirmed the Auditor's report. It is true that the Auditor admitted the evidence of the holders of the bonds, and was of the opinion that it was competent testimony. We have much doubt as to the correctness of that ruling, but as in our opinion the other and perfectly legitimate testimony fully supports and sustains the finding of the Auditor without the testimony of the obligees, it is not necessary for us to decide upon its admissibility, and our decision will be based upon a consideration of the other evidence only.

The transaction in which the indebtedness of the decedent to his sisters arose was the conveyance of the farm owned by the father of the decedent and his sisters, and which descended to them all equally at their father's death. In 1861 the mother and sisters of the decedent, by a deed dated March 20, 1861, formally conveyed to him the fee-simple title of all of them to this farm containing 113 acres or thereabouts. This deed was given in evidence by the appellant, and it recited an agreement between the widow and heirs of Jacob Eshelman, deceased, that John Eshelman, one of them, should take the farm at \$12,000, deducting therefrom two sums of \$705.61 and \$2884.79 $\frac{3}{4}$, respectively, charged on the land in favor of the widows of John Moltz and Jacob Moltz; one-third of the balance of said valuation-money was to be charged on the land for the use of the widow of Jacob Eshelman during her life, and the principal to be paid at her death. The deed further recited that in consideration of the payment of \$799 $\frac{58}{100}$ to each of his sisters, and of the further sum of \$2803.20 at the death of their mother, the land was conveyed to John Eshelman. The deed contained the usual acknowledgment of the receipt of \$799.58 paid to each of the sisters, and a release of all claims by the widow and sisters to the land. A release was also given in evidence, dated June 16, 1866, after the death of the widow, of all claims to the sum of \$400.46, being the share of each in the dower charge of the widow, who had then died. There was no proof of the actual payment of any money at the time

the deed and releases were given, and outside the testimony of the interested witness which is rejected from the present consideration there is no proof of the actual payment of any of the money due the sisters at any time. There is no question of the Statute of Limitations or the presumption of a payment arising in the cause, because the decedent, in the most solemn and absolute manner possible, not only admitted and acknowledged his indebtedness to his sisters, but he expressly declared in his will the fact of his indebtedness to each of them, stated the amount due to each, and positively directed his executor to pay the several amounts mentioned to each of them within two years after his death. And in addition to this he formally executed bonds to each of his sisters for the amounts due to them respectively, payable on April 1, 1888, with two per cent. annual interest, and directed his executor to deliver the bonds after his death.

The presumption of actual payment arising from the receipt contained in the deed and from the releases, is not a conclusive presumption, and may be rebutted by parol proof. (*Byers v. Mullen*, 9 W. 266; *Watson v. Blaine*, 12 S. & R. 131; *Hamscher v. Kline*, 57 Pa. 397; *Horton's Appeal*, 38 Id. 294; *Megargel v. Megargel*, 105 Id. 475.) In the last case a mortgagee had given to the mortgagor a receipt for \$500 "in full satisfaction of the mortgage." We said (*STERRETT, J.*), "That was, of course, evidence of payment, but it was not conclusive of the fact. It was susceptible of explanation or direct contradiction (*Foster v. Beals*, 21 N. Y. 247-9); and, in point of fact, it was clearly and satisfactorily shown by the testimony of several competent witnesses that no part of the mortgage debt had ever been paid. Admissions of the mortgagor to that effect, made at different times after the date of the receipt, down almost to the time of his death, were clearly proven. The receipt, which was the sole evidence of payment, was thus successfully rebutted, and hence the referee was fully justified in finding the fact of non-payment, as above stated."

In the present case there was an abundance of this kind of testimony from disinterested and perfectly credible witnesses. William Wolf said, "John Eshelman came to me the same year his father died. . . . He said he was going to move back on the big farm, his father's farm. I said I guess not. Then he said I have easy terms to buy it. He said the agreement between him and his sisters was that they were to leave their shares in the farm. He told me they were getting equal shares. That he was to pay them what he got. That was all at that time. . . . He told me once or twice while I lived on the little farm when we settled that he was getting in his money to pay off his sisters' interest, and

he told me once or twice afterward when he got money from me that he wanted it for that purpose. This last conversation was four or five years after I had gone off the little farm."

Jacob C. Wolf, a brother of John Eshelman's first wife, said, "Several times I had conversations with John Eshelman about owing his sisters, in 1881 and 1882, and thereabouts. He had my money, borrowed money from me, and at first I was not particular about a judgment note or anything of that kind, and after it got up a little way I told him I would like to have a judgment note. He said he would not give a judgment note to any person. He said he had money from other people, and he said he had his sisters' money and they had no notes, and he said if his word was no good, paper was no good. The last time he spoke to me about this was in 1883. . . . He said he owed his sisters and had their money without notes."

Mrs. Catharine Bixler said, "I had a conversation with John and his wife. She said when she wanted to have anything fixed up in the house he said wait until he has the sisters paid out, then he will live too like others. . . . The conversation was about ten years ago (1878)."

Jacob Stouffer said, "In March, 1883, John Eshelman and I were going to the bank at Harrisburg. I endorsed for John. Coming home he got telling me in regard to his confidence in regard with his sisters. He also told me that when he settled up his pappy's estate that his sisters gave a release without any papers, and he told me that he wanted to use a part of this money for some of the sisters; . . . he told me he would sell the large farm and pay off his sisters." As John Eshelman died in October, 1885, this conversation occurred about two years before his death.

David Eichelberger said, "When we butchered at Lantz's I talked to him about fixing up his farm. I was there, Mr. Lantz and John Eshelman. He (John) came there during the day. I asked why he did not fix up his buildings, that they would sell better. He said he owed his sisters too much money, he couldn't fix it."

It must be remembered that these declarations were not offered for the purpose of creating a debt, or for the purpose of taking the case out of the Statute of Limitations. They were offered to rebut the presumption of payment arising from the receipt in the deed and from the releases, and hence their admissibility did not depend upon their being made directly to the creditor or to his authorized agent. They could be proved by the testimony of any one who heard them.

We are of opinion that the Auditor was fully justified in finding the fact that John Eshelman was indebted to his sisters upon the original con-

veyance of the farm; that he had never discharged that indebtedness, and that there was, therefore, good and valuable consideration for the bonds in question. It was very evident that he was in the habit of borrowing money, and had use for it constantly. He owed a number of notes for quite considerable amounts at the time of his death, and the presumption of payment of his debts to his sisters is thereby much weakened. Against the manifest weight of the testimony on this subject his declarations to the scrivener that he did not owe his sisters is of but little consequence. He might not have desired to admit the fact of so much indebtedness to one who is not shown to have been upon any particular terms of intimacy with him. But whatever his motive may have been, he could not talk his sisters out of their rights, as creditors, in their absence by such a declaration to a stranger. It is impossible to go into a close calculation of the exact amount due when the bonds were given, because there are no precise data on the record from which it could be made, but as he had a large amount in his hands upon the settlement of his administration account to which his sisters were equally entitled with himself, in addition to the valuation-money of the land, and as the sisters who could have told what they had received were objected to by the appellant, and as the mere accumulations of interest would constitute a large sum, we cannot make any inference against so solemn an instrument as a bond that the whole amount was not owing. The Auditor has found that the bonds were given for full consideration, and no error in that finding has been clearly shown. In view of the conclusion we have reached the other questions raised upon the record are of no consequence and require no discussion.

The decree of the Court below is affirmed, and appeal dismissed at the cost of the appellant.

C. K. Z.

Common Pleas.

C. P. No. 1.

June 16, 1891.

Long et al. v. Girdwood, Defendant, and McCallum, Crease & Sloan, Garnishees.

Foreign attachment—Foreign and domestic creditors—Bankruptcy proceedings in a foreign country will pass the title to property in United States—Whether creditors are foreign or domestic depends on their domicile and not on citizenship—Citizens of United States residing

in Canada for business purposes are foreign creditors so far as regards an attachment in this country against a native of Scotland.

Sur rule for a new trial.

This was a foreign attachment. At the trial the following facts were given in evidence: The plaintiffs, who were citizens of the States of Missouri and New York, but resided in Hamilton, Canada, for the purposes of business, were creditors of Girdwood & Forrest, of Scotland, in the following manner: The latter, who were in the habit of exchanging wool with the plaintiffs, shipped a cargo, and attached a draft to the bill of lading, at the same time sending them a check on a Glasgow bank for wool received from the plaintiffs. The draft was paid on the representation of defendants' agents that there was wool enough in New York to protect them. The check was sent to Scotland, and dishonored, the defendants having failed, and a sequestrator of their estate having been appointed by the Sheriff's Court of Glasgow on October 27, 1884. The plaintiffs thereupon issued the present foreign attachment on December 12, 1884. ALLISON, P. J., directed the jury to find for defendants.

Henry C. Terry, for rule.

The bankrupt law of a foreign country cannot operate as a legal transfer of property in the United States.

Harrison v. Sterry, 5 Cranch, 289.

The assignee or bankrupt sequestrator of a foreign debtor has no right to withdraw the debtor's effects from this country until our citizens are satisfied.

Milne v. Moreton, 6 Binney, 353.

Warner's Appeal, 13 WEEKLY NOTES, 505.

If an assignment is not recorded as provided by the Act of May 3, 1855, a foreign attachment will bind the property.

Philson v. Barnes, 14 Wright, 230.

Harry B. Gill, contra.

As a general rule the transfer of property *in invitum* is inoperative *per se* beyond the territorial limits of the government under whose laws the transfer is made.

Milne v. Moreton, 6 Binney, 353.

Speed v. May, 17 Pa. 91.

Harrison v. Sterry, 5 Cranch, 289.

Nevertheless upon principles of international comity the Courts will recognize such transfer, and give effect thereto where no rights of creditors are concerned.

Hibernia Bank v. Lacombe, 21 Hun, 175.

Holmes v. Remsen, 20 Johnson, 229, 259.

Willits v. Waite, 25 N. Y. 584.

Story on Conflict of Laws, § 420.

Milne v. Moreton, 6 Binney, 353.

Upton v. Hubbard, 28 Conn. 274.

And even where there are creditors, and the rights of domestic creditors are not concerned, and they are not citizens of the State whose

process is invoked, the Courts will sustain the previously acquired title of a receiver, trustee, or assignee, obtaining title under the laws of another State.

Merrick's Estate, 5 W. & S. 9.
Lowry v. Hall, 2 Id. 131.
Smith's Appeal, 104 Pa. 381.
Bentley v. Whittemore, 4 C. E. Greene, 462.
Moore v. Bonnell, 2 Vroom, 90.
Sanderson v. Bradford, 10 N. H. 265.
Bagby v. Railroad Co., 86 Pa. 291.
Perkins v. Paper Co., 42 L. I. 297.
Bacon v. Horne, 23 WEEKLY NOTES, 65.

By the law of England such a creditor, even if given such priority, would be treated as a trustee for the sequestrator to the extent that he has collected his claim out of property in a foreign jurisdiction.

Hunter v. Potts, 4 T. R. 182.
Sill v. Worswick, 1 H. Bl. 665.
Phillips v. Hunter, 2 Id. 402.

Plaintiffs are not United States creditors. Citizenship does not determine their status. It is their domicile. The national character of persons for purposes of trade depends not on the country of their citizenship, but on that of their domicile.

Wildes v. Parker, 3 Sumner, 593.
It depends on residence and trade.
Livingston v. Ins. Co., 7 Cranch, 506.
The Venus, 8 Id. 253.

June 27, 1891. Rule discharged.
H. W., Jr.

C. P. No. 4. December 3, 1890.

Baker v. Baker.

Attachment—Sale of chargeable and perishable goods.

Rule to show cause why property attached in the hands of the sheriff should not be sold as chargeable and perishable.

The motion, on which the rule was granted, was supported by an affidavit of R. D. Baker, "that the debt and demand of the plaintiffs is just" (as provided in rule of Court 21, § 90); and "that a true and accurate inventory thereof is exhibited herewith; that the said property is chargeable and perishable, consisting of a large amount of household effects . . . and live stock."

George Tucker Bispham and John G. Johnson, for the plaintiffs.

As to sale of property under attachment before judgment, counsel cited—

Act of March 17, 1869, § 4, P. D. 69.
Rule of Court 21, § 90.
Tr. & Haly's Pr., § 2275.
Martin v. Malseed, 1 WEEKLY NOTES, 82.

Frank P. Prichard and John Sparhawk, Jr., for the garnishees.

December 6, 1890. THAYER, P. J. This application is well founded, being clearly within the rule and the decisions upon this subject.

Rule absolute. O. L.

U. S. Circuit Court— Eastern District.

May 18, 1891.

Harvey v. Seegar.

Practice—Service of subpoena ad respondendum—Acts of Congress of March 3, 1887, and August 13, 1888.

A service of a subpoena in a suit in equity for the infringement of letters patent will be set aside when made upon a defendant domiciled in another district while he is temporarily within the district of which the complainant is an inhabitant, and in which the bill is filed.

Motion to set aside service of subpoena.

Bill in equity by Charles T. Harvey, an inhabitant of the Eastern District of Pennsylvania, to restrain the infringement of letters patent by James H. Seegar and Chas. Seegar. The service was made upon James H. Seegar, whose domicile was set forth in the bill as being in Rochester, in the Northern District of New York, while temporarily in Philadelphia.

Josiah R. Adams, for complainant.

The case can be said to arise out of the diverse citizenship of the parties, and hence the service was correct.

Howard L. Osgood, Sydney G. Fisher, and Francis Rawle, for respondent.

The cause does not arise *only* out of the fact of diverse citizenship, and the service should be set aside.

Act of March 3, 1887, 24 Stats. at Large, 552.
Act of August 13, 1888, 25 Id. 433.
Keinstadtler v. Reeves, 33 Fed. Rep. 308.
Miller-Magee Co. v. Carpenter, 34 Id. 433.
Mfg. Co. v. Mfg. Co., Id. 819.
Connor v. Ry. Co., 36 Id. 273.
Riddle v. R. R. Co., 39 Id. 290.
Register Co. v. Register Co., 42 Id. 81.
Typographic Co. v. Typographic Co., 44 Id. 711.
McCormick Co. v. Walthers, 134 U. S. 41

BUTLER, J. The service was improper, and must be set aside. M. W. C.

WEEKLY NOTES OF CASES.

VOL. XXVIII.] FRIDAY, SEPT. 18, 1891. [No. 22.]

Supreme Court.

Jan. '91, 82.

February 26, 1891.

Clark v. Morss.

*Replevin bond with warrant to confess judgment
—Act of March 21, 1772.*

A warrant of attorney to confess judgment contained in a replevin bond does not invalidate the bond.

The Act of March 21, 1772 (Purd. Dig. 1489), is limited to the replevin of a distress for rent, and is not applicable to a case in which the title to the property replevied is the subject under investigation.

The provisions of this Act in relation to the assignment of the bond and the maintenance of an action thereon in the name of the avowant or person making consuance, affect only such bonds as are taken in replevin of a distress for rent. In all other cases the suit on a replevin bond is properly brought in the name of the sheriff, obligee, to the use of the party beneficially interested.

While a sheriff may not exact a bond with a warrant of attorney to confess judgment, yet he is not prohibited from taking such a bond if voluntarily tendered.

The warrant of attorney to confess judgment in such a bond affects the remedy only, and the judgment entered thereon is cautionary only until the replevin suit is determined.

Appeal of L. W. Morss and J. M. Fanning, defendants, from the judgment of the Common Pleas of Wayne County, in a feigned issue framed upon the opening of a judgment entered against them by virtue of a warrant of attorney contained in a replevin bond given by them to Eben H. Clark, sheriff, the said judgment being entered to the use of B. K. Bortree and Matilda Bortree, his wife, in right of the wife, F. E. Bortree and Henry Bortree.

The judgment, to determine the validity of which the issue in this case was framed, was entered on March 15, 1887, by virtue of the warrant of attorney contained in the following bond:

Know all men by these presents that we, L. W. Morss and J. M. Fanning, of Salem Township, are held and firmly bound unto Eben H. Clark, Esq., high sheriff of the county of Wayne, in the sum of twelve hundred dollars, to be paid to the said sheriff or his certain attorneys, executors, administrators, or assigns, to which payment, well and truly to be made, we do bind ourselves and each of us, for and in the whole, our and each of our heirs, executors, and administrators jointly and severally by these presents.

Sealed with our seals and dated the tenth day of September, A. D. 1883. The condition of this obligation is such that if the said bounden L. W. Morss shall be and appear before the Judges of the Court of Common Pleas, to be held in and for the county aforesaid, the first Monday of October next, then and there to prosecute his suit with effect, and without delay, against B. K. Bortree, Henry Bortree, F. E. Bortree, and Amanda Bortree, wife of B. K. Bortree, for taking and unjustly detaining his goods and chattels, to wit: six cows, two three-year-old steers, set light bobs, set heavy bobs, lumber wagon, horse rake, set double harness and trace chains, fanning mill and scoop shovel, one gray mare, hay rope, and also make return of the goods and chattels, if return thereof shall be adjudged by law, and also save and keep harmless the said sheriff touching the replevying the goods and chattels aforesaid, then the above obligation to be void and of none effect, or else to be and remain in full force and virtue. And we do hereby confess judgment for the above sum, in favor of the said Eben H. Clark, sheriff, waiving inquisition and exemption and release of all errors.

L. W. MORSS, [L. S.]
J. M. FANNING, [L. S.]

The facts of the case are set forth in the following portion of the charge to the jury by DREHER, P. J., of the 43d judicial district:—

“On the 10th day of September, 1883, Mr. Morss sued out a writ of replevin from this Court against the Bortrees who now appear in the present suit as plaintiffs. That action of replevin was brought by Mr. Morss to recover the possession of five cows, two three-year-old steers, set of light bobs, set of heavy bobs, a lumber wagon, a horse rake, a set of double harness, trace chains, fanning mill, scoop shovel, one gray mare and a hay rake. The replevin embraced other property, which, however, was not replevied. That is, it was not taken by the sheriff and delivered to Mr. Morss. But by virtue of the replevin the sheriff did deliver to Mr. Morss the property, a list of which I have just read in your hearing. Instead of five cows, however, which were mentioned in the replevin, he delivered to Mr. Morss six cows. A replevin is a writ sued out by one party claiming to have the right of possession of property in the possession of the defendant named in the writ. In such action of replevin there may be involved simply the right to the immediate possession of the property, and there may also be involved the right of ownership. While the plaintiff in an action of replevin may have the title to the property, and be the real owner of it, yet the defendant may have the right, under some arrangement between himself and the plaintiff, to the possession. Therefore it sometimes occurs that when the owner of property issues his replevin to recover the possession, he may be defeated in his suit by the defendant showing, though admitting the ownership of the plaintiff, that he, the defendant, by contract or arrangement with the plaintiff, is entitled to retain the possession.

"When a plaintiff sues out his replevin the sheriff is not bound to execute it until the plaintiff gives him security in the form of a bond signed by the plaintiff in the writ, and usually the sheriff requires of him some other person as security. Mr. Morss did execute a bond to the sheriff with Mr. Fauning as security. That bond was for the purpose of indemnifying and saving harmless the sheriff from any damages which might accrue to him for taking this property from the possession of Mrs. Bortree and her sons, and delivering it to Mr. Morss. The condition of the bond is in these words. [Reciting above condition.] That case did not come on for trial at October term 1883, but it came on for trial at May term, 1884, and on the 16th day of May, 1884, Judge McCOLLUM, before whom that case was tried, directed the jury to render a verdict in favor of the defendants in that suit, who were the Bortrees. The record of that suit has been given in evidence, and the charge of Judge McCOLLUM, in which he distinctly stated that jury that under the plaintiff's own statement he had prematurely sued out his writ of replevin, because the plaintiff then, as he now says, left the property in the possession of Mrs. Bortree. She, therefore, was in the lawful possession of it, and if Mr. Morss was the owner, having left it in her possession, before he could sue out his writ of replevin successfully, he should have demanded the possession of the property, and not having done that, Judge McCOLLUM held that the only verdict that could be rendered in that suit, and on that trial, must be in favor of the defendants, the Bortrees. But he distinctly said, which of course was the law in the case, that that verdict did not settle the question of the ownership of this property. But Mr. Morss had failed to prosecute his suit with effect, and therefore there was a technical forfeiture of this replevin bond, whether he was the owner of the property, or whether he was not.

"The sheriff, or the counsel for the Bortrees, had a judgment entered on this bond for the penalty named in the bond. That judgment was subsequently opened by this Court, so as to allow Mr. Morss an opportunity to be heard, and it is now a question for you to determine under the evidence in the present case whether Mr. Morss was the owner of that property in September, 1883, when he sued out his replevin.

"In 1880 Mr. Morss held one judgment in his own name against B. K. Bortree, and was interested in a second judgment against him, in this Court, and in June of that year he caused an execution to be issued on those judgments, as he had a right to do, and levied upon certain personal property of B. K. Bortree, the husband of Matilda Bortree, and who is named as one of the plaintiffs in the present case, though his name as it stands upon the record is simply a matter of

form, because the suit is brought in the right of his wife, Matilda Bortree. Upon these executions, as you have learned from the evidence, the sheriff levied upon considerable property on the farm where the Bortree family then resided. At that sale Mr. Morss became the purchaser of considerably more personal property than is now in dispute in this suit. There was some of the property which he bought at that sheriff's sale in the shape of grain in the ground, which has since been used up by somebody, so that he could not recover that specific or identical grain in the ground in his action of replevin brought in 1883. He became thus the rightful and legal owner of all the property which he purchased at that sheriff's sale. Mrs. Bortree alleges that after the sheriff's sale there was a contract or bargain between herself and Mr. Morss, by which he sold to her this same property. Mr. Morss says that he did not sell her the property, but that he left it there on the premises by an understanding between himself and Mrs. Bortree, she thinking that she would be able to pay Mr. Morss the money that was due him, or the advances which he had made. Now, the question for you to determine is whether that was a sale, an absolute sale made by Mr. Morss to Mrs. Bortree on that occasion. In order to make a sale of personal property there must be a coming together of the two minds of the seller and the buyer, the seller agreeing to transfer the ownership of the property to the buyer, either receiving for it money or other valuable consideration at the time of the sale, or a promise on the part of the buyer to pay for it at some future time. Those are the elements that enter into an absolute sale of personal property. There may be, and frequently is, what is called a conditional sale, where the seller delivers over to the purchaser the possession of the property with the understanding that the seller is to remain the owner of the property until it is paid for. Under such a contract the seller would have the right to take the possession of that property, if the other party does not pay for it. So there may be what in law is called a bailment of personal property, a mere loaning of the property for some consideration for its use, and that may be merely nominal. The owner of property may permit it to remain in the possession of another for a certain or an indefinite period of time, he having the right, unless he has entered into a contract that it shall remain for some definite time, to go and take possession at any time he pleases."

Plaintiffs offered in evidence the foregoing bond. This was objected to by defendants because it did not sufficiently identify the replevin suit; it was a bond with warrant of attorney to confess judgment; it had never been assigned to plaintiffs, and no scire facias had been issued upon it to ascertain

the damages. Objections overruled; bond admitted. (First assignment of error.)

Plaintiffs also made the following offer: "We offer in evidence the record in the continuance docket, No. 377, May term, 1883, L. W. Moras, plaintiff, v. B. K. Bortree, Henry Bortree, Dr. F. E. Bortree, and Amanda E. Bortree, they being the same parties who are the plaintiffs in this suit. Summons in replevin for five cows, etc., issued September 10, 1883. October 19, 1883, sheriff returned replevied six cows, etc., property delivered to plaintiff. May 15, 1884, jury called and find for the defendants May 16, 1884. July 14, 1884, *retorno habendo* issued. Returned 'eloigned.' April 24, 1889, judgment is entered against the plaintiff and in favor of the defendants."

Objected to because it does not show that any judgment was entered in the replevin suit at the time of the entry of judgment on the bond; because the record shows that the judgment was entered against the defendants in the replevin suit and in favor of the plaintiff, and because if such entry of judgment was a clerical error it does not appear what judgment should have been entered.

The plaintiffs in the present case then asked leave to have the record so amended that the judgment should conform to the verdict, which amendment was allowed. Objections overruled; record admitted. (Second assignment of error.)

The defendants submitted, *inter alia*, the following point:—

(1) The evidence fails to prove a contract between Moras and Mrs. Bortree of such character as to vest in her the title to the property purchased by him at sheriff's sale. *Answer.* That point I refuse, because the facts are for the jury. You must determine, under the evidence, whether there was a contract, and I have stated to you what constitutes a good sale of personal property. (Third assignment of error.)

Verdict for plaintiffs for \$627.72, and judgment thereon. Whereupon defendants took this appeal, assigning for error the action of the Court in admitting the above offers of evidence, and the answer to the foregoing point.

H. Wilson (*A. T. Searle* with him), for appellants.

George S. Purdy (*F. P. Kimble* with him), for appellees.

May 11, 1891. McCOLLUM, J. The appellants attack the original judgment in this case on two grounds. They contend, first, that the bond was invalid because it contained a warrant of attorney to confess judgment, and second, that it was not forfeited at the time judgment was entered upon it. In support of their claim they refer to the record of the suit in which the bond

was given, and to the 11th section of the Act of March 21, 1772 (Purd. Dig., 11th ed., p. 1489). The record to which reference is made shows a verdict in favor of the defendants, on the 16th of May, 1884; and a judgment on the verdict on the 24th of April, 1889. The judgment on the bond was entered on the 15th of March, 1887, by virtue of the warrant of attorney contained therein. The theory of the appellants is that any proceeding on the bond prior to final judgment in the action of replevin was premature; that the bond in replevin is prescribed by law, and that the warrant of attorney to confess judgment was in excess of the statutory requirement and rendered the whole instrument void. But it is clear that the Act of 1772 is limited to a replevin of a distress for rent, and is not applicable to a case in which the title to the property replevied is the subject under investigation. It is now settled that the provisions of the Act in relation to the assignment of the bond and the maintenance of an action thereon in the name of the avowant or person making consurance, affect only such bonds as are taken in replevin of a distress for rent. In all other cases the suit on a replevin bond is properly brought in the name of the sheriff, obligee, to the use of the party beneficially interested (*Morris on Replevin*, 268-9; *Tibbal v. Cahoon*, 10 Watts, 232; *Balsley v. Hoffman*, 13 Pa. 603). The bond in suit is not condemned by the Act of 1772, and there is no decision of this Court that the warrant to confess judgment invalidates it. Replevin bonds with like warrants are not uncommon in Pennsylvania. In the appendix to *Morris on Replevin*, the forms of bonds in use in Philadelphia, in 1849 and in 1869, are given, and these contain a warrant to confess judgment. It is stated by the counsel for the appellees, in their paper-book, that in their district these bonds are in common use, and we learn from reported decisions of the Courts of Common Pleas that they are taken in other parts of the State (*Diller v. Weitzler*, 10 L. Bar, 5; *Shippey v. Evans*, 3 Kulp, 438). In *Neville v. Williams* (7 Watts, 421), the plaintiff in a replevin confessed a judgment to the sheriff for his protection in executing the writ, and it was held that the sheriff was not restrained by any law from taking such security, and that process might be issued upon it for the use of the party beneficially interested. *Morris*, in his work already referred to, says, "it seems that a warrant to confess judgment would be binding, though the sheriff might not be justified in insisting on such a provision." In *Shippey v. Evans*, *supra*, Judge ELWELL, in a well-considered and satisfactory opinion, sustained a judgment entered on a replevin bond by virtue of the warrant of attorney contained in it. There is no statute or rule of public policy which prohibits a sheriff from ac-

cepting such a bond if it is voluntarily tendered to him by the plaintiff in the replevin. The warrant to confess judgment affects the remedy on the bond, but the liability of the obligors is measured by its lawful conditions. In the present case the judgment entered on the replevin bond was opened to allow the appellants to take defence on the merits. The affidavit on which their motion to open the judgment was founded contained no suggestion that the bond was invalid, or that it was obtained from them by artifice or coercion, and there was no attempt on the trial to show that it was not their voluntary obligation. This bond was not taken under the statute to secure the return of a distress for rent, but in a case relating to property in chattels, and it depends on usage for its validity (*Balsley v. Hoffman, supra*). The question is not whether the sheriff may lawfully exact such a bond, but whether it may, when voluntarily given, be enforced. No presumption of fraud or coercion arises from the presence of the warrant to confess judgment. It does not enlarge the obligation of it. The real purpose of the bond is indemnity to the sheriff, and whatever form of security is intelligently and freely agreed upon by the parties is binding upon them.

We hold, therefore, that the bond in this case and the judgment entered upon it were valid. The latter was not premature. It was authorized by the terms of the bond and warrant, and was cautionary only. But aside from this, it was entered nearly three years after the verdict in the replevin and the bond was forfeit by the failure of the principal obligor to prosecute his suit with effect (*Gibbs v. Bartlett*, 2 W. & S. 29; *Bank v. Hall*, 107 Pa. 583).

The amendment to correct a clerical error in the entry of judgment on the verdict in the action of replevin was properly allowed. The question of the ownership of the property replevied was for the jury upon the evidence, and it was submitted with instructions which carefully guarded the rights of the appellants. Their claim respecting the title to this property has been denied by two juries after full and fair hearings have been allowed them, and they have no just cause to complain of the action of the Court.

The specifications of error are dismissed and the judgment is affirmed.

H. S. P. N.

Jan. '91, 343.

March 18, 1891.

Summerson v. Hicks.

Replevin—Costs—Tender.

Where the plaintiff in an action of replevin, who endeavors to retain possession of horses without either payment or a proper tender of the balance due for the

same, between the first and second trials of the issue pays the money into Court after leave granted, and it is taken out of Court upon like leave, he is liable for costs.

While the defendant may have done wrong in not accepting the sum due her before the suit was begun, she did not thereby forfeit her right under her contract to hold title and possession until actual payment.

The penalty for refusing the price of goods sold when offered, is not the loss of the goods and the price, both or either, but the payment of the costs when the purchaser's demand is properly made.

Bringing money into Court after action begun is analogous to a plea of tender, and by the settled rule carries with it the liability for costs up to that time.

An agreement to submit the case to a Judge without a jury does not take the case out of the usual rule.

The plaintiff to maintain his tender should also have paid costs up to that point, and then would have been entitled to judgment. Failing in this the judgment must have been for defendant, with a *retorno habendo*, to be satisfied on payment of the balance of price due, and costs.

Appeal of William Hicks and Mary Hicks his wife, defendants, from the judgment of the Court of Common Pleas of Clinton County, in an action of replevin for two horses and two sets of harness brought against them by John Summerson.

The facts of the case are fully set forth in the report of a former appeal in this cause, in 134 Pa. 566, and 26 WEEKLY NOTES, 332, and in the opinion of the Supreme Court, *infra*.

The case was submitted to the Court, MAYER, P. J., without a jury, under the Act of 1874, who, after referring to the former trial, found as follows:—

"The Court instructed the jury to find a verdict for the plaintiff, which was done. Judgment was then entered upon the verdict, and the defendants took an appeal to the Supreme Court. The judgment of the Court of Common Pleas was reversed by the Supreme Court on the ground that the tender was not maintained by the plaintiff by bringing the money into Court. The Supreme Court also construed the written paper as a contract of sale and that by the terms of the written agreement time was not of its essence. In their opinion they also say that the defendants were wrong in refusing the money when tendered on the 1st of April. [This question of tender was not made in the Court below on the trial of the case, but it was reversed by the Supreme Court, which was not in accordance with the rules laid down in some of the cases. (See *Railroad v. Getz*, 113 Pa. 214; *Ritter v. Sieger*, 105 Id. 400; *Fox v. Fox*, 96 Id. 60.)]

"The question of tender was not made in the Court below, and if it had been we would no doubt have required the money to be paid into Court. Since the reversal of the judgment the plaintiff has paid into Court the amount of the

money tendered, with interest upon it to the date of payment.

["The defendants have come into Court and asked to take this money out of Court, which request was granted, and the defendants have received the money tendered with interest], from the date of the tender until it was paid into Court.

"CONCLUSIONS OF LAW.

"As the defendants 'were wrong in not accepting the tender,' and as they have now accepted it with interest, which is maintaining it, we are of the opinion that the plaintiff is entitled to recover, and judgment should be entered in his favor within thirty days by the prothonotary of the Court, unless exceptions are filed by the defendants."]

Whereupon the defendants took this appeal, assigning for error the portions of the opinion included between brackets, and that the Court erred in overruling the exceptions filed.

Seymour D. Ball, for appellants.

Jesse Merrill, for appellee.

May 18, 1891. MITCHELL, J. This case is governed by the decision already made when it was here before, 134 Pa. 566. It was then held that the contract was one of sale, and that the title and the right of possession were in the vendor from April 1, 1886, until payment in full of the purchase-money, or, of course, its equivalent, a tender duly maintained. The action was replevin, and as it stood when it was first tried in the Court below, the plaintiff was endeavoring to retain the possession without either payment or a proper tender. This Court decided that under the contract and the circumstances the right of possession was still in the vendor, and directed a venire de novo. If the case had proceeded to a new trial in the ordinary course, the plaintiff not being able to prove either payment or tender maintained so as to be effectual, must have failed in the action. As the facts were apparently undisputed he brought the money into Court upon petition and leave granted; the defendant took the money out of Court upon like leave, and the case was submitted to the Judge without a jury by agreement, under the Act of 1874. The plaintiff thus completed his title to the horses, the defendant received the stipulated price, and the whole controversy was at an end, except as to the question of costs. The learned Judge imposed these on the defendant because she had been in the wrong in not accepting the money when it was offered to her on the day appointed. But while this was an error on her part, she did not thereby forfeit her right under the contract to hold the title and possession until actual payment. The penalty for refusing the price of

goods sold when offered, is not the loss of the goods and the price, both or either, but the payment of the costs when the purchaser's demand is properly made. If plaintiff had brought the money into Court with his writ he would have been entitled to judgment. But in seeking to recover possession without payment he put himself as much in the wrong on the merits as the defendant already was, and, what is more important, he put himself in the wrong legally. From the time his writ issued until he brought the money into Court he never was in position to maintain his action, and was therefore always liable for the costs. Bringing the money into Court after action begun, was analogous to a plea of tender, and by the settled rule carried with it the liability for costs up to that time (*Harvey v. Hackley*, 6 Watts, 264). We see nothing in the agreement of submission to the Judge without a jury to take the case out of the usual rule. The plaintiff to maintain his tender should also have paid costs up to that point, and then would have been entitled to judgment. Failing in this the judgment must have been for defendant, with a *retorno habendo*, to be satisfied on payment of the balance of the price due and costs (*Morris on Replevin*, 215, 3d ed). This was the position of the present case up to the time of defendant's taking the money out of Court, and her action in so doing did not forfeit her right to the costs which were then due her.

The learned Judge in his opinion adverts to the fact that the question of tender was not made at the first trial in the Court below, and suggests that the action of this Court in reversing upon it was at variance with the rule laid down in *R. R. Co. v. Getz*, 113 Pa. 214, and other cases. It was not so intended. The question was argued here by both parties as if it were properly before us (see the reported arguments in 134 Pa. 568-9), and was made the basis of the decision upon that view with no intention of departing from the usual practice.

Judgment reversed, and judgment for defendant for costs only.

H. S. P. N.

Common Pleas.

C. P. No. 1.

June 27, 1891.

Lloyd v. Krause, Owner, and Thompson, Contractor.

Mechanics and material men—Lien—Waiver of—Contractor and sub-contractor—In order to deprive a mechanic or material man of his

right to file a lien, the waiver of a contractor must be clear, positive, and precise.

Rule for judgment for want of a sufficient affidavit of defence.

This was a scire-facias sur mechanic's lien.

The lien was filed by a sub-contractor for materials furnished in the erection of the building.

The affidavit of defence filed by the owners set forth that the building against which the lien was filed had been erected under a written contract, made between the contractor, Thompson, of the first part, and the affiants as owners, of the second part, in which it was provided, *inter alia*, "That there should be no legal or lawful claims against the said party of the first part [meaning in fact the defendants, owners] in any manner, from any source whatever for work or materials furnished on said work."

William Draper Lewis and *Charles E. Morgan, Jr.*, for the rule.

The right of a sub-contractor to file a lien under the Act of 1836 can only be taken away by an express agreement between the owner and contractor that no liens shall be filed.

Schroeder v. Galland, 134 Pa. 277.

Benedict v. Hood, Id. 289.

There is no provision in this contract that mechanics' liens shall not be filed.

The contract being perfectly clear as it is written, the meaning cannot be altered by parol evidence.

Patterson v. Forry, 2 Pa. 456.

Kennedy v. Plank Road Co., 25 Id. 224.

Druckemiller v. Young, 27 Id. 97.

Albert v. Ziegler, 29 Id. 50.

Whitman v. Lippincott, 3 WEEKLY NOTES, 94.

Forrest v. Nelson, 108 Pa. 481.

Matthew Dittman and *Charles Davis*, contra.

It is evident that the word "*first*," used in the foregoing section of the contract, is a typographical error, and the clause should read, "party of the second part."

The stipulation against liens is undoubtedly obligatory upon the principal contractor, and he could file no lien.

Long v. Caffrey, 93 Pa. 526.

Scheid v. Kapp, 121 Id. 593.

Although a contractor has power to bind a building for work and materials, he cannot confer that right upon a sub-contractor, when by the terms of the contract he does not possess the right himself.

Schroeder v. Galland, *supra*.

Brown v. Cowan, 110 Pa. 588.

Ex die. Rule absolute.

H. L. C.

C. P. No. 4.

June, 1891.

City of Philadelphia v. Laughlin.

Practice—Nuisance—City claim—Notice—Registered owner—Amendments.

Notice to remove a nuisance in order to sustain a city claim, must be given to the registered owner, and not to the reputed owner of the property.

An amendment of a municipal claim will not be permitted, when its allowance would deprive the defendant of a defence.

An amendment of a municipal claim should be fortified by affidavit.

Rule to strike off claim and judgment, quash *sci. fa.*, and set aside return.

Claims for removing a nuisance were filed against two adjoining properties in the name of — Laughlin, owner or reputed owner, or whoever may be owner, on November 17, 1881. On November 11, 1886, an affidavit was filed stating that Ellen Laughlin is the registered owner, that search had been made for her, and that she could not be found in said city (meaning Philadelphia, perhaps), and she has no known residence therein. The same day a writ of scire facias was issued, which was returned as "made known by posting and advertising, and *nihil habet* as to Laughlin, owner, and Ellen Laughlin, actual and present owner." On that return judgment was entered on January 20, 1887, for want of an affidavit of defence. No further proceedings were had until June 4, 1891, when this rule was taken.

Alexander Simpson, Jr., for the rule.

E. Spencer Miller, assistant city solicitor, contra.

C. A. V.

June 20, 1891. ARNOLD, J. (After stating the facts *ut supra*.) The case is, therefore, like *Philadelphia v. Dungan* (124 Pa. 52), and *Philadelphia v. Richards* (same book on page 303), in which it was decided that notice to remove a nuisance must be given to the registered owner, and not the reputed owner. In this case, the claim filed contains an averment of notice to Laughlin, owner or reputed owner. What Laughlin, male or female, was notified, is not averred. Nor is it averred that he or she was the registered owner, as the law requires. As the affidavit filed in 1886 shows that Ellen Laughlin was the registered owner, it is not a strained presumption—the family name being the same—that she was the registered owner in 1881.

If proper effort were made to find and notify the registered owner before the contract to do the work is given out, in these nuisance cases, the owners would, in most cases, do the work at their own expense, and thus save the municipal-

ity the necessity of doing it for nothing, as in this case.

The city solicitor has moved to amend the claim as filed, by adding the name Ellen before Laughlin, and the words registered owner after the said name, wherever it occurs. That such amendments may be made if applied for in time, was decided in *Allentown v. Hower* (93 Pa. 336), and *Philadelphia v. Richards* (*supra*), but they are never allowed if they prejudice existing rights, or deprive the party of his defences, as by the Statute of Limitations. (*First National Bank v. Shoemaker*, 117 Pa. 94.) Here there has been a delay of nearly ten years. The defendant has acquired rights, which we ought not to deprive her of by amendment which falsifies all that was alleged ten years ago. When amendments are applied for they should be fortified by the affidavit of some person knowing the truth that they are true. The Court should have something to amend by. An amendment of that kind gives no advantage to the city, unless proof is given in support of the matters proposed to be inserted (*Philadelphia v. Stevenson*, 132 Pa. 103).

Rule absolute.

H. B.

C. P. No. 4.

June, 1891.

Frazier, Trustee, v. Rector et al. of St. Luke's Church.

Charitable uses—Corporation—Trustee—Appointment by Court.

When a gift is made to a charity but the trustee designated is a corporation forbidden by law to hold the subject of the gift, the Court will appoint a capable trustee, who will use the corporation as an agent to distribute the charity in accordance with the will of the donor or testator.

Case stated.

This was an action to recover arrears of ground-rent. The facts appearing by the case stated for the opinion of the Court were as follows:—

Catharine M. Moore, by her will dated April 9, 1863, and proved and filed on February 3, 1864, devised, *inter alia*, an undivided moiety of two yearly ground-rents of \$45 unto The Domestic and Foreign Missionary Committee of the Protestant Episcopal Church in the United States of America; there was not, and is not now, any such committee; but there was and is a corporation called The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America, which was chartered by the State of New York on May 13, 1846, the object or work of which is the support of missionaries or religious teachers of the Protestant Episcopal Church in the United States of America, within the United States and

Foreign Countries. In consequence of the Act of April 26, 1855, § 5, prohibiting corporations not incorporated under the laws of this State, from acquiring and holding any real estate within this Commonwealth, directly or by any trustee, unless authorized to hold such property by the laws of this Commonwealth, an application was made to this Court for the appointment of a trustee to hold the moiety of said ground-rents, with authority to extinguish the same. This application was made by the attorney-general, and on it a decree was made, appointing the plaintiff, William W. Frazier, trustee of the undivided moiety of the said two ground-rents, in trust for the support of missionaries or religious teachers of the Protestant Episcopal Church in the United States of America, within the United States and Foreign Countries, the income to be paid to and disbursed by and under the direction of the Foreign and Domestic Missionary Society of the Protestant Episcopal Church in the United States of America; and that the said William W. Frazier, trustee, may, at any time, extinguish the said ground-rents on receipt of the principal thereof, and on such extinguishment he shall account for and pay the moneys derived therefrom to the Domestic and Foreign Missionary Society aforesaid, in trust for the uses aforesaid.

The owner of the ground out of which one of said ground-rents issues, the defendant in this action, is willing to pay the arrears of a moiety of said ground-rent, but desires the opinion of this Court, whether the said plaintiff, as trustee, is duly authorized to receive them; hence, this case stated has been agreed upon and submitted to the judgment of the Court.

Richard C. McMurtrie, for plaintiff.

Morton P. Henry, for defendant.

JUNE 27, 1891. ARNOLD, J. It would be a mere exhibition of industry, an affectation of learning, and a useless repetition of decisions, to go over the subject of charitable uses, their vicissitudes and their final triumph. When St. Paul said that charity never failed, he spoke of the creation of charity, the desire to do good; while judges and law-makers have been astute to preserve it from failing, by searching for the object of the charity and securing its proper administration. Charitable uses—the most comprehensive term known—have been at times, and for sinister purposes, divided into pious and superstitious uses. This contrast of good and bad uses was an invention to enable the king to confiscate the estates of schismatics and dissenters, as they were contemptuously called, and brought the *cy pres* doctrine into contempt. Fortunately that day has gone by, a better and more humane spirit prevails, and

broad, comprehensive charity has become the especial object of the care of the Courts. The rule now is to search out the charity and then secure and enforce it. Failure is impossible. It makes no difference whether the founder of the charity named a trustee or not, nor whether the trustee is dead, refuses to act, or is incapable, or under the ban of the law; for the Court will appoint a trustee who can and will act. Mr. Binney's definition of charity as "whatever is given for the love of God, or for the love of your neighbor, in the catholic and universal sense—given from these motives and to these ends—free from the stain or taint of every consideration that is personal, private, or selfish," is the most comprehensive modern definition that has been given to it. The words "free from every consideration that is personal, private, and selfish," are as essential to the definition of charity as the love of God and your neighbor; for if there be any personal and selfish motives or ends to be served in the enjoyment of the gift, then it is not a charity. Other tests of charity are certainty of purpose in benefiting other men and even brute creation, or inanimate property, thereby preventing distress of its owner; and uncertainty as to the persons to be benefited; for if the gift be to certain persons for immediate distribution between them, it is not a charity, but a present bequest.

[His Honor here stated the facts, *ut supra*.]

If a decision that the work of the Domestic and Foreign Missionary Society aforesaid is a charity is wanted, it may be found in the reports of the Supreme Court of this State, in a case in which a legacy had been given by Elliott Cresson to the missions and schools of the Episcopal Church about to be established at or near Port Cresson, Africa, and that legacy was awarded to the said society. (The Domestic and Foreign Missionary Society's Appeal, 30 Pa. 425.) The bequest in that case was held to be a charity, and the Court vested it in the society as a party capable of taking it, and in whose care it was given, but it was made prior to the Act of 1855. That a corporation may be a trustee was in early times doubted, because it was said it had no conscience to be affected or body to be taken and imprisoned. Mr. Cruise says, however, that the modern doctrine is, that a corporation may hold in trust for itself or a third person. (1 Cruise, Title 12, Chap. 1, sec. 90.) A corporation is now considered a body of trustees when seised of property to charitable uses. Chief Justice GIBSON, in deciding that a church could be a trustee, said the simplicity of the lives of our forefathers enabled them to do without many institutions that now are absolutely indispensable. Incorporations were unknown, yet bequests were made to pious and charitable as-

sociations. (Witman v. Lex, 17 S. & R. 88.) If the corporation is capable of taking, but not of executing the trust, it will be deemed a trustee to convey to some person who can execute it; or if it is incapable of taking, but capable of executing the trust, a trustee will be appointed who can take the legal title, and the corporation will be used as the agent to distribute the bounty among those entitled to it. The Statutes of Mortmain do not make void a gift or grant in mortmain; they merely expose the property to the danger of an escheat. A corporation may take without license or authority, but it cannot hold indefeasibly. (Leazure v. Hillegas, 7 S. & R. 313.) Such statutes do not extend to charitable uses, and lands may still be given for the maintenance of a school, hospital, or other purpose of that nature. (4 Cruise, Title 32, Chap. 2, sec. 43.) A gift to a minister for his personal benefit is not a charity, but if it is given to him as a minister, as one holding that office, and is not totally separated from the general object with which he is officially connected, it is a charity. (Grieves v. Case, 1 Vesey, Jr., 548; Attorney-General v. Cock, 2 Vesey, Sr., 273; McGirr v. Aaron, 1 Penrose & Watts, 49.) Chief Justice GIBSON said, that a devise can and will be prevented from failing for want of a trustee, by holding that, notwithstanding the literal meaning of the words, the actual intent was for the maintenance of the trustees as one of a class, in that case a priest, but in ease of the congregation. In the case of the Attorney-General v. Tancred (1 Eden, 10), it was said, that when the uses are charitable, and the person (who creates them) has full power to convey, the Court will aid a defective conveyance. Thus, though devises to corporations were void under the Statute of Henry VIII. (of Wills), yet they are always considered good in equity, if given to charitable uses. This applies aptly to the case in hand.

Here we have a good charitable use, but a trustee which is forbidden to take. This Court has sustained the charitable use, raised up a trustee to support it, and thus the will of the testatrix has been carried out. This is done, not in violation of the law, but in obedience to it. The trustee will collect the income, and use the organization of the Missionary Society to distribute it to the persons whom the testatrix intended to benefit. When the rent is redeemed, the money will be applied by the trustee to the same uses and by the same agency. It will no longer be real estate, but movable personal property.

Judgment will be entered for the plaintiff in the case stated.

H. B.

WEEKLY NOTES OF CASES.

VOL. XXVIII.] FRIDAY, SEPT. 25, 1891. [No. 23.]

Supreme Court.

Jan. '91, 300.

April 8, 1891.

Brown & Hendrickson v. Decker.

Contract—Construction of—Jurisdiction.

A. contracted to erect for B. a certain building, the contract containing the following provision: "And it is mutually agreed and distinctly understood that the decision of the engineers and architects shall be final and conclusive in any dispute which may arise between the parties to this agreement, relative to or touching the same, and each and every of said parties do hereby waive any right of action, suit, or suits, or other remedy in law or otherwise, by virtue of said covenants, so that the decision of the said engineers and architects shall in the nature of an award be final and conclusive on the rights and claims of said parties."

In the specification annexed there was also the following: "Also, that any disagreement or difference between the owners and contractor, upon any matter or thing arising from these specifications or the drawings to which they refer, or the kind or quality of the work required thereby, shall be decided by the engineers and architects, whose decision and interpretation of the same shall be considered final, conclusive and binding upon both parties."

A. subsequently entered into a contract with C. whereby the latter undertook to do certain of the plastering and other work, and the plans and specifications, terms and conditions of the contract between A. and B. were expressly made parts of the latter contract as if written therein, and C. was to do everything in and about and concerning "the work," as is provided in the contract between A. and B.; C. further was to supply all materials and do all the work according to the terms of the original contract:—

Held, 1. That the contract between A. and C. was subject to all the provisions of the principal contract.

2. In case of dispute between C. and A., C. had no right of action at law, but must resort to the tribunal appointed in the original agreement.

3. Even although the dispute included an alleged fault of A. the trial of that question was not taken away from the selected tribunal. To hold otherwise would make the question of jurisdiction depend not upon the agreement of the parties but upon the finding of a jury upon one of the disputed facts.

4. The fact that in the contract between A. and C., A. reserved the right to sue C. for the recovery of any money for damages he might suffer from C.'s defective performance which he might not recover out of the money payable under the contract, did not avoid the terms of the original contract or give C. the right to sue.

Appeal of John A. Decker, defendant, from the judgment of the Common Pleas No. 3 of Philadelphia County, in an action of assumpsit

brought by L. W. Brown and W. L. Hendrickson, trading as Brown & Hendrickson, to recover a balance alleged to be due under a written contract for certain plastering and other work.

The facts as they appeared at the trial are sufficiently set out in the opinion of the Supreme Court, *infra*.

The defendant requested the Court to charge the jury, *inter alia*, as follows:—

(1) It is admitted in this case that there is a dispute between the plaintiffs and defendant, as to the character of plaintiffs' work. If you find that this dispute was substantial, then under the terms of agreement the decision of the architects is conclusive of this dispute, and if you find the architects have decided that plaintiffs' work was not well done, then plaintiffs cannot recover here. *Answer*. I have already told you that would be so if defects did not arise from the defendant's negligence. (Second assignment of error.)

(2) If you find that the plaintiffs did not do the work to the satisfaction of the architects, but refused or neglected to do this plastering work in accordance with the instructions of the architects as they had agreed, then your verdict should be for the defendant. *Answer*. I instruct you that if the plaintiffs refused to do the work in accordance with the specifications, that would be so. (Third assignment of error.)

(4) Under all the evidence your verdict should be for the defendant. *Answer*. I decline that. (Fourth assignment of error.)

The Court charged the jury, *inter alia*, as follows: [While it is true, according to the contract, disputes about the work must be referred to the architects, and plaintiffs would be obliged to refer disputes to them, this only applies to the interpretation of the contracts, and not to defective work which might flow from defendant's acts.] It does not exempt defendant if the spots came from his negligence, or if it came from causes over which plaintiffs had no control. You will inquire whether the defects were from bad workmanship.

Verdict for plaintiffs for \$262.77, and judgment thereon. Defendant appealed, assigning for error the answers to the points and the portions of the charge above quoted in brackets.

William Henry Peace, for appellant.

S. Morris Waln, for appellees.

May 27, 1891. GREEN, J. The defendant being a contractor for the erection of a large building at Hoboken, New Jersey, made a subcontract with the plaintiffs to do the plastering work of the building. The contract between the parties, which was in writing and under seal, contained the following recital and condition, to-wit: "Whereas the said party of the first part (defendant) has entered into articles of agree-

ment with the trustees of the Stevens Institute of Technology, at Hoboken, N. J., bearing date June 7, 1887, for the construction and completion of certain high school buildings at Hoboken according to certain plans and specifications, their terms and conditions therein referred to, which said plans and specifications, their terms and conditions, are to be considered as if hereto attached, all information concerning the same being known to the said parties of the second part."

After reciting that the parties had agreed upon a sub-contract for part of the work, the agreement proceeds, "and whereas, it has been agreed that, as to so much thereof as has been thus sub-contracted for, the said parties of the second part (plaintiffs), for the consideration hereinafter named, are, as between themselves and the said party of the first part, to stand in the place of the latter, and to do everything, in, about, and concerning the same, as is provided in said party of the first part's contract with the said trustees of the Stevens Institute of Technology, subject to all its terms and restrictions, so that the said party of the first shall be indemnified and saved harmless from all loss, costs and charges in and about said portion of work and materials. Now this agreement witnesseth," etc. The third clause of the agreement provides that the plaintiffs shall supply all materials and do all the work according to the requirements of the original contract between the defendant and the Institute so that the defendant shall be enabled to complete the buildings in the time stipulated by the contract; the materials and workmanship shall be of the best quality, "and shall be furnished and performed to the fullest extent that the said party of the first part under his contract with the said trustees of the Stevens Institute of Technology can be obliged to furnish and perform the same." Other provisions of a similar character are contained in the agreement fully subordinating it to the operation and effect of the principal contract between the defendant and the trustees of the Institute.

It cannot be doubted, therefore, that the contract between the present parties was completely subject to all the provisions of the principal contract, so far as the plastering was concerned, with the same effect as if they had been literally incorporated into the present contract. The language is, "Their terms and conditions are to be considered as if hereto attached," and the plaintiffs "to stand in the place of the latter" (defendant), and be "subject to all its terms and restrictions."

One of the provisions of the principal contract is in these words: "And it is mutually agreed and distinctly understood that the decision of the engineers and architects shall be final and conclusive in any dispute which may arise between the parties to this agreement, relative to or touch-

ing the same, and each and every of said parties do hereby waive any right of action, suit or suits, or other remedy in law or otherwise, by virtue of said covenants, so that the decision of the said engineers and architects shall, in the nature of an award, be final and conclusive on the rights and claims of said parties." In that part of the annexed specifications which relates to the form of bid the following clause is contained: "Also that any disagreement or difference between the owners and contractor, upon any matter or thing arising from these specifications or the drawings to which they refer, or the kind or quality of the work required thereby, shall be decided by the engineers and architects, whose decision and interpretation of the same shall be considered final, conclusive and binding upon both parties."

We are clearly of opinion that both of the foregoing provisions of the principal contract are to be considered as of the same legal effect as if they were bodily incorporated into the contract between the present parties, and it only remains to consider what effect they have in determining the present contention.

In the case of *Reynolds v. Caldwell* (51 Pa. 298), in which the subject of contention arose out of a contract between a principal contractor for work on a railroad and a sub-contractor under him, the final clause of the contract was in the exact words of the final clause of the principal contract in the present case. A dispute having arisen between the sub-contractor and the principal contractor, the former brought an action of covenant on the contract between them, and sought to recover damages for its breach. A recovery having been obtained, the cause was removed to this Court, where the judgment was reversed in an exhaustive opinion by Mr. Justice STRONG, who held that no action at law could be maintained upon the contract, but that the parties must resort to the tribunal appointed by the agreement. He further held that even if the final estimate was erroneous and the contractor's covenants were broken, and although recourse to the tribunal selected was not reasonably possible, and although the engineer refused to act, and although there were such gross and palpable mistakes in the estimates as amounted to fraud in the engineer, the agreement of submission was binding, and the remedy was only by action against the engineer, and not by an action on the contract. In the course of the opinion STRONG, J., said: "Provisions similar to this are often introduced into such contracts, and they have been more than once under consideration in this Court. Even when much less stringent than the present they have been held effective to preclude any resort to an action at law."

In *O'Reilly v. Kerns* (52 Pa. 214), THOMPSON, J., said: "It is not necessary to cite

authorities for what is so well settled as that where a railroad or canal company and its contractors, or in a contract between original and sub-contractors, it is agreed that to prevent disputes the engineer of the work shall in all cases determine the amount or quality of the several kinds of work which are to be paid for under the contract, and decide every question which may arise relative to the execution of the contract on the part of the contractor, that his decision has been uniformly held to be final and conclusive."

The same doctrine was applied and enforced in *Hartup v. The City of Pittsburgh* (97 Pa. 107), in which we held that the right of action was waived under the stipulation to that effect in the agreement.

In the present case all right of action was waived in the precise terms contained in the agreement under consideration in the case of *Reynolds v. Caldwell*, *supra*, and we know of no reason why we should not follow that ruling. The learned Judge of the Court below, while recognizing the doctrine, declined to apply it for the reason that the stipulation only applied to the interpretation of the contracts, and not to defective work which might flow from defendant's acts. We are unable to agree to that view. There is no such restriction contained in the contract.

There was a clear and well-defined dispute between the defendant and the plaintiffs as to the character and quality of the plastering and blackboard work done by the plaintiffs, the defendant alleging that it was defectively done. There seems to be no doubt that there were serious defects in the work, which the defendant was obliged to correct at his own expense. But the plaintiffs claimed that the defendant had failed to furnish steam heat to dry the rooms, and that this caused the defects in question. The defendant replied that he was not bound to furnish steam heat, and that the plaintiffs did not ask him to do so, and he also testified that the work was badly done. Thus the parties were at issue upon the question of the character and quality of the work done, and that question was one which was not only within the proper function of the architects, but was exclusively within their jurisdiction to hear and determine. It may be conceded that the dispute included an alleged fault of the defendant, but the trial of that question was not taken away from the selected tribunal, and as it came within the category of "any dispute which may arise between the parties to this agreement," it was just as certainly embraced within the jurisdiction conferred upon the arbitrators as any other question touching the character of the work. The case of *Reynolds v. Caldwell* goes very much

further than it is necessary to go in this case, denying the right of any action on the agreement. To hold that if a jury, in an action on the contract, should determine that the defects in controversy were in any manner traceable to the negligence of one of the parties, although such alleged negligence was denied and formed part of the dispute, therefore the reference to the engineer or architect must be abrogated, and the waiver of all right of action, suit, or other remedy stricken out of the contract, would make the question of jurisdiction depend not upon the agreement of the parties, but upon the finding of the jury on one of the disputed facts. We cannot agree to such a result. The appellees suggest that a right to sue was reserved in the contract, and therefore the reference to the engineer is avoided. But the right to sue is given only to the defendant, and it is limited to the recovery of any money which he could not recover by withholding out of the money payable under the contract the damages he might suffer from the plaintiffs' defective performance. We are clearly of opinion that all right of action on the contract was waived except to recover upon an award made by the engineers and architects, and, as there was nothing of this kind in the case, the judgment must be reversed.

Judgment reversed.

W. M. S., JR.

Common Pleas.

C. P. No. 2.

April 17, 1891.

Pierce v. Electric Co.

Practice—Foreign attachment—Foreign corporation registered in this State under the Act of April 22, 1874, and empowered to do business here, is not exempt from process by foreign attachment.

Sur rule to dissolve foreign attachment.

A writ of foreign attachment issued August 13, 1890, against the McLaughlin Electric Company. On March 18, 1891, a rule was entered to dissolve the attachment, the affidavit in support of the rule alleging that the McLaughlin Electric Company was incorporated under the laws of the State of New Jersey, in October of 1889, and that immediately thereafter they established an office in the city of Philadelphia, appointed an agent for the transaction of business therein, and filed in the office of the secretary of the Commonwealth of Pennsylvania, a statement (under seal of said company), signed by its president and secretary, showing the title and object of the corporation, the location of its offices, and the

names of its authorized agents therein, and the certificate of the secretary of the Commonwealth (under the seal thereof) of the filing of said statement was preserved for public inspection by each of said agents in each of said offices, and alleging that "at the time of the commencement of the above action the company defendant was engaged in carrying on business in the city of Philadelphia, and had full right, power, and authority under the laws of the State of Pennsylvania so to do, and that the writ of foreign attachment was unlawfully and improperly issued against the defendant."

Depositions were taken in support of the rule to dissolve the attachment, and there was produced a certificate of the secretary of the Commonwealth showing that on March 26, 1890, the McLaughlin Electric Company, a foreign corporation, filed in the office of the secretary of the Commonwealth a certificate under the seal of said corporation, signed by the president thereof, stating the title of said corporation to be "The McLaughlin Electric Company;" that its office in the Commonwealth of Pennsylvania is located at 281 Bullitt Building, Philadelphia; that its authorized agent in charge of its business in said Commonwealth is W. J. Coite.

William W. Ker, for the rule.

John Sparhawk, Jr., contra.

A writ of attachment in the form aforesaid may be issued against any foreign corporation, aggregate or sole, and the proceedings aforesaid may be had thereon, as far as the case will permit.

Act of June 13, 1836, *Purd. Dig.* 823.

By this is meant a corporation chartered by another State.

Harley v. Charleston Co., 2 Miles, 249.

Bushel v. Ins. Co., 15 S. & R. 173.

In *Chase v. Ninth National Bank* (56 Pa. 355), the defendants had an agent or clerk and a place of business in Pennsylvania, upon whom process could be served, yet the Court decided that it did not exempt the corporation from process by foreign attachment.

A corporation is a creature of the sovereign will, and when created by one sovereignty it can operate within another's limits only by the latter's express permission, or by permission implied from principles of comity, but such permission does not make it any the less a foreign corporation.

State Treas. v. Aud.-Gen., 46 Mich. 224; 13 Am. and Eng. R. R. Cases, 296.

A corporation has its domicile in the State whose Legislature has created it.

8 Amer. and Eng. Ency. of Law, 330, and cases cited therein.

Barr v. King, 96 Pa. 488.

Darlington v. Rogers, 36 Legal Int. 115.

April 17, 1891. THE COURT. Rule discharged. W. M. S., Jr.

Orphans' Court.

June 15, 1891.

Bockius's Estate.

Trustees—Award to trustees—Accounts of trustees—Form of—Trustees must charge themselves with the amount awarded them by a decree of Court, and claim credit for any portion thereof not received—All matters of discharge must be so set up as to permit of objection by the cestui que trustent.

Sur exceptions to adjudication.

The facts were as follows: E. Fanny Bockius died October 3, 1884, leaving a will duly proved October 8, 1884, wherein, after making certain bequests, she gave all the residue of her estate to her executors in trust to invest and to pay the income thereof to her three daughters, Annie, Fanny, and Bessie in equal shares for life. She appointed as her executors, George Bockius, P. Logan Bockius, and Richard E. Cochran. The executors filed their account May 6, 1886. The account was adjudicated, and on June 7, 1886, the sum of \$22,420.57, awarded to the accountants as trustees under the will. On March 17, 1888, Richard E. Cochran was discharged as a trustee. On October 11, 1890, the remaining trustees filed an account of their administration of the trust, in which they charged themselves with receiving only the sum of \$17,655.45 as the principal of said trust estate.

Before the Auditing Judge, HANNA, P. J., Fanny May Bockius, an adult *cestui que trust*, and the Guarantee Trust and Safe Deposit Company, guardian of Bessie G. Bockius, a minor *cestui que trust*, sought to surcharge the accountants with the sum of \$4766.12, being the difference between the amount with which the accountants charged themselves as trustees, and the amount awarded to them upon the adjudication of their account as executors, with interest from the date of that adjudication, and with interest on the whole principal from the date of the adjudication of their account as executors, viz., June 7, 1886, to the date of the beginning of their income account, as filed, viz., August 3, 1888.

Upon these claims for surcharge the Auditing Judge found as follows:—

"The testatrix was executrix of her husband's will, and after her death it was discovered she had commingled the assets and moneys of his estate with her own moneys, so that it was almost impossible to distinguish the two estates. She had not settled her account as executrix, and Mr. Pile took out letters d. b. n. upon the estate of her deceased husband. The executors of testa-

trix filed their account on May 6, 1886. It was called for audit on June 7, 1886, but the adjudication was delayed until March 7, 1887.

"The cause of the delay seems to have been an endeavor to settle in one settlement the estate of both testatrix and her deceased husband, which, as stated, were so commingled. If this had not been done all the subsequent trouble would have been avoided. But the parties interested, with their counsel and the guardian of the minors, consented to, and took part in, such a settlement. In the adjudication of that account an award was made to Mr. Pile as administrator c. t. a. of George Bockius, the deceased husband of the testatrix, of the debt due by

her, viz.	\$9,429.37
And interest from October 3, 1884,	
to March 3, 1886	1,139.38

\$10,568.75

This was paid to Mr. Pile, and left a balance of \$22,420.57 awarded to the accountants as trustees under the will of testatrix. This was in March, 1887.

"But this balance it seems was not considered by the parties as truly representing the residuary estate of testatrix, and they sought to correct it in an amicable but irregular manner, instead of correcting the adjudication by a bill of review, and thus definitely ascertaining and fixing the precise balance of the residuary estate. By agreement of the parties they treated the unsold securities in their hands, together with \$10,000 of city loan, admittedly a part of the estate of George Bockius, deceased, as a fund composed of the assets of both estates, and then made a distribution as of both estates. This was on June 20, 1888. Those interested under the will of the father, George Bockius, were paid, and the minor, Bessie Bockius, received \$2500 as a legacy to her of that amount. And then the balance was set apart to the trustees for those interested under the will of Mrs. Bockius, and constituted the actual residuary estate of Mrs. Bockius which came into the hands of the trustees. The above balance was not received by the trustees until, say, June, 1888. In the meantime a settlement of the estate of both testatrix and her deceased husband had been made. To do this some securities were sold, a reappraisal of those unsold made, and out of the balance of cash and securities unsold, distribution was made amongst the parties interested in both the estate of George Bockius, deceased, and in the estate of the testatrix.

"From the testimony the Auditing Judge is satisfied that in June, 1888, all the parties interested in the estate agreed, and were satisfied that all the trustees were to receive as the residuary estate of Mrs. Bockius were the securities and investments, as follows" (here the Auditing

Judge copies the list from the scheme of distribution, June 20, 1888, which was put in evidence at the audit).

On the income account the claim to surcharge accountants with interest from June 7, 1886, until the present time on \$4766.12, the alleged difference between the amount awarded to them as trustees and the amount with which they charge themselves in the account filed, was refused, because, according to the adjudication, "the Auditing Judge is satisfied the accountants should not be charged with the corpus of the estate except as in the restated account."

The Auditing Judge also refused to surcharge accountants with income between the date of adjudication of their account as executors and the date of beginning of income account on their trustees' account, as filed (August 3, 1888), because "It was shortly before August, 1888, that the securities of the estate as a trust came into their hands, and it very satisfactorily appeared that the income on the securities prior to the family settlement of June, 1888, was collected and expended by the trustees or their counsel for the support of the *cestui que trust*. The share of the minors was paid to their guardian, who never alleged any deficiency or error in June, 1888, when the division of the combined estates took place. At this date it is to be presumed that a proper settlement and distribution of all income had been made. The Auditing Judge therefore cannot see the propriety or justice in surcharging accountants with interest on a sum prior to a time when the same was actually received by them."

To this adjudication Fanny May Bockius and the Guarantee Trust and Safe Deposit Company, as guardian of Bessie G. Bockius, filed exceptions, averring, *inter alia*, that the Court erred in refusing to surcharge the trustees with said sum of \$4766.12 in the principal account, and with interest thereon, and interest on the whole of the principal of the trust from June 7, 1886, to August 3, 1888.

George Gluyas Mercer, for exceptants.
Joseph M. Pile, contra.

July 3, 1891. PENROSE, J. The first duty of persons holding offices of trust, it is said, is to be constantly ready with their accounts; and all doubts and obscurities are to be taken adversely to them. Loss arising from default in this respect must be borne by the trustees; it cannot be cast upon their *cestui que trusts*, in the absence of the clearest and most convincing evidence of absolute knowledge and complete acquiescence on the part of the latter. These principles are elementary, and require no citation of authority.

In the present case, the accountants, as executors of the testatrix, filed their account in May,

1886, charging themselves with cash and securities, there specified, amounting to \$37,808.94, and showing a balance, after crediting payment of debts, counsel fees, etc. etc., of \$33,029.32. Of this, the adjudication, filed in March, 1887, awarded \$10,569.75 to the administrator d. b. n. c. t. a. of the estate of the husband of the testatrix, of which she had been executrix, and after the deduction of clerk's fees, etc., the balance, \$22,420.75, composed as there indicated, to the accountants as trustees under the will, for the daughters of the testatrix, two of whom were then minors.

In the account now filed by them as such trustees, the accountants have debited themselves, not with the sum thus awarded, but with only \$17,655.45, including moneys since received; and the explanation of the deficiency is supposed to be found in the testimony annexed to the adjudication, and in a family settlement, alleged to have been made in June, 1888. The account was filed October 11, 1890.

As already stated, two of the three *cestui que trusts* were, at the time of the settlement of the executors' account, and one of them still is under age; but apart from that fact, and from the further fact that they both deny ever having entered into such family adjustment of accounts (see Wistar's Appeal, 30 Sm. 484), the statement or schedule upon which it is said to have been based is so intricate and confused—blending, as it does, principal with income, real and personal, administration with distribution, etc., that even the most accomplished accountant would, without careful examination and analysis, find trouble in understanding it. But if the settlement were established it would not relieve the accountants of their duty of exhibiting an account showing, specifically and in detail, precisely how, as the result of it, the fund in their hands as executors in March, 1887, and then awarded to them as trustees, was reduced to any smaller sum. If errors are alleged in the decree then made, they must be pointed out with all the exactness that would be required in a proceeding for review—if, indeed, the correctness of the decree can be impeached collaterally or in any other manner than by review. If the reduction has been caused by subsequent payments, shrinkages, losses, or charges, they must be claimed as credits in the account, so that their propriety as matters of discharge may be considered by the Court upon objection by the parties sought to be affected; and if, as already stated, the accountants, through failure to keep proper accounts, are unable to give the items, they, being the only persons in default, will be charged with all that they fail to discharge themselves of, with such interest as, under the circumstances, may be equitable and just. An account must be duly vouched, and general

statements, even under oath that "every dollar has been accounted for, or properly expended," cannot be accepted for this purpose. The remarks of Judge WOODWARD, in Romig's Appeal (3 Norris, 236), and of Judge ROGERS, in Mylin's Estate (7 Watts, 64), will be found directly in point. As to matters of account, the maxims *de non apparentibus et non existentibus eadem est ratio*, and *quod non apparet non est*, are especially applicable.

In the cases which have been referred to, the accounts were stated with sufficient detail, and there was only the absence of vouchers as to numerous small items; while here not only the vouchers but the items themselves are wanting. As was said in Keen's Estate (16 Phila. 208), "It is a manifest misapplication of the term to style that an account which does not exhibit all the transactions with regard to the fund; and a decree of confirmation, as it is conclusive only as to matters which appear, can in such case be of little practical utility." Obviously where, as here, the trust is for the protection of future interests as well as existing life estates, and the account is filed for the purpose of obtaining a discharge by the trustees, the fullest detail is essential.

See further on the subject of accounts, Hardwicke v. Vernon (14 Ves. Jr. 504); Tew v. Earl of Winterton (1 Id. 451, Sumner's note); Perry on Trusts, section 821; Bower's Appeal (2 Barr, 432); Equity Rule LXVI; Daniell's Ch. Pr., *1222, n. 1.

That confusion was occasioned by the fact that the testatrix had blended her own estate with that of her husband, in which she had but a life interest, would afford no reason for imperfection in the method of stating the present account, even if the confusion so caused had continued. But did it continue? Her account as executrix, stated by the accountants as her executors was filed in January, 1885, and after an examination by a very competent Auditor, extending over a period of more than six months, the amount due by her was ascertained, and the securities held by her as executrix, with the sum so due, awarded to the administrator d. b. n. c. t. a. of the husband's estate. The Auditor's report was filed in January, 1886, and in May following, the accountants filed their own account as executors, by the adjudication of which filed March 7, 1887, the amount found due the husband's estate by the Auditor's report was awarded to the administrator d. b. n. c. t. a., and the balance, as already stated, to the accountants for the purposes of the present trust. After this, viz., April 15, 1887, the account of the administrator of the husband's estate was filed, debiting the accountant with the amount of the wife's indebtedness so awarded, and with the securities of the husband's estate awarded by the Auditor

in January, 1886; and this account was called for audit in October, 1887. The adjudication filed in December, 1887, awarded distribution of the balance \$36,061.00 so made up between the three daughters and one of the sons—\$9015.25 to each.

After all this, confusion could scarcely be excusable; and with any proper system of keeping accounts it could not possibly exist.

It is not alleged that there was any want of good faith; and the Auditing Judge, believing in the integrity of the accountants, has, after hearing the testimony, reached the conclusion that they should not be surcharged. It is quite likely that ultimately we shall be of the same opinion; but the *cestui que trusts* have the right to insist that the matters set up by way of discharge shall be in a shape to permit objection by them, and specific consideration by the Court. As the case now stands they are deprived of this right.

The exceptions are sustained *pro forma*, and the account referred back to the Auditing Judge for further proceeding: the accountants being ordered to present for that purpose a restated account, debiting them with the balance awarded to them by the adjudication of their account as executors, and taking credit for all items set up by way of discharge—with the further duty on their part of sustaining the credits so claimed by proper proof or vouchers. c. k. z.

May 19, 1891.

Bourguignon's Estate.

Widow's exemption—Delay in claiming—When not an estoppel—When notice and advertisement not necessary—Tenant for life who is also executrix not required to enter security to protect interests of remaindermen—Family settlements—Counsel fees.

Sur exceptions to adjudication.

The following are the material portions of the adjudication upon the account of the executrix of Charles L. Bourguignon, deceased.

"The testator died September 22, 1875, having made his will, dated May 30, 1871, whereby he gave all his property to his wife, Kate, for life, and after her death to his children. The testator left two children, Charles L. Bourguignon and Mary Bourguignon.

"The account was admitted to be correct, excepting two items: January 28, 1891, widow's exemption under Act April 14, 1851, \$300; January 28, 1891, M. H. Stutzbach, Esq., professional services, \$100.

"It will be noticed that both of these items are charged in the account under date of January 28, 1891, when he, the testator, died on September 22, 1875.

"With regard to the widow's claim, it appeared that no petition for its allowance was ever filed, and that, therefore, it was not paid under any order of this Court, as required by the Act of Assembly and rules of Court in such cases.

"The widow on the day this account was prepared simply took credit therein for the amount of the exemption. While it has been held that the widow may claim her exemption at the audit of the account when the interests of others have not been affected by the delay (Kirkpatrick's Estate, 5 Phila. 98), in this case the delay has been unusual—more than fifteen years, and the rights of others have intervened.

"In view of the recent decision of the Supreme Court in Kerns's Appeal (120 Pa. 530), where the delay of one year was held to be too long, this credit cannot be allowed.

"With regard to the claim of \$100 fee paid Mr. Stutzbach, it appeared that immediately after the death of the testator he represented the widow and executrix in the settlement of the estate of the testator, and there can be no doubt that \$100 was a very reasonable charge for the services rendered by him, but according to Mr. Stutzbach's own statement, out of regard for the testator, who had been his friend and with whom he had maintained very intimate business relations, he made no charge for his services, but gave them as a present to the widow. Under these circumstances the Auditing Judge does not think that she is entitled to claim credit in her account for the same, as if it was a cash item paid out by her. This credit is not allowed.

"Mr. Kluges presented the claim of Henry F. Miller, an attaching creditor of Charles L. Bourguignon, a son of testator, in a suit in which the accountant has been summoned as garnishee, C. P. No. 3, etc., for \$1250, and Mr. Sellers, for the accountant, presented her claim on a similar attachment for \$1200. He also claimed this sum out of Charles L. Bourguignon's share of his father's estate, on the ground that it was money borrowed by him from the estate.

"The Auditing Judge does not think it necessary at this time to do anything more than to note the fact that these claims have been presented, as Charles L. Bourguignon has no present distributable interest.

"The whole balance must be awarded to the widow for life, under the terms of the will of the testator, . . . upon giving security to protect those who are interested in the remainder, as required by the Act of Assembly in such cases."

Exceptions were filed, by all parties interested in the estate, to the findings of the Auditing Judge.

James C. Sellers, for accountant.

J. F. Kluges, contra.

May 29, 1891. *PENROSE, J.* The evidence is uncontradicted that the \$300 to which the widow of the decedent was entitled by way of exemption were used by her for the support of herself and two children, both of whom were minors. She was the executrix, and formal notice of a claim of exemption was, of course, unnecessary; advertisement was equally so, since the estate was solvent and creditors were not affected. Moreover, the entire estate was given to her for life, and no one could possibly be injured, therefore, even if the right to exemption had not been asserted until now. The statute gives the right to retain property to the specified amount and is silent as to the time within which it must be done. Delay can only act as an estoppel where there are persons having interests, as creditors or distributees with a present right of participation in the estate, who are or may have been induced by the widow's inaction to believe that her claim was waived. Here there are no such persons; the distributees in remainder shared with the widow and tenant for life the moneys which she retained, and for nearly sixteen years after the death of the decedent acquiesced in all that she has done. Under these circumstances the lack of the ordinary formalities as to presentation and allowance of the claim, or the failure as executrix to take credit for the exemption until the account was filed, cannot be regarded as important, as against the persons entitled in remainder or those claiming under them. Upon this subject the cases of *Roberts v. Messinger* (19 Crumr. 298), and *Hess v. Frankenfield* (10 Outerb. 441), are directly in point.

What has been thus said applies also to the credit for counsel fees, which, as the evidence shows, were given to the widow at the time the services for which they were charged were rendered. The gift was to her individually, not to the estate; and it is not material that she did not go through the form of paying the amount and receiving it back again. After the claim was given to her, she became the owner, with the right at any time to pay it to herself as assignee. Delay in payment hurt no one but herself, and the Statute of Limitations could, in such case, have no operation.

Whether under any circumstances the accountant could be called upon to enter security as tenant for life for the protection of the interests in remainder is far from clear. We have not been furnished with a copy of the will, but the very purpose of appointing her executrix may have been to save the necessity on her part of giving security. In *Keene's Estate* (31 Smith, 133), and *Lindsay's Estate* (10 WEEKLY NOTES, 36), the Court refused to compel the entry of security by a tenant for life who was also execu-

trix. But apart from her right as executrix, it seems clear that security ought not now to be exacted. Before the Act of 1834, a legatee for life was entitled to possession (*Westcott v. Cady* 5 John. Ch. Rep. 349), and the object of the Act was merely to protect the interests in remainder. Nothing is clearer than that this right of protection may be waived by those for whom it was intended; *quilibet potest renunciare juri pro se introducto*; and the waiver may be proved by implication quite as well as by express agreement. The decedent in this case died in 1875. There were no creditors, and the son and daughter, who were the only persons having the right to demand security, have for more than fifteen years assented to the possession of the property by the mother, without security. Her liability to them has thus become merely that of debtor (*Reiff's Estate* 9 Crumr. 145), and after this lapse of time, and after she has acted upon the change of relation, to treat her as still occupying the position of fiduciary, with all the liabilities as such, would be most inequitable and unjust. (*Vandever's Appeal*, 6 Wright, 74; *Mackey's Appeal*, 21 WEEKLY NOTES, 293.) Family settlements, as has often been said, "are favorites of the law, and when fairly made are never allowed to be disturbed by the parties or any other for them." "The parties to such an arrangement executed would be forever estopped from disturbing it as amongst themselves, upon the most familiar principles of justice. And why should the arrangement be broken up by a mere intermeddler?" (*Walworth v. Abel*, 2 Smith, 370; *Weaver v. Roth*, 9 Outerb. 408.)

Moreover, the son, in this case, whose attaching creditor asks for the entry of security by the mother, having thus dealt with her, afterwards borrowed from her, individually, moneys which had belonged to the estate, in excess of his share of what will be coming to him at her death (even with the disallowance of the credits for exemption and counsel fees), giving her a bond which is still unpaid, the amount of which, with interest, will be available in final settlement as a set-off against any claim he may have against her or her estate. Having thus received part of the moneys for which she was originally accountable to him as executrix, it is very plain that he cannot compel its payment a second time. He is estopped from asserting that she still holds as executrix moneys which, in that capacity, she had no right to lend upon a security given to her individually.

It is needless to say that the rights of the son are the measure of those of his attaching creditor. If security cannot be demanded by him, neither can it be by his creditor.

The exceptions are sustained.

W. C. S.

WEEKLY NOTES OF CASES.

VOL. XXVIII.] FRIDAY, OCT. 2, 1891. [No. 24.]

Supreme Court.

Jan. '91, 81.

February 4, 1891.

Chain v. Hart.

Suits for attorney's fees—Affidavit of defence—What it must contain.

In an action to recover attorney's fees, an affidavit of defence setting forth that the suits in which the services were rendered were managed unskillfully, but not stating in what the unskillfulness consisted, is not sufficient.

If the facts upon which rest defendant's conclusions of unskillfulness are not specifically stated as required by rule of Court, it cannot be determined by the Court, whose exclusive province it is, whether the plaintiff was or was not chargeable with either professional unskillfulness or mismanagement.

Appeal of John D. Hart, defendant, from the judgment of the Common Pleas of Montgomery County, in an action of assumpsit, brought by B. E. Chain, Esq., to recover fees for professional services rendered.

The suit was begun before a justice of the peace, and judgment recovered for \$298.23, from which judgment an appeal was taken by the defendant to the Common Pleas.

The rule of Court of the Common Pleas of Montgomery County, regulating the procedure in cases of an appeal from a justice, adopted June 7, 1890, is as follows:—

1. (A) In all appeals by defendants from the judgments of justices of the peace in actions founded on contracts, express or implied, the plaintiff having first (a) filed a concise statement of his demand, together with copies of all notes, contracts, book entries or other instruments of writing or particular reference to records upon which the plaintiff's demand is founded, if any, or a statement of his contract if the same is not in writing, on or before the second Monday of the term to which the appeal is entered, and (b) made due proof of the service of at least fifteen days' notice of such filing on the attorney of record of such defendant, if there be any, shall be entitled to judgment for the whole of plaintiff's demand, together with interest and costs, any time after fifteen days subsequent to the filing of plaintiff's statement and service of notice as aforesaid, unless the defendant, or some one for him, knowing the facts, shall have filed a sufficient affidavit setting forth that the defendant verily believes he has a just defence to the whole or a part of plaintiff's demand, as the case may be, and specifically stating the nature and character of the same;

and if to a part only, stating to what part, and specifying how much he admits to be due to the plaintiff, and judgment may then be entered against the defendant for the sum so admitted to be due, and the trial may proceed for the residue of plaintiff's demand: *Provided, however*, where no appearance has been entered of record for the defendant, and judgment has been entered against him, such judgment may be taken off by the prothonotary at any time within ten days after the entry thereof on application of any attorney of this Court, accompanied by his affidavit that he had been retained in the suit or appeal prior to the filing of the plaintiff's statement and neglected to enter his appearance, but such judgment shall be re-entered by the prothonotary unless a sufficient affidavit of defence be filed within five days after the taking off of such judgment.

When no affidavit of defence is filed judgment shall be entered by the prothonotary on application of plaintiff's attorney of record.

When an affidavit of defence is filed, but deemed insufficient, plaintiff's attorney may enter, as of course, a rule on the defendant to show cause why judgment should not be entered for want of a sufficient affidavit of defence, and the prothonotary shall forthwith place the rule upon the judgment list.

(B) If the plaintiff shall neglect to file a statement and copies, as provided in paragraph "A," on or before the second Monday of the term to which the appeal may have been entered, he may file the same at any time thereafter, and, unless the defendant shall file a sufficient affidavit of defence within fifteen days after service of the notice on the defendant, or his attorney of record, of the filing of such statement and copies as aforesaid, the prothonotary shall, on application of plaintiff's attorney of record, enter judgment for want thereof.

2. In all appeals by plaintiffs from the judgments of justices of the peace, the plaintiff shall not be entitled to judgment for want of an affidavit of defence until fifteen days after he shall have served a copy of his statement and accompanying copies, as aforesaid, upon the defendant or his attorney of record.

3. Where affidavits of defence have been filed, the proceedings to obtain judgment for want of a sufficient affidavit of defence shall be the same in appeals by plaintiffs and defendants.

4. Paragraph "B" shall apply only to all appeals entered subsequent to the 1st day of January, 1890.

Under this rule of Court plaintiff filed a statement of claim, setting forth that he had been employed as attorney by defendant to prosecute a certain suit against William C. Hamilton & Son, and that he had contracted to pay him such sums of money as his services were worth, and that plaintiff accepted such employment, and conducted said proceedings until discharged by defendant. To his claim plaintiff added an itemized statement of his fees and costs.

To this statement of claim defendant filed an affidavit of defence, setting forth, *inter alia*, as follows:—

"The defendant never retained the said plaintiff, in and about the several suits mentioned in plaintiff's statement. The said plaintiff never was his counsel in the matters therein mentioned. That the said defendant did have, and still has, a claim of ten thousand dollars against William C.

Hamilton & Son, and that Mr. Charles Hunsicker was his duly authenticated counsel in said matter, in the (defendant's) effort to collect the said claims against the said Hamiltons.

"That the defendant put into the hands of Mr. Hunsicker, his then counsel, all the necessary papers and facts concerning his claim against the said Hamiltons, when it became the duty of the said counsel, Mr. Hunsicker, as well as the duty of this plaintiff, in assuming to act as counsel for the said defendant, to exercise his skill professionally, as well as his judgment in instituting the proper and legal proceedings against the said Hamiltons to collect his said claim, \$10,000 against the said Hamiltons. That the said plaintiff, in assuming to act as his counsel, managed said prosecution of the said suits unskillfully and never did collect the said claim of \$10,000, but by reason of said mismanagement this defendant was put to great loss and damage, to wit, \$10,000; that the said suits were improperly brought by the said plaintiff, and greatly hindered and delayed the said defendant in collecting his said claim now amounting to over \$10,000. Five years and more were fruitlessly consumed in the abortive attempts of this plaintiff in collecting said claim, by reason of the unskillfulness of this plaintiff. That said claim against the Hamiltons is still uncollected and is outstanding; that the services claimed for in the plaintiff's statement were worthless; the entire litigation was useless because said plaintiff and his colleague had not used skillfulness, as attorneys, in performing the duties the said plaintiff had thus assumed.

"That the costs alleged to have been paid by the said plaintiff were by reason of said unskillfulness in bringing said suits, and this defendant is not liable for.

"The defendant further avers and says that the services in statement claimed for were worthless, and said plaintiff failed entirely in collecting said claim. That the costs alleged to have been paid were paid voluntarily and without any request of the said defendant and that said defendant is not liable for the same.

"That this affidavit of defence is not required to be filed under the rules of this Court; that the rule of Court was adopted subsequent to the time of filing the appeal in this case; that for the other purposes of this defence this defendant makes as part thereof the affidavit filed in the case of *Hunsicker v. Hart*, of 19, Dec. T. 1889, as all the facts set forth therein are applicable to his cause in this case."

A rule for judgment for want of a sufficient affidavit of defence was then taken by plaintiff, which was afterward made absolute by the Court, *WEAND, J.*, filing the following opinion:—

"The claim in this case is for services as attorney rendered by plaintiff to defendant in certain

legal proceedings pending in this Court. It is not denied by the affidavit of defence that plaintiff performed the services, but it is contended that he is not entitled to judgment, 1st, because he was never employed; 2d, because he acted unskillfully; 3d, because his services were worthless. An affidavit of defence to prevail must deny the equity of plaintiff's demand, and must not be argumentative or evasive. Even if defendant did not employ plaintiff, yet if he recognized him as his attorney and accepted his services he will be held to have admitted his employment and be liable therefor. It is not averred that the other counsel was alone to be paid, or that he had no authority to call in other counsel, and if plaintiff's services continued for several years, as defendant alleges, the law will assume that he was entitled to pay, unless defendant, during that time, gave him notice to the contrary.

"The affidavit alleges that plaintiff managed the proceedings unskillfully; that by reason of said mismanagement the defendant was put to loss, and that the suits were improperly brought, and that plaintiff did not recover the amount sued for. We are not informed in what the unskillfulness consisted, or how the case was mismanaged, nor why the money was not recovered. A mere argument of these facts is not sufficient without something to indicate in what they consisted, so that the Court may judge whether the acts complained of are a defence in law. It may be that this is only the defendant's idea without anything to base it upon, or merely his inference from his own construction of the law. The failure to recover may have been for good cause over which counsel had no control.

"An attorney is not liable, if he acts honestly and to the best of his ability. (*Lynch v. Com.* to use, etc., 16 S. & R. 368.) Unless the affidavit avers facts from which the Court can infer that the facts, if proven, would prevent a recovery, we cannot infer that in this case the plaintiff did not do his whole duty.

"It is not stated why the services rendered were worthless, except that 'plaintiff failed in collecting said claim.' As plaintiff's claim is not for a contingent fee the failure to recover is not a defence. That an attorney may recover on a *quantum meruit* for professional services can no longer be disputed (*Thompson v. Boyle*, 85 Pa. 477; *Gray v. Brackenridge*, 2 P. & W. 75), and as the action therefor is the ordinary one of assumpsit, it is governed by the affidavit of defence rules and the Civil Procedure Act of 1887.

"The rules of Court apply to this case, although the appeal was filed before their adoption. It was a suit pending, and the Court could adopt such rules as might be necessary to a speedy settlement of the case, not infringing upon defendant's rights. To require him to file an affi-

davit of defence was not depriving him of the right to a trial by jury, if he had a defence good in law.

"And now, October 6, 1890, judgment is directed to be entered in favor of plaintiff and against defendant for the amount of plaintiff's claim."

Judgment was accordingly entered in favor of plaintiff for \$329.66; whereupon defendant took this appeal, assigning for error this action of the Court.

H. U. Brunner, for appellant.

The rule of Court is inapplicable; it is *ex post facto* as to this case. The appellant's right of appeal and to a trial had attached before its adoption.

Suits for the recovery of counsel fees are not within the affidavit of defence law.

Atwood v. Caverley, 1 WEEKLY NOTES, 82.

Rogers v. Scullins, 2 Id. 535.

Meany v. Kleine, 3 Id. 474.

Hale's Ex'rs v. Ard's Ex'rs, 48 Pa. 22, 24.

Post v. Wallace, 110 Id. 121.

Endlich Aff. of Def. p. 198.

But if an affidavit of defence is required, the one filed is sufficient.

Henry Freedley, for appellee.

The cases cited by the appellant decide only that an attorney's services are not the subject of a book entry, and therefore not within an affidavit of defence rule which applies only to book accounts, bonds, obligations, and instruments in writing.

But the rule of Court applicable to this case covers all contracts, express or implied, and copies are only to be filed "if any." The wording of this rule is the same as that of the Procedure Act of May 25, 1887, and the claim is within its provisions.

The affidavit filed is palpably insufficient. It is in the alternative, denying the employment, and then admitting it. It is argument only, traversing none of the material facts of the statement; alleges no facts, but leaves all to inference.

March 2, 1891. *STERRETT, J.* In his "history of the case," the defendant has furnished us with what purports to be a history of the rule of Court under which the judgment was entered. This was not only unnecessary, but wholly irrelevant to the single inquiry presented by the record, viz: Whether defendant's affidavit discloses a sufficient defence to the plaintiff's claim. It is quite sufficient for us to know that a Court, having full authority in the premises, adopted the rule, and that it was in force when the statement of claim and affidavit of defence were filed.

The suit was brought to recover for professional services rendered and money paid by the plaintiff for defendant. The statement of claim is in due form and sufficiently sets forth a good

cause of action calling upon the defendant for a specific affidavit of defence, such as is required by the rule of Court. After setting forth with sufficient fulness and precision the circumstances under which the services were rendered, etc., the plaintiff avers that defendant contracted to pay him such sum or sums of money as they were worth, and appends thereto an itemized statement of the services and their value, together with the items of costs and expenses paid by him for the defendant.

In his affidavit of defence, the defendant, after evasively averring that plaintiff never was his counsel in the suits specified in the statement of claim, and asserting that he had and still has a claim of \$10,000 against William C. Hamilton & Son, in which "Mr. Charles Hunsicker was his duly authorized counsel," admits that plaintiff was associated with Mr. Hunsicker in endeavoring to collect said claim. He then avers that plaintiff, in assuming to act as his counsel, managed the suits unskillfully, and never collected said claim; that said suits were improperly brought by plaintiff, and by reason of said mismanagement and unskillfulness defendant suffered great damage, etc. These allegations may be well enough as far as they go, but they fall far short of what is required by the rule of Court. The affidavit is silent as to wherein there was any mismanagement, or in what the alleged unskillfulness consisted, or why the claim was not collected. The defendant contented himself with drawing his own conclusions from facts withheld from the Court, and therein consists the fatal defect of his affidavit. If the facts, from which he drew his conclusions, had been stated specifically, as the rule requires, the Court might and probably would have reached a very different conclusion. Be that as it may, however, it was the exclusive province of the Court to determine, from facts properly averred in the affidavit of defence, whether the plaintiff was or was not chargeable with either professional unskillfulness or mismanagement.

The action of the Court, in entering judgment for the plaintiff, is so fully vindicated in the opinion sent up with the record, that further elaboration is unnecessary. The first and second specifications are not sustained. The third specification is dismissed, for the reason that, in no event, would it have been proper for the Court to have entered judgment for the defendant.

Judgment affirmed.

H. S. P. N.

[See next case.]

Jan. '91, 208.

April 3, 1891.

Class v. Kingsley.*Affidavit of defence—What it must contain.*

An affidavit of defence must contain all the facts necessary to make a legal answer to the claim, and their omission cannot be supplied by possible inferences.

Appeal of J. E. Kingsley & Co., defendants, from the judgment of the Common Pleas No. 1, of Philadelphia County, in an action of assumption brought by Charles Class, trading as the Arctic Hygeia Ice Manufacturing Company.

Plaintiff's statement claimed \$323.22, with interest, for ice sold and delivered to defendants, and to it was annexed a copy of the book of original entries, showing the dates and amounts delivered, and the charge at \$7 per ton.

Defendants filed the following affidavit of defence:—

"Edward F. Kingsley, being duly affirmed according to law, deposes and says that he is one of the above-named defendants, and has a just, true, and legal defence to a part of the claim upon which the above suit was brought of the following character: The plaintiff's statement filed alleges the claim for 92,335 pounds of ice (46.167 tons) at seven dollars per ton. This deponent says, to wit: That one Harry B. Crowell, in the early part of the present year, to wit, the month of March, was engaged in business with the said plaintiff, under the firm-name of Crowell & Class, and at said last-named time said Crowell made a specific contract with defendants to deliver to them ice at the Continental Hotel until the return of the said J. E. Kingsley to Philadelphia from California, at the price of four dollars per ton; that on or about May 5, 1890, the plaintiff notified defendants, that unless they contracted with him for ice for the season at seven dollars per ton, that he, the said plaintiff, would discontinue serving ice to said defendants from that date. And to this deponent says, that at the said last-named time he notified plaintiff that four dollars per ton was the price agreed upon between them; that four dollars per ton was all that he would pay, and that he need not serve them with any more ice except at four dollars per ton; that the said defendants are ready and willing to pay the sum of four dollars per ton for the ice delivered, being the full contract price agreed upon between them. All of which this deponent expects to be able to prove upon the trial of the above case."

Subsequently defendants filed a supplemental affidavit as follows:—

"Edward F. Kingsley, being duly affirmed according to law, deposes and says that he is one of

the above-named defendants, and has a just, true, and legal defence to a part of the claim upon which the above suit was brought of the following character, viz: The plaintiff's statement filed alleges the claim for 92,335 pounds of ice (46.167 tons) sold and delivered at seven dollars per ton. This deponent denies that defendants agreed to pay plaintiff the sum of seven dollars per ton for the said ice; on the contrary, this deponent says that one Harry B. Crowell, on or about the fifteenth day of March, 1890, was engaged in business with the said plaintiff under the firm-name of Crowell & Class, and at said last-named time the said Crowell called at the Continental Hotel, the then and now place of business of the said defendants, and then and there endeavored to secure from defendants a contract to purchase ice for a term of years at a reduced price; the defendants declined then to enter into any contract for the delivery to them of ice for a term of years; and the said Crowell was then informed that J. E. Kingsley, one of said defendants, was going to California, to be absent about two months, and would make no long contracts before his return to Philadelphia; the said Crowell then made a verbal agreement as follows: He said that they, the plaintiffs, would deliver to defendants ice at the Continental Hotel, until the return of the said J. E. Kingsley to Philadelphia from California, at four dollars (\$4) per ton. The said J. E. Kingsley returned, as aforesaid, to Philadelphia on or about the tenth day of May, 1890.

"That on or about the fifth day of May, 1890, the plaintiff sent to defendants a letter, a copy of which is as follows:—

PHILADELPHIA, May 5, 1890.

MESSRS. J. E. KINGSLEY & SON, Philadelphia:

GENTLEMEN: Unless you agree to contract with us for the season at seven dollars (\$7) per ton, we have concluded to discontinue serving you with ice from this date. Please give beater answer. If not in when he calls, please send word by telephone before six o'clock.

Yours truly,

ARCTIC HYGEIA ICE MANUFACTURING COMPANY,
CHAS. CLASS.

"And this deponent says that, in reply to said letter, that he notified plaintiff over the telephone that four dollars (\$4) per ton was the price agreed upon between them; that four dollars per ton was all that they would pay, and that he, plaintiff, need not serve them with any more ice, except at four dollars per ton.

"And this deponent says that plaintiff did not deliver to defendants any ice after the said fifth day of May, 1890.

"That the said defendants are ready and willing to pay to plaintiff the sum of four dollars per ton for the ice delivered, the said sum being the full contract price agreed upon between them. All of which this deponent believes, and expects

to be able to prove upon the trial of the above case."

The Court, on December 20, 1890, made absolute a rule for judgment for want of sufficient affidavits of defence.

Defendants then appealed and assigned as error this action of the Court.

Henry C. Brown (George Frederick Keene with him), for appellants.

Amos H. Evans, for appellee.

The original affidavit of defence is not specific. It is vague, evasive, and uncertain, and leaves facts necessary to a just and legal defence to conjecture and mere inferences.

Peck v. Jones, 70 Pa. 83.

The affidavit alleges a specific contract, but does not state whether said contract was verbal or written. If written, no copy is attached to the affidavit. If verbal, its terms are not set forth with such particularity as to enable the Court to determine whether the construction placed upon it by the defendants is warranted or not.

Willard v. Reed, 132 Pa. 5.

Erie City v. Butler, 120 Id. 382.

The supplemental affidavit of defence is not only equally vague and evasive, but does not set out any contract of any kind by any one with defendants.

An affidavit of defence that sets up an agreement should show with whom it was made.

Griel v. Buckias, 114 Pa. 187.

May 27, 1891. *McCOLLUM, J.* Charles Class, trading as the Arctic Hygeia Ice Manufacturing Company, appellee, claims by his statement filed in this case that in the months of April and May, 1890, he sold and delivered to J. E. Kingsley & Co., appellants, forty-six tons and one hundred and sixty-seven pounds of ice at seven dollars per ton. It is not denied that the ice was delivered as stated in the claim, and it is not alleged that the sum charged for it is exorbitant or above the market price. The sole defence made to the claim is, therefore, that on or about the 15th of March, 1890, one Henry B. Crowell, who was then engaged in business with the appellee under the firm name of Crowell & Class, agreed with the appellants to deliver to them ice at four dollars per ton until the return of J. E. Kingsley from California, which was expected within two months. To develop this defence two affidavits were required, and it is fair to assume that these contain all the facts which constitute the appellants' answer to the claim. It is not stated in what business Crowell & Class were engaged on the 15th of March, that Crowell had authority from the appellee to make contracts for the sale of ice, or that the ice was delivered in pursuance of the contract. All the facts alleged in the affidavits may exist with-

out impairing the validity or justice of the appellee's demand. To hold these affidavits sufficient we must infer that Crowell & Class were engaged in the ice business, and that the appellee is their successor and delivered the ice under their contract, or that he authorized Crowell as his agent to enter into the agreement which is set up as a partial defence to the action. If the authority of Crowell to bind the appellee by the agreement sufficiently appeared in the affidavits they would constitute a valid defence to three-sevenths of the claim. But this essential element of the defence is left wholly to inference, when, if it existed, it could and presumably would have been stated as a fact. It is too well settled to need citation of authorities that the affidavit must contain all the facts necessary to make a legal answer to the claim, and that their omission cannot be supplied by possible inferences. In this case it is not even averred that the appellants believe and expect to be able to prove that Crowell had authority from the appellee to make the contract, or that the ice was delivered in pursuance of it, and it is not a necessary inference from the facts stated in the affidavits that the contract was authorized or adopted by him. It is a reasonable and statutory rule which requires that the facts relied on as a defence shall be plainly stated in the affidavit that the Court may judge of their legal effect as an answer to the claim. While technical precision in the statement of the facts is not demanded, a plain and intelligible averment of them is necessary. Applying to this case the well-settled rules which govern the statement of a defence, we are constrained to hold with the Court below that the affidavits are insufficient.

The judgment is affirmed.

[See preceding case.]

W. M. S., Jr.

Common Pleas.

C. P. No. 3.

September 21, 1891.

Benevolent Order of Active Workers to use of Binns, Assignee for Benefit of Creditors, v. Sanders.

Corporation—Foreign corporation—Fraud—Assignments—Conflict of laws—A charter of a corporation cannot be attacked in a collateral proceeding even for fraud in the obtaining of the charter—A foreign corporation may assign its property in Pennsylvania for the benefit of its creditors, although an Act of the State of its incorporation forbid such assignment in said State—Short-term orders—An agent of a "short-term order" who with notice that the

order has made an assignment has paid back money received for dues, may be compelled to pay the same amount to the assignee for creditors.

Rule for judgment for want of a sufficient affidavit of defence.

The statement in this case set forth that the defendant was on and prior to the 28th of April, 1891, an officer and employé of the Benevolent Order of Active Workers, being secretary of branch No. 49 of said order; that as such secretary it was his duty to collect from the members of the said order, connected with said branch, the dues payable by them, and to pay over the same to the treasurer of the said order; that, on April 28, 1891, the corporation made an assignment for the benefit of its creditors to Burton Binns, Esq.; that at the time of the assignment the defendant had in his hands the sum of \$211 derived from dues collected from members of branch 49, which sum the defendant refused to pay over to the assignee.

The affidavit of defence set up: "That the officers and organizers of the said order did fraudulently obtain from the State of New Jersey on April 7, 1891, a charter therefor, ostensibly as a beneficial association, but in fact to carry on the same as a short-term order for their individual gain. The said officers and organizers then framed the by-laws of said order, and represented that upon the payment in all of \$33, at the end of ten weeks, or sooner, under certain conditions, each member would be paid \$100, which said contract and mode of business was in excess of said order's charter powers, in violation of the laws of New Jersey, and impossible of performance in point of fact. That this deponent, as secretary of branch No. 49 of said order, received from the members of said branch as dues, on April 27 and 28, the sum of \$96. On account of the inability of the said order to carry out the aforesaid representations upon the faith of which said dues were paid as aforesaid, and of the illegal character of the business of the order, it executed a deed of assignment for the benefit of creditors to said Burton Binns, on April 28, 1891, whereupon the members paying said dues claimed the same from this deponent, as having been paid under fraudulent misrepresentation, and in violation of law, and he refunded the same to them, and he has now no money of said order in his possession.

"Article X. of the by-laws of the order provided that all the expenses of the order should be kept within the expense fund, which consisted of the sum of \$5 paid by each member for the expense of the order, including the salaries and commissions of its officers, which sum in the three weeks of the life of the order exceeded \$5000.

"The debts due by said order do not exceed \$100, and no certificates had matured at the time of said assignment; and the assets of said order now in the hands of said assignee are more than sufficient to pay the creditors of said order, and the expense of winding up the same.

"That by reason of said charter having been obtained by fraud, and the business carried on being illegal, and the representations made being untrue and fraudulent, this deponent has been advised that the members of said branch No. 49, who paid him their dues as aforesaid, were entitled to receive the same back from him, and as he has refunded the same he is not indebted to the plaintiff. All of which he believes to be true and expects to be able to prove on the trial of the cause.

"That the Act under which said order was incorporated is dated March 22, 1886, and is as follows:—

"Sec. 2. This, the fifth section of the Act to which this is a supplement (the Act of April 9, 1875), be amended, so that the same shall read as follows:—

"That the sole and exclusive objects of incorporation under the Act shall be to relieve or support such of the members thereof, or such other persons as shall by sickness, casualty, old age, or other cause, be rendered incapable of attending to their usual occupation or calling, to discourage intemperance and diffuse the principle of benevolence and charity; to promote the decent interment of deceased members or widows of deceased members; to give and extend benevolent and charitable relief and assistance to persons who are not members of incorporations; to promote religion, morality, or industry by local missions or Sunday schools, or schools of a charitable nature; and other charitable objects; and one or more of the above objects may be provided for in the constitution and by-laws of such corporation, which shall have power to provide for such necessary expenses as shall accrue by carrying into effect the said object or objects; and no part of the funds of such corporations shall be used for banking purposes or in any way except as provided in this Act."

"Under the law of New Jersey a corporation cannot assign its property to an assignee for the benefit of creditors, but a receiver must be appointed; the deed of assignment in the present case is therefore void. (See *American Ice Machine Co. v. Steam Fire Engine and Machine Co.*, 7 C. E. Green, 72)."

Henry Budd, for the rule.

It is to be noted that the affidavit does not attempt to account for the entire amount with which the defendant is charged by the statement. The charge is that he had in his hands, at the time of the assignment, the sum of \$211. The affidavit merely says that on certain days, viz., the 27th and 28th of April, 1891, the defendant collected \$96. It does not say that this sum was all that he had then in his hands; it does not deny that he collected the balance of the \$211, or say that he paid over said balance, or

in any other way meet the positive assertion of the statement.

It is further to be noted that the affidavit does not say when the defendant paid back the sum of \$96, but it does admit having made such payment with full knowledge of the assignment. It is hardly necessary to add that the effect of such a payment is to destroy that equality which in a case of this kind is the truest equity; for the members to whom the defendant has refunded their dues will receive not a dividend as will their fellows but the whole amount.

The charter of the association cannot be attacked collaterally, even where the ground of attack is that it was obtained by fraud.

Cochran v. Arnold, 8 P. F. Smith, 399.

Garrett v. Dillsburg, etc., R. R., 28 Id. 465.

A *fortiori* it cannot be attacked by an officer of the association, who, for aught that appears in the affidavit, was a party to the fraud, and, most especially, in a proceeding brought to recover money for the purpose of equitable distribution.

A corporation has a right to assign.

Dana v. Bank of the U. S., 5 W. & S. 223.

Ardesco Oil Co. v. N. A. Min. and Oil Co., 16 P. F. Smith, 375.

But it is said that this is a New Jersey corporation and that a New Jersey corporation has no right to assign. To support this position a case in 7 C. E. Gr. 72, has been cited. An examination of this case will show that it does not decide that a New Jersey corporation cannot assign, but that in New Jersey an assignment made under certain circumstances is not valid when made by a corporation. The decision is upon a local statute, which of course can have no extra-territorial force. But even if the decision were intended to have a broad scope the right of assignment would remain. A corporation when it comes into a State may and must conduct its business in accordance with the laws thereof. It is true that it cannot by entering another State than that of its origin acquire additional corporate powers properly so called; e.g., a corporation whose charter forbids its holding stock in another company cannot acquire such right by entering another State whose policy is not adverse to such holding, but it can by entering the said State obtain the right to carry on its business therein in the usual way in which business is there carried on, subject, in that respect, only to such restrictions as the State may impose upon it, either as conditions of entrance into the State or in common with other corporations, domestic or foreign.

Ernest H. Davis, contra.

The business of the order was in violation of law and all its acts *ultra vires*, and besides the order was a scheme to enrich its promoters at the expense of its members—a fraud.

[FINLETTER, P. J. Were not the members parties to the fraud?]

The assignee's rights are not greater than those of the assignor.

Kent, Santee & Co.'s Appeal, 87 Pa. 165, 167.

Marks's Appeal, 85 Id. 231.

Trickett on Assignments, § 114.

The assignee stands in a position of a suitor asking the aid of a Court to enforce a contract, illegal and against public policy, when no rights of innocent third parties intervened; the affidavit having set up that the debts of the order are less than \$100.

The test whether a demand connected with an illegal transaction is capable of enforcement at law, is whether the plaintiff required the aid of this illegal transaction to establish his case.

Swan v. Scott, 11 S. & R. 164.

Story on Contracts, § 610.

Then the right to the dues depends upon the provisions of the charter and by-laws which are illegal.

Neblack on Mut. Ben. Socs., § 144.

State v. Standard L. Ass'n, 38 Ohio St. 281.

[FINLETTER, P. J. How can the defendant avoid the consequences of having received the money as agent of the order?]

He did not receive as such agent.

A foreign corporation has no right to make an assignment in this State for the benefit of creditors. The Act of March 24, 1818, Pur. Dig. 121, applies only to individuals.

In New Jersey assignments for benefit of creditors cannot be made by corporations. Receivers must be appointed.

Rev. St. N. J., p. 36, § 1; p. 187 § 57; p. 188, §§ 69, 70.

American Ice Machine Co. v. Steam Fire Engine Co., 7 C. E. Green, 72.

Eo die. Rule absolute.

Orphans' Court.

Frank's Estate.

Collateral inheritance tax—When it accrues—When it may not be avoided.

A release or conveyance by a devisee, legatee, or distributee who is a collateral heir or stranger to the blood of the testator, to one whose right of succession is not subject to the tax after the devise, legacy, or distributive share has once vested, will not deprive the Commonwealth of the collateral inheritance tax.

A decedent died intestate, seised of real estate, and leaving to survive him a widow and a sister; the latter

released her interest in the real estate to the former for a nominal consideration:

Held, that the interest of the sister was not relieved from the payment of the collateral inheritance tax.

Sur appeal from decision of the register of wills assessing a collateral inheritance tax.

The facts were these: Henry S. Frank died August 8, 1889, intestate, leaving to survive him no issue, but a widow, Rose Frank, and one sister, Henrietta F. Loeb, wife of Marx B. Loeb, as his only heirs-at-law. Deceased in his lifetime purchased a house and lot No. 2224 Green Street, Philadelphia, as a residence and home for himself and his wife; and it was known to the said Marx B. Loeb and Henrietta F. Loeb that it was the wish of the decedent, that he and his wife, or whichever of them might survive the other, should continue to hold, possess, and enjoy the said premises as in absolute ownership. Frank died suddenly, without expressing, in writing, or in legal form of testamentary disposition, his wish and desire in regard to said premises. Marx B. Loeb and Henrietta F. Loeb, his wife, never entered into the possession or enjoyment of said premises and estate, but the possession thereof, since the death of the said Henry S. Frank, has continuously been and now is in the said widow, Rose Frank. Mr. and Mrs. Loeb, by deed, dated December 15, 1890, and duly recorded, reciting the foregoing facts, and that they desired to release and disclaim unto the said Rose Frank any right or title that they might have in the said premises, and for the consideration of one dollar, released and forever quit claimed the said premises unto the said Rose Frank, her heirs, and assigns forever.

The register of wills appraised the said property at "\$31,500, less one-half in which the widow has life estate \$15,750=15,750." On which the tax at five per cent. is \$787.50, and twelve per cent. penalty \$63, or a total of \$850.50. From this appraisalment the administrators appealed.

Mayer Sulzberger, for appellants.

In this case the collateral heir upon whom the law cast the estate, refused to take, and renounced in favor of the widow; it being real estate, this had to be done by way of deed of release.

"As the right to take by succession and testament is derived from the State, it must necessarily be enjoyed subject to such conditions as the State may impose. And if a condition be that the kindred or legatees shall pay a bonus, this is not a tax or burden imposed on their property, or on the property of anybody else. It is simply the price of the privilege which the State has conferred upon them. If they do not choose to avail themselves of the privilege they need not pay the price, and are no worse off than before."

Strode v. Commonwealth, 52 Pa. 183.

Under none of the statutes is there any personal liability on the part of the legatee or devisee, as such, to pay the tax unless he actually or constructively accepts or receives the legacy or share. But it will be a justification and a defence for refusing to pay, that he has absolutely renounced and refused to accept the inheritance or legacy.

Dos Passos on Collat. Inherit. Taxes, p. 219, and cases cited in note.

S. Davis Page, Edward P. Allinson, and Boies Penrose, contra.

May 29, 1891. *HANNA, P. J.* The release or conveyance by a devisee, legatee, or distributee, after the devise, legacy, or distributive share has once vested, will not deprive the Commonwealth of the collateral inheritance tax. The tax accrues immediately upon the death of the testator or intestate. And payment cannot be evaded by a conveyance or assignment to one whose right of succession is not subject to the tax. A devisee or legatee may waive all claim and refuse the bounty of a testator, or to share as a distributee, but if he be a collateral heir or stranger to the blood of testator, the tax remains due and payable. In the case before us, decedent, the owner of real estate, died intestate, leaving surviving his widow, but no issue, and one sister, as his only heirs-at-law. Consequently, under the intestate law, the real estate became immediately vested in the sister in fee, subject only to the life estate of the widow in one-half. Decedent died in August, 1889, and in December, 1890, sixteen months afterwards, his sister, by proper deed, released and conveyed all her right, title, and interest in the real estate to the widow, to the end that she should hold the same as sole owner, in fee.

It is therefore contended, because the sister waived and relinquished her interest in the real estate for a nominal consideration, in favor of the widow, it is thereby relieved from payment of the collateral tax. But as shown this is a mistaken view of the law. The sister inherited the real estate of her brother immediately upon his death. It then passed to her, and by virtue of the Act of May 6, 1887 (*Purdon*, 2148, pl. 1), at once became liable to the tax. The widow obtained title from her after she became the owner by operation of law, and when she so conveyed, it was subject to the lien of the tax, which accrued at the death of the decedent.

The Commonwealth would easily and constantly be deprived of her revenue, provided for by the Act of 1887, if payment of the tax could thus be avoided.

The appeal is dismissed, and assessment of the tax by the register sustained.

W. C. S.

WEEKLY NOTES OF CASES.

VOL. XXVIII.] FRIDAY, OCT. 9, 1891. [No. 25.]

Supreme Court.

May, '91, 49. June 3, 1891.
Commonwealth v. Delaware, Lackawanna and Western R. R. Co.

Taxation—Corporations, foreign and domestic—Property used in this and other States taxable proportionately—Property of a domestic railroad company exclusively used in other States not taxable in Pennsylvania.

The capital of a domestic railroad corporation invested in equipment, used interchangeably on its main line in this State and its leased lines in other States, is taxable only in the proportion which the number of miles operated and equipped by it in Pennsylvania bears to the whole number operated and equipped by it.

For purposes of taxation tangible personal property has a *situs* wherever it may be found. The property of foreign and domestic corporations, whether located permanently or used temporarily in Pennsylvania, is subject to taxation by the State.

Pullman's Palace Car Co. v. Comm'th, 107 Pa. 156, and Comm'th v. American Dredging Co., 122 Id. 386, followed.

A domestic railroad corporation is not liable to taxation in Pennsylvania upon its interest in a railroad operated by it in another State, and subject to taxation by that foreign State.

Appeal of the Commonwealth of Pennsylvania, plaintiff, from the judgment of the Common Pleas of Dauphin County, entered upon an appeal by the Delaware, Lackawanna and Western Railroad Company, defendant, from the settlement by the auditor-general and State treasurer for tax upon its capital stock.

The case was tried without a jury, under the Act of April 22, 1874, and the findings of the Court (SIMONSON, P. J.) were as follows:—

"(1) This is an appeal from a settlement made by the auditor-general and State treasurer on the tenth day of September, 1890, against the defendant for tax on capital stock for the year ending the first Monday of November, 1889, based upon a report made by defendant's secretary and treasurer as required by law. In said settlement defendant is charged with tax upon the whole amount of its capital stock of \$26,200,000, amounting to \$91,700. Defendant has paid \$76,700 of said tax and has appealed

from the remainder of said tax on the ground that it is levied upon property outside of the taxing jurisdiction of the State of Pennsylvania, and that, therefore, the State has no right to tax said property, and that the settlement is therefore invalid and unconstitutional.

"(2) We find the facts with reference to the situation and location of the property of defendant represented by its capital stock to be as follows:—

"The general office of the company is at No. 26 Exchange Place, in the city and State of New York. Its capital stock is \$26,200,000, and during the year ending as aforesaid, there were declared and paid upon said capital stock four dividends of $1\frac{1}{2}$ per centum each upon the twentieth day of January, July and April and October, respectively, making a total of 7 per centum for the year.

"The main line of railroad owned by said company in Pennsylvania extends from the Pennsylvania and New York State line near Great Bend Village to the centre of a railroad bridge across the Delaware River near Delaware Station, originally constructed jointly by the Delaware, Lackawanna and Western Railroad Company and the Warren Railroad Company, a corporation of New Jersey. The said main line of railroad in Pennsylvania is 114.61 miles in length. In addition thereto the company owns branch railroads in Pennsylvania as follows: Lackawanna and Bloomsburg branch from Scranton to Northumberland, 80 miles; Winton branch, from Nay Aug to Winton, 7.50 miles; Keyser Valley branch, from junction with main line to Keyser Valley, 6.43 miles; Storr's branch, from Storr's Junction to Storr's Mine, 2.80.

"The defendant also operates and has therein such interest as was conveyed by the agreement, a copy of which is hereunto annexed and marked 'Exhibit A,' and made part of this finding, a railroad known as the Warren Railroad, extending from the centre of the railroad bridge across the Delaware River hereinbefore mentioned, to a point known as the 'Junction,' in the State of New Jersey, the said road being 18.80 miles in length, all in the State of New Jersey. The Warren Railroad Company, from which the said Warren Railroad was acquired, never owned any equipment, but the said road has been at all times, and still is, operated with equipment furnished by the Delaware, Lackawanna and Western Railroad Company. It is operated as a part of the main line of the Delaware, Lackawanna and Western Railroad.

"In addition to the railroads above mentioned the Delaware, Lackawanna and Western Railroad Company does now, and did in 1889, operate under lease for various terms of years the following railroads:—

"Valley Railroad, from a connection with the main line of D., L. & W. R. R. Co., at the New York and Pennsylvania State line to Binghamton, N. Y., 11.64 miles, all in the State of New York. The company owning this road possessed but 100 box cars and no passenger equipment whatever. Such freight cars as are needed in addition to the said box cars, all locomotives, and all passenger equipment are supplied by the D., L. & W. R. R. Co.

"Cayuga and Susquehanna Railroad, from the Susquehanna River near Owego to Ithaca, New York, 34.41 miles, all in the State of New York. This road has its own equipment.

"New York, Lackawanna and Western Railroad Company in Pennsylvania, 6.41 miles, equipped by the D., L. & W. R. R. Co.

"New York, Lackawanna and Western Railroad Company in New York, 207.79 miles, all in New York. This road has its own equipment.

"Greene Railroad, from Chenango Forks to Greene, New York, 8.10 miles, all in New York. The entire freight equipment of this road is furnished by the D., L. & W. R. R. Co.

"Utica, Chenango and Susquehanna Valley Railroad Company, from Greene, N. Y., to Utica, N. Y., 75.66 miles, with branch to Richfield Springs, 21.75 miles. Total, 97.41 miles, all in New York. The entire freight equipment of this road is furnished by the D., L. & W. R. R. Co.

"Oswego and Syracuse Railroad, 34.98 miles, all in New York. This road has its own equipment.

"Morris and Essex Railroad, 119.85 miles, all in New Jersey. This road has its own equipment.

"Morris and Essex Extension, 1.91 miles, all in New Jersey. No equipment of its own.

"Passaic and Delaware Railroad, 13.99 miles, all in New Jersey. No equipment of its own.

"Chester Railroad, 10.02 miles, all in New Jersey. No equipment of its own.

"Newark and Bloomfield Railroad, 4.24 miles, all in New Jersey. No equipment of its own.

"The D., L. & W. R. R. Co. also, by reason of the ownership of a majority of the stock, controls the Syracuse, Binghamton and New York Railroad, 81 miles in length, all in New York; and the Sussex Railroad, 29.52 miles, in New Jersey. The last two roads have their own equipment.

"The total miles of railroad owned, leased, or controlled and operated by the Delaware, Lackawanna and Western Railroad Company is 891.41, of which 217.15 miles are in Pennsylvania, and 673.66 in New York and New Jersey. The total equipment owned by the Delaware, Lackawanna and Western Railroad Company was inventoried December 31, 1889, at \$8,134,823. This equip-

ment was used upon the entire system interchangeably with the equipment of such of the leased and controlled roads mentioned as possessed their own equipments—that is to say, the leased equipment of roads in other States was used in Pennsylvania, and that owned by the Delaware, Lackawanna and Western Railroad Company was used in other States. It is difficult to determine precisely what should be considered the equipment of the roads in Pennsylvania and what the equipment of the roads outside of Pennsylvania. But we believe it would be fair to divide the aforesaid valuation of equipment owned by the company as follows, viz:—

"Value of equipment for operating the roads in Pennsylvania, \$5,075,342.

"Valuation of equipment owned by Delaware, Lackawanna and Western Railroad Company, for use of its roads outside of Pennsylvania, \$3,059,481.

"The Delaware, Lackawanna and Western Railroad Company owns real estate outside of Pennsylvania located and valued as follows, viz: Binghamton, New York, \$23,905.52; Buffalo, New York, \$304,790.28; New York City, \$201,418.48; Rochester, New York, \$23,185.03; Chicago, Illinois, \$51,740.60; Staten Island, New York, \$1,609.35; Utica, New York, \$50,388.05; ore lands in New Jersey, \$40,120.11; Syracuse, New York, \$20,083.86. It also owns vessels, barges, and tugs, built, registered, and used wholly outside of Pennsylvania, of the value of \$156,526.17.

"(3) The road owned by the Delaware, Lackawanna and Western Railroad Company in Pennsylvania was built primarily for the purpose of transporting to markets outside of the State the products of anthracite coal lands in said State, and the principal business of the railroads owned or leased and operated by said company in Pennsylvania does now, and did in the year 1889, consist chiefly of the transportation of freight and passengers by continuous carriage upon a single way-bill or ticket, from points in Pennsylvania to points in other States, or from points in other States to points in Pennsylvania, or from points in another State passing through Pennsylvania to points in other States. The transportation upon said roads in Pennsylvania of freight and passengers local to Pennsylvania—that is to say, between points both of which are within said State—did not, in the year 1889, exceed say 19 per centum of the entire transportation business conducted upon said roads.

"The ownership, interest, or estate of the Delaware, Lackawanna and Western Railroad Company in the Warren Railroad Company is, and was in the year 1889, of a fair cash value of not less than \$1,000,000. In this estimate we do not include the equipment of the Warren Rail-

road, which is owned by the Delaware, Lackawanna and Western Railroad Company.

"An analysis of the facts shows that of the total miles of railroad, owned, leased, or controlled and operated by defendant in the States of Pennsylvania, New Jersey, and New York, amounting to 891.41 miles, there are in Pennsylvania 217.75 miles, and outside of Pennsylvania 673.66 miles; and that defendant owns the equipment of 147.31 miles of the roads outside of Pennsylvania, the remaining 526.35 miles of road being equipped by the several corporations from which the defendant has leased said roads, or which are controlled by it by reason of its ownership of stock therein.

"As it does not appear from the evidence or findings of facts that the defendant has any of its property represented by its capital stock invested in these 526.35 miles of road, we think they cannot be included in any computation of the proportion of the capital stock not taxable by the State of Pennsylvania. After excluding these, we have a proportion of 217.75 miles in Pennsylvania and 147.31 miles outside of Pennsylvania upon which the equipment is owned by the defendant and is used interchangeably. The total value of equipment owned by defendant we have found to be \$8,134,823, and therefore the portion of defendant's capital stock represented by this sum is taxable only in the proportion thus indicated. It is true that the findings of fact show that the equipment owned by the other roads, leased or controlled by defendant, is used interchangeably upon the roads of said companies and defendant's own road in Pennsylvania, but we think this furnishes no ground for including the mileage of said roads in the apportionment, for if this were done we must necessarily, also, have the value of their equipment which is not given; and it is fair to assume that if their equipment was not used in Pennsylvania there would be a correspondingly larger proportion of the equipment owned by defendant in this State.

"The findings of fact show that the value of the leasehold interest held by defendant in the Warren Railroad is one million dollars. This excludes the idea that any larger proportion of capital stock of defendant is represented by said leasehold interest or is invested in said road, and therefore the only exemption which can be conferred upon defendant's capital stock is the exemption of one million dollars of its capital stock. In arriving at these proportions, we assume the value of the assets to be the same as the par of the capital stock, the tax being levied on the basis of the amount of dividend declared, and not upon the appraisement.

"The legal questions here involved are practically the same as some of those which were considered in the case of the Commonwealth v.

The Pennsylvania Company, June T., 1889, of Dauphin County, Common Pleas [pending in Supreme Court], and for the reasons there given, which we need not here repeat, we think that the amount of the capital stock of defendant, represented by the value of its equipment, should be apportioned for taxation according to the proportions, 217.75 miles taxable and 147.31 miles not taxable, and that the amount of its capital which represents the value of its interest in the lease of the Warren Railroad, as well as the amount which represents its investments in real estate outside of the State of Pennsylvania, and the amount which represents its investments in vessels, barges, and tugs, built, registered, and used wholly outside of Pennsylvania, are exempt from taxation by the State of Pennsylvania.

"We embody these results in the following

"CONCLUSIONS OF LAW.

"(1) Defendant is not liable to taxation by the State of Pennsylvania on so much of its capital stock as is represented by the value of its leasehold interest in the Warren Railroad; and the settlement hereby appealed from, so far as it taxes said investment, is erroneous and illegal.

"(2) Defendant is liable to taxation by the State of Pennsylvania only on $\frac{147.31}{891.41}$ parts of the whole amounts of its capital stock invested in equipment, this being the proportion which the number of miles operated and equipped by it in Pennsylvania bears to the whole number of miles operated and equipped by it, and the settlement appealed from, so far as it taxes any greater amount of capital so invested, is erroneous and illegal.

"(3) Defendant is not liable to taxation by the State of Pennsylvania on so much of its capital stock as is represented by the value of the real estate owned by it outside of Pennsylvania, and the settlement appealed from, so far as it taxes said amount, is erroneous and illegal.

"(4) Defendant is not liable to taxation by the State of Pennsylvania on so much of its capital stock as is represented by the value of the vessels, barges, and tugs owned by it, which were built and are registered and used wholly outside of the State of Pennsylvania, and the settlement appealed from, so far as it taxes said investments, is erroneous and illegal.

"(5) Defendant having paid to the treasurer of the State of Pennsylvania the whole amount of tax legally due on the settlement appealed from, judgment is directed to be entered in favor of the defendant if exceptions be not filed within the time limited by law."

Exceptions were filed to the foregoing findings by both parties. The only one sustained which affects the questions raised on this appeal was the following, filed by the Commonwealth: "The

company defendant is a domestic corporation, having been chartered by the Act of March 11, 1853 (P. L. 163), which Act, together with the Acts therein referred to, and the supplements thereto, is made a part of this finding of fact."

Judgment was accordingly entered in favor of the defendant; whereupon the Commonwealth appealed, assigning for error the overruling of several exceptions filed by it to the findings of the Court.

James A. Stranahan, deputy attorney-general (*William U. Hensel*, attorney-general with him), for the appellant.

This appeal raises two questions:—

(1) Whether the capital of a domestic corporation invested in equipment used interchangeably on its main line in this state, and its leased lines in other states, is exempt from taxation by this State; and—

(2) Whether a domestic company is entitled to any exemption from the tax on its capital stock by reason of leasehold interests in foreign roads, none of the capital of the company being invested in said leases, but the company having proved that the lessee's interest was worth a sum—in this case \$1,000,000.

The decision of the lower Court allowing the exemption asked for in each case is opposed in principle to the case of—

Comm'th v. Standard Oil Co., 101 Pa. 119.

Prior to the decision in that case (101 Pa. 119) the Courts had never been asked to apportion the capital stock tax, except in cases of railroad companies or companies of like nature which had been chartered by two States and whose capital stock was invested in a line of works lying in the two States. As these companies owed their existence but partially to this State, and had but part of their capital stock invested in works which the grant by this State authorized them to build, the Courts, from comity or necessity, held that the company should pay tax only on such part of its capital stock as had been invested in this State under the authority of the grant from this State, and where no objection was raised by either party, it was assumed that the mileage basis furnished a fair measure of the capital thus employed.

Comm'th v. Bridge Co., 9 Am. L. Reg. (O. S.) 298.

Comm'th v. C. P. & A. R. R. Co., 29 Pa. 370.

Pitts. Ft. W. & C. Ry. Co. v. Comm'th, 66 Id. 73.

Comm'th v. P. & C. R. R. Co., 2 Pearson, 389.

No. Cent. Ry. Co. Case, 2 Leg. Opin., No. 24.

The Standard Oil Company was a foreign corporation, and the first case which allowed any apportionment of the capital stock tax of a purely domestic corporation was—

Comm'th v. Penna. Coal Co., 41 Leg. Int. 125; affirmed by Supreme Court, and unreported.

That case decided that when any part of the

assets of a domestic corporation was invested in real estate outside the State or in government bonds, the capital stock of such company was exempt from taxation to that extent, for the reason that this State had no power to tax it. This seemed such a departure from the previous practice that the Court hedged its decision about with these words: "This decision is expressly restricted to the tax on capital stock and to capital stock representing tangible property situated without the State and there employed for corporate purposes. Its language must be understood as used in reference to the question decided."

The universal understanding of the principle on which the cases of the Standard Oil Co. and the Penna. Coal Co. were based, has been that in the case of a foreign corporation only so much of its capital was taxable as can be shown to have been brought within the confines of this State, while in the case of a domestic corporation only such portion of its capital stock is exempt as is shown to be beyond the taxing power of the State. In other words, in the case of a domestic company the burden is on the company to show that the State cannot tax a part of the capital; in the case of a foreign corporation the burden is on the State to show what it can tax.

The question of exemption in the case of a domestic corporation is a question of power, not of comity or equitable adjustment. The intention of the State is to tax the whole capital stock of every company created by it, and exemption begins only where power to tax ceases.

(1) In the present case, as all the equipment is used in this State and none of it permanently located elsewhere, the State has the power to tax it.

The situs for taxation of the equipment of a railroad company is the domicile of the company.

B. & O. R. R. Co. v. Allen, 17 A. & E. R. R. Cas. 464.

Pacific R. R. v. Cass Co., 53 Mo. 17.

Orange & A. R. R. Co. v. Alexandria, 17 Gratt. 176.

Hays v. Pacific Mail S. S. Co., 17 How. 596.

St. Louis v. Ferry Co., 11 Wall. 423.

Sangamon & Morgan R. R. Co. v. Morgan Co., 14 Ill. 163.

Wilkey v. City of Pekin, 19 Ill. 160.

Ontario Bank v. Bunnell, 10 Wend. 187.

Burroughs on Taxation, 186.

Cooley on Taxation, 273.

Comm'th v. Standard Oil Co., 101 Pa. 119, 149.

Comm'th v. Amer. Dredging Co., 122 Id. 386.

There is no real conflict between *Pullman's Palace Car Co. v. Comm'th* (107 Pa. 156) and the decisions quoted above. That case decided merely that where there is no other basis for determining what proportion of a foreign transportation company's capital stock is within this State, the value of its rolling stock habitually used here may be taken as the basis.

We do not deny that a State can tax capital represented by rolling stock of a foreign corporation doing business within the State, but we do claim that the State creating a corporation is not debarred from taxing that part of its capital invested in rolling stock because the cars and engines run in and out of the State continually; and we claim that under the decision in the American Dredging Company Case (122 Pa. 386) the reason for levying the tax is all the stronger since it is not alleged that this property is taxed in any other jurisdiction.

(2) Leasehold interests in real estate are but chattels, and are properly taxable at the domicile of the lessee.

It is not claimed that any of the defendant's *capital stock* was ever invested in the Warren Railroad Company. In fact it is difficult to see how capital stock can be *invested* in a lease, unless the lease had been purchased from some former lessee for a cash consideration and the lease then assigned, which is not the case here. This leasehold, if it has in fact the value put upon it, represents, not the *capital stock* of the defendant, which never entered into it, but part of its surplus account. It is a book asset, not actual tangible property, and it will be noticed in this case that the Court in ascertaining what proportion this item bore to the capital of the company defendant, "assumed" that the par of the capital stock represented the total capital of the defendant, whereas it is in fact only slightly over one-half of its total assets.

No authorities have been found directly in point, but the case most nearly resembling this is—

State v. Honsatonic R. R. Co., 7 A. & E. R. R. Cas. 238.

See also Archer v. R. R. Co., Id. 249; 102 Ill. 493. *M. E. Olmsted*, for the appellee.

Where rolling stock is used continuously upon a line extending into two or more States, neither State can tax to the full extent, but each is entitled to a fair proportion.

Pullman's Palace Car Co. v. Comm'th, 107 Pa. 156; 141 U. S. 18.

Pullman's Palace Car Co. v. Twombly, 29 Fed. Rep. 658.

By the terms of the agreement of October 1, 1857, between the Warren Railroad Co. and the Delaware, Lackawanna and Western R. R. Co., which is made part of the findings of fact by the Court below, the Warren Company conveyed to defendant all of its property—

To have and hold the said railroad, lands, road-bed, superstructures, buildings, and fixtures, with all and singular, the hereditaments and appurtenances thereto, belonging, or in anywise appertaining, unto the said parties of the second part, their successors and assigns, with all the rights, privileges, immunities, and franchises, for the full, free, and uninterrupted use and enjoyment of the same, as fully, to all intents

and purposes, as the same are vested in, or might be exercised by the said party of the first, for and during the full term and continuance of the legal existence of the said the Warren Railroad Company, yielding and paying for the same the amount and in the manner hereinafter stipulated.

As the charter of the Warren Railroad Company is perpetual, this conveyance amounts to a fee simple. This road, which lies wholly in New Jersey, is actually taxed and lawfully so, to the full extent of its value, by the State of New Jersey. Our tax laws do not contemplate the imposition of a tax by this State upon property which is lawfully taxable in other States. A tax on capital stock is a tax on property.

Comm'th v. Standard Oil Co., 101 Pa. 119.

Comm'th v. Amer. Dredging Co., 122 Id. 386.

A lease which is perpetual or which may be made perpetual at the option of the lessee, conveys an estate of freehold, practically in fee simple.

Caldwell v. Fulton, 31 Pa. 475.

Sanderson v. Scranton, 105 Id. 469.

D. L. & W. R. R. Co. v. Sanderson, 109 Id. 583.

Cincinnati College v. Yeatman, 30 Ohio St. 276.

June 12, 1891. *PER CURIAM*. We are unable to see that the ruling of the Court below is in conflict with *Com. v. Standard Oil Company* (101 Pa. 119). That company is a foreign corporation, and it was held that it was not the intention of our taxing Acts to tax the whole capital stock of such corporations doing business within this Commonwealth, irrespective of the place of its investment, but to tax the property of such company, that is to say, its capital stock, to the extent that it brings such property within the State in the transaction of its business. This is the only equitable rule which will secure to the Commonwealth its fair proportion of tax and yet enable such corporations to carry on their legitimate business. For if a corporation having its *situs* in our State and transacting business in every other State of this country can be taxed in each State to the full amount of its capital stock, the result is confiscation.

The defendant here is a domestic corporation, and it was contended that its capital invested in equipment used interchangeably on its main line in this State and its leased lines in other States is not exempt from taxation in this State. The Court below held otherwise, and from this decision the Commonwealth has appealed.

It is true that the *situs* of a domestic corporation is in this State, and that for many purposes the domicile of the person, whether natural or artificial, draws to it the personal property belonging to such owner. That this is so as to such intangible property as is not the subject of taxation elsewhere, such as money at interest, may be conceded. But for the purposes of taxa-

tion tangible personal property has a *situs* wherever it may be found. Hence it was held in *Pullman's Palace Car Company v. The Commonwealth* (107 Pa. 156), the said company being a foreign corporation, that the proportion of the capital stock of the company invested and used in Pennsylvania is taxable here, and that the amount of the tax may be properly ascertained by taking as a basis the proportion which the number of miles operated by the company in this State bears to the whole number of miles operated by it, without regard to the question where any particular car or cars were used. This Court saying in its opinion: "They (the cars) are operated within this State. They are daily passing from one State to the other. They are used in performing the functions for which the corporation was created. The fact that they were also used and operated in other States cannot wholly exempt them from taxation here." This case has recently been affirmed by the Supreme Court of the United States, although the report of the case has not yet reached us. [141 U. S. 18.] On the other hand, we held in *Com. v. American Dredging Company* (122 Pa. 386) that the dredges, which were the subjects of the controversy, were taxable at the *situs* of the company, for the reason that, although wholly used outside of the Commonwealth, they did not remain in any one place long enough to render them liable to taxation there. This Court saying in its opinion: "From the nature of the business it is in one place to-day and in another to-morrow, and hence not taxable in the jurisdiction where temporarily employed. It follows that if not taxable here it escapes altogether."

It may be that in the case of a domestic corporation the Commonwealth would have the power to tax its entire capital stock, no matter where found, nor how invested, and notwithstanding that the whole or the greater portion of its stock was invested in tangible property located and used in other States, and liable to taxation by the laws of those States. But the Commonwealth is not a bandit with a pistol at the throat of every property owner. On the contrary, she imposes no greater burdens than the necessities of the State require, and she endeavors, at least, to impose those burdens in as equitable a manner as the wisdom of the Legislature and the difficulties of the subject admit.

We do not think it was error for the learned Court below to hold that the defendant was not liable to taxation by this State on its interest in the Warren Railroad. That road is wholly outside of the State, and whatever the defendant's interest therein may be it is liable to taxation by the State of New Jersey. We think it comes within the principles above indicated.

Judgment affirmed.

A. B. H.

Jan. '91, 210.

March 25, 1891.

Gillmer v. Daix et al.

Will—Construction of—Fee simple title—Equity—Specific performance—Attempted restraint on alienation of fee simple by subsequent words in will void.

A fee is not to be taken away by words of doubtful meaning.

Testator provided as follows: I give and bequeath to my son G. all my real and personal estate. Should he die without leaving to any person, then to my brother R. during his life, after his death to all the children and grandchildren of my sister-in-law L.:

Held, that a fee simple was given G. by the first sentence of the will, and that the second sentence could not cut down the estate already given. Viewed as an expression of the testator's desire that G. shall make a will and leave the property to some one, the second sentence is precatory; and regarded as a condition that G. shall make a will, it is void as an attempted restraint on the alienation of a fee.

Appeal of Augustus F. Daix and Augustus F. Daix, Jr., copartners, trading as A. F. Daix & Son, agents, defendants, from the decree of the Common Pleas No. 4, of Philadelphia County, granting the relief prayed for in a bill in equity filed by Mauricio W. Gillmer, for the specific performance of a contract for the sale of land.

The bill set forth the following facts: (1) Margaret J. Gillmer in her lifetime was seised in fee, *inter alia*, of all that certain lot (described). (2) Being so seised she died February 23, 1887, having first made her last will and testament, dated August 5, 1886, duly proved, registered, etc., whereby she devised said premises unto Mauricio W. Gillmer, her son, the said plaintiff, in fee. (3) The language of the will is as follows:—

NORTH WALES, August 5th, 1886.

I, Margaret J. Gillmer, widow of the late John Smith Gillmer, of Bahia, Brazil, being of sound mind, do hereby declare and pronounce this to be my last will and testament.

Item. I give and bequeath to my son Mauricio Wanderly Gillmer, all my real and personal estate. Should he die without leaving to any person, then to my brother William T. Ray, during his life, after his death to all the children and grandchildren of my sister-in-law, Margaret Smith Lock, of Tennessee. The paper that I have given to my brother William T. Ray I want to remain as it is.

MARGARET JANE GILLMER.

(4) The paper referred to in said will is as follows:—

I hereby agree that any sum realized from the sale of my property at Sixty-first and Vine streets, over and above \$40,000, after paying the present mortgage on the same of \$9500, shall be the property of my brother W. T. Ray, providing the net sum realized does not exceed \$55,000; should it exceed that sum then any additional

amount received shall be equally divided between my brother and myself.

MARGARET J. GILLMER.

NORTH WALES, October 28, 1877.

(5) William T. Ray, mentioned in said will, died April 22, 1890, unmarried and intestate.

(6) Being advised that under the will he became seised of an estate in fee simple in said premises, plaintiff made with the defendants an agreement of sale, of which the following is a copy:—

This agreement . . . witnesseth, that the said Mauricio W. Gillmer, for the consideration hereinafter mentioned, doth hereby for himself and for his executors, etc., covenant and agree with the said Augustus F. Daix, etc., that he, the said Gillmer, will, on or before the first day of October, 1890, at the cost of the said Daix, etc., by a good and sufficient deed of conveyance, grant and convey unto Daix, etc., all that certain lot of ground situate (lot described). And the said Daix, etc., hereby covenant, promise, and agree with the said Gillmer, etc., that they, the said Daix, etc., shall and will pay unto the said Gillmer, etc., the sum of forty thousand dollars in manner following, viz., The sum of ten thousand dollars at the time of the execution of the deed, and the balance of said purchase-money, viz., thirty thousand dollars to be secured by a first or purchase-money mortgage, together with a bond and warrant, which bond and warrant will bear interest at the rate of five and three-tenths per cent. per annum, and to be payable within five years from its date.

In witness, etc.

(7) Plaintiff, in fulfilment of said agreement, has executed and offered to deliver to said Daix, etc., the defendants, and has offered to execute and deliver to such person or persons as they, the said defendants, may direct, a fee simple deed in the usual form for the said premises, but the defendants have refused to receive the same in execution of the said agreement, alleging that the said plaintiff does not, under the said will, show a good title in fee simple in himself to the said premises.

The bill prayed a decree (1) that the plaintiff does take a fee simple estate in the premises described in the bill, and that the attempted restraint on alienation of said fee simple implied in the subsequent words in said will, is void and of no effect. (2) That the defendants be ordered and decreed to fulfil their contract of purchase set forth in the bill, and that they pay all costs in this case.

The answer admitted paragraphs 1 to 5 of the bill, and admitted the agreement and tender, but set up that under the will the plaintiff did not become seised in fee, and hence could not make a good title as required by the agreement; and further alleged willingness on the part of the defendants to carry out the agreement upon a good title in fee being assured to them.

The cause was heard on bill and answer on December 6, 1890, and on December 13, 1890,

the Court entered the following decree: And now, to wit, December 13, 1890, this case came on before this Court, and was argued by counsel on bill and answer, whereupon it is considered, ordered, and decreed that the complainant, Mauricio W. Gillmer, does take a fee simple estate in the premises described in the said bill under the will of his deceased mother, and that the attempted restraint of alienation on said fee simple by the subsequent words in said will is void and of no effect, and that the defendants are ordered and decreed to fulfil their contract of purchase set forth in said bill, and that they pay the costs in this case.

Whereupon the defendants took this appeal, assigning for error the decree of the Court.

James W. Laws, for appellants.

Plaintiff takes but a life estate under his mother's will, with a power of appointment by will; upon failure to exercise this power, a remainder for life and then in fee is limited to others. There is an entire absence of any intention, express or implied, that the plaintiff should have the power to dispose of the estate or consume it in his lifetime. This construction does violence to no part of the will, but gives effect to all the provisions. If possible, every will must be construed so as to give effect to all the clauses.

France's Estate, 75 Pa. 225.

The will shows upon its face that it was written by the testatrix without the advice of counsel, so that its terms are to be given a popular meaning rather than a technical one.

The words "should he die without leaving to any person," taken alone, would indicate the intention of the testatrix to confer upon her son, by implication, a power of appointment by will. And the words "die" and "leaving" would indicate that she contemplated and intended that her son should enjoy his estate until his death; but there is an entire absence of any intention, express or implied, that he should have the power to dispose of or consume the estate in his lifetime.

Furthermore, testatrix provides in the most unequivocal terms what disposition shall be made of the property upon the failure of her son to dispose of it in the one manner in which she has, by necessary implication, given him the power, and she directs that her estate shall go to her brother for life, with remainder over in fee to her other relatives.

The words of the will, "I give and bequeath to my son all my real and personal estate," do not convey a fee.

Fox's Appeal, 99 Pa. 382.

This case is to be distinguished from one in which there is a clear intention to devise a fee

and then an attempt to restrain its alienation. Here there is no express gift of the fee, neither is there any attempted restraint of alienation.

The Act of April 8, 1833 (§ 9, P. L. 249, *Purd. Dig.* 1711, pl. 10), provides that—

All devises of real estate shall pass the whole estate of the testator in the premises devised, although there be no words of inheritance or of perpetuity, unless it appear by a devise over, or by words of limitation, or otherwise, in the will, that the testator intended to devise a less estate.

If the gift to the appellee without words of limitation or perpetuity with an express devise over would vest in him a life estate, a power of appointment engrafted on it will not enlarge it to a fee.

4 *Kent's Com.* 319.

Dodson v. Ball, 60 Pa. 492.

Yarnall's Appeal, 70 Id. 342.

Joseph Mellors, for appellee.

Under the Act of April 8, 1833, § 9 (*supra*), the first sentence of the devise vested in the plaintiff a fee.

Fox's Appeal (99 Pa. 382), relied upon by the appellants, is not in point, the words of the will in that case—"She at no time to give or bequeath any portion of said estate out of my family, as at her decease I wish my estate which remains to go to my nephews and nieces which may be living at that time"—clearly showing an intention to give but a life estate, though preceded by the words, "I do give and bequeath to my beloved wife all my real and personal estate."

The second sentence of the will in question implies a wish that the testatrix's son might not die intestate should he not part with the property in his lifetime.

The words "Should he die without leaving to any person," do not indicate at all the intention of the testatrix to confer upon her son a power of appointment by will; but, on the contrary, they recognize that he has a power of devise by virtue of the quantity of estate he takes; and if he has a power of devise, then, of course, he has a fee.

A power of alienation is necessarily inseparable from an estate in fee.

Karker's Appeal, 60 Pa. 141.

4 *Kent*, 131 to 135.

McWilliams v. Nisly, 2 S. & R. 513.

Schermerhorn v. Negus, 1 *Denio*, 448.

A general restraint of alienation when an-

nexed to an absolute estate is void, upon the familiar principle that conditions repugnant to the estate to which they are annexed bind not.

Jaureche v. Proctor, 48 Pa. 466, 472.

A devise of an estate generally or indefinitely with a power of disposition over it, carries a fee.

Church v. Disbrow, 52 Pa. 219.

A gift over, if the devisee or legatee does not dispose of his interest or *dies intestate*, is void both as regards realty and personality.

Theobald on Wills, 2d ed., p. 460, citing—

Holmes v. Godson, 2 Jur., N. S. 383; 25 L. J. Ch. 317.

Barton v. Barton, 3 K. & J. 512.

Lightbourne v. Gill, 3 B. P. C. 250.

Re Mortlock's Trusts, 3 K. & J. 456.

Re Valden, 1 D. M. & G. 53.

Watkins v. Williams, 3 Mac. & G. 622.

Henderson v. Cross, 29 B. 216.

Perry v. Merriitt, 18 Eq. 152.

In re Wilcocks's Settlement, 1 Ch. D. 229.

April 13, 1891. *PER CURIAM*. We agreed with the learned Judge below that Mauricio W. Gillmer took a title in fee simple under his mother's will to the real estate described in the bill. The language of the will is as follows:—

"*Item*. I give and bequeath to my son Mauricio Wanderly Gillmer, all my real and personal estate. Should he die without leaving to any person, then to my brother, William T. Ray, during his life, after his death to all the children and grandchildren of my sister-in-law, Margaret Smith Lock, of Tennessee. The paper that I have given to by brother, William T. Ray, I want to remain as it is."

The first sentence above quoted gives a fee to her son. So much is clear. The second is not clear, and upon this ground alone we might affirm this case, as a fee is not to be taken away by words of doubtful meaning. The most that the writer can make of the second sentence is that it is an expression of the testator's desire that her son shall make a will and leave the property to some one. This, if so, would be precatory—the mere expression of a wish. If, however, we regard it as a condition that he shall make a will, the condition is void under all the authorities. In any view we think the decree is free from error.

The decree is affirmed, and the appeal dismissed at the costs of the appellants.

A. R. H.

WEEKLY NOTES OF CASES.

VOL. XXVIII.] FRIDAY, OCT. 16, 1891. [No. 26.]

Supreme Court.

Oct. '91, 37.

January 12, 1891.

Commonwealth ex rel. Tate v. Bell.

Habeas corpus—Practice—Delegate election—Nominating convention—Bribery—Contempt of Court—Act of May 23, 1887—Art. III., sec. 32, of Constitution.

When a relator, in his petition for a writ of habeas corpus, sets out that he was adjudged guilty of contempt of Court on refusing to testify as a witness, and sentenced to pay a fine and undergo imprisonment, this Court will not consider an objection to the return of the sheriff that the commitment does not set out the contempt or the facts showing the jurisdiction of the Court.

When a person is committed for contempt of Court for refusing to testify in a case where a third person has been indicted for bribery, the question of the sufficiency of the indictment against such third person, or whether the acts charged therein constitute an indictable offence, will not be examined into on a hearing on the writ of habeas corpus.

Delegate elections and nominating conventions are a necessary part of our representative and elective system, and as such they are recognized and, to some extent, guarded and regulated by law. Bribery of delegates to nominating conventions is a fraud upon our elective system.

Under the Act of May 23, 1887 (P. L. 161), which provides that any competent witness, except defendants actually upon trial in the criminal Court, may be compelled to testify in any proceeding, civil or criminal, but he may not be compelled to answer any questions which, in the opinion of the trial Judge, would tend to criminate him, the trial Judge is the proper person to determine whether any particular question is one tending to criminate the witness.

Art. III., sec. 32, of the Constitution provides as follows:—

"Any person may be compelled to testify in any lawful investigation or judicial proceeding against any person who may be charged with having committed the offence of bribery or corrupt solicitation, . . . and shall not be permitted to withhold his testimony upon the ground that it may criminate himself, . . . but such testimony shall not afterwards be used against him in any judicial proceeding except perjury, . . . and any person convicted of either of the offences aforesaid, shall . . . be disqualified," etc.

Held (1) In construing a Constitution its words should be taken in their popular, natural, and ordinary meaning rather than in any technical or restricted sense.

(2) That the captions of such an instrument are merely intended to indicate the general character of the articles to which they are prefixed.

(3) The words "offence of bribery" employed in this section mean all bribery, whether bribery at common law, or under the Constitution itself, or any kind of statutory bribery.

Habeas corpus, issued from the Supreme Court, wherein John R. Tate was relator, and Samuel W. Bell, sheriff and keeper of the common jail of Lawrence County, was defendant.

The following is a copy of the relator's petition for the writ:—

"The petition of John R. Tate respectfully represents that on the 15th day of December, 1890, at No. 8 September Session of the Court of Quarter Sessions of Lawrence County, there was pending and undetermined an indictment against one William D. Wallace, wherein it was charged:

"First. That the said William D. Wallace did on the 3d day of July, 1890, unlawfully, and corruptly promise and agree to give to the said John R. Tate and others, electors and delegates to a nominating convention, convened for the nomination of a candidate for congress in the Twenty-fifth Congressional District, certain gifts or rewards, to wit, a large sum of money, to wit, \$1200, in consideration that the said John R. Tate and others, electors and delegates aforesaid, would give and cast their votes in said convention for the nomination of Alexander McDowell as a candidate for the office of congress aforesaid; the said Alexander McDowell being a candidate for said nomination.

"Second. That said William D. Wallace did on the same day unlawfully and corruptly solicit, encourage and request the said John R. Tate and others to receive and accept said sum of money as a bribe and pecuniary reward to induce and influence them to make and join in the nomination of said Alexander McDowell as a candidate for said office.

"That on the same 15th day of December, 1890, at No. 11 September Session of said Court, there was pending and undetermined an indictment charging: First. That your petitioner, John R. Tate, elector and delegate in the convention aforesaid, did on the 3d day of July, 1890, unlawfully, wickedly and corruptly accept and receive from said William D. Wallace, and divers other persons unknown, friends of Alexander McDowell, a candidate as aforesaid, a certain gift or reward in money, to wit, the sum of \$650, under an agreement and promise that he, the said John R. Tate, elector and delegate as aforesaid, in said convention, would give his vote for the nomination of said Alexander McDowell as the candidate aforesaid. And that John R. Tate did on the same day unlawfully, wickedly and corruptly accept and receive the promise of said William D. Wallace and other persons unknown, friends of said Alexander McDowell, that he, the said John R. Tate, should thereafter receive a certain

gift or reward in money, to wit, the sum of \$650, if he, the said John R. Tate, would give his vote in said nominating convention for the nomination of said Alexander McDowell.

"And, second. That said John R. Tate, afterwards on the same day in pursuance of said unlawful, wicked, and corrupt agreement and promise did give his vote for the nomination of said Alexander McDowell, and did thereupon unlawfully, wickedly, and corruptly accept and receive from said William D. Wallace, and others unknown, said gift or reward in money, to wit, the sum of \$650.

"And, third. That on the same day said John R. Tate did unlawfully, wickedly and corruptly offer and agree with the said William D. Wallace and others, unknown friends of said Alexander McDowell, to give his vote at said nominating convention to said Alexander McDowell, in consideration, that for his said vote for said Alexander McDowell, he, the said John R. Tate, should receive a gift or reward in money, to wit, the sum of \$650.

"And, fourth. That on the same day said John R. Tate, a delegate elected from Beaver County, and acting as a delegate in said convention, unlawfully, wickedly, and corruptly did solicit, accept and receive from said William D. Wallace, and others unknown, a certain bribe in money, to wit, the sum of \$650, to induce and influence him, the said John R. Tate, to make and join in the nomination for said office of said Alexander McDowell.

"And, fifth. That on the same day the said John R. Tate, acting as a delegate in said convention, did unlawfully, wickedly, and corruptly solicit, accept, and receive from said William D. Wallace and others unknown, a certain bribe in money, to wit, the sum of \$650, to induce and influence him, the said John R. Tate, then and there to make and join in the nomination for said office of said Alexander McDowell.

"That on the said December 15, 1890, the said William D. Wallace being on trial before the Honorable A. L. HAZEN, President Judge, and his associates and jury, in the county of Lawrence aforesaid, upon the indictment first above mentioned, your petitioner, John R. Tate, was called as a witness in behalf of the Commonwealth against said William D. Wallace, and being duly sworn was inquired of by the acting district attorney as follows:—

"Q. State, Mr. Tate, whether you ever heard the defendant in this case, Mr. Wallace, talk about drawing a check at any time during the nominating convention held in this city?

"Q. State whether you ever heard him make any offers or promises of money to Thomas J. Downing and Edwin Shaffer, in connection with any other person, in case they would vote for Major McDowell?

"Q. Did you have any conversation with William D. Wallace about how you should vote that day?

"Q. State whether Mr. Wallace had any packages of envelopes there that day with money in them?

"Q. State whether Mr. Wallace offered any money to Thomas J. Downing and Edwin Shaffer, in connection with any other parties?

"Q. Was he soliciting you to vote for Major McDowell at the times you were in his office?

"Q. At the times you were in his office, on the last day of the convention, did he offer you, Downing, or Shaffer, any money as an inducement in case you would vote for Major McDowell, and, if so, how much?

"Q. Didn't you, when you were asked in the grand jury at the last term of Court, whether Mr. Wallace had offered you \$1200, yourself, Tate, Shaffer, and Downing, the last day of the convention, and didn't you answer that question and say he had?

"Q. Mr. Tate, state whether you ever heard Mr. Wallace talk about drawing a check at any time during the last nominating convention?

"Q. State whether you know or heard of Mr. Wallace offering to anybody any money there in his office that day?

"Q. State whether or not Mr. Wallace said anything about drawing a check for any persons in case they would vote for Major McDowell, and, if so, how much, and to whom?

"Q. Was he soliciting you to vote for Major McDowell at the times you were in there in his office?

"Q. State, Mr. Tate, whether Mr. Wallace, at the time you were in there on the last day of the convention, offered you, Downing, or Shaffer any money in case you would vote for Major McDowell, and, if so, how much, as an inducement to influence you to vote for Major McDowell?

"Q. Going back to the time that you and Mr. Downing and Mr. Shaffer met Mr. Wallace coming up street, state whether you went into a side street together?

"Q. You have stated you were in the office of Mr. Wallace the final day of the convention; was there anything said to you by Mr. Wallace that day as to your vote for Major McDowell?

"Q. Did Mr. Wallace say anything to you about voting for Major McDowell on the third ballot that afternoon?

"Q. State, Mr. Tate, whether Mr. Wallace offered you, Thomas Downing and Edwin Shaffer, \$1200 in case you would vote for Major McDowell that afternoon on the third ballot?

"Q. Did he say anything to you about voting for Major McDowell that afternoon?

"To which several questions your petitioner declined to make answer, stating to the Court as

the reason for his refusal to answer, that his answers would tend to criminate him and that he had been so advised by his counsel. Whereupon the President Judge required and directed said John R. Tate, your petitioner, to answer said several questions, stating to him that his answer could not be used against him in any criminal proceeding against him. But your petitioner still refusing to answer, for the same reason above stated, and also under the advice of his counsel, the Court, on December 16, 1890, adjudged him guilty of contempt, and committed him to the common jail in custody of the sheriff, until such time as he would purge himself of the contempt.

"Your petitioner was imprisoned in the common jail in the custody of the sheriff until December 17, 1890, when he was, by the direction of the Court, brought into Court, and being inquired of by the President Judge, whether he still persisted in his refusal to answer the several questions aforesaid, answered that he did, for the same reasons before stated, whereupon he was remanded to said jail. And in the afternoon of the same day being again by the direction of the Court brought into Court, he, through his counsel, stated to the Court, that he in refusing to answer the questions asked him on the part of the Commonwealth in the case of Commonwealth versus William D. Wallace, at No. 8, September Sessions, 1890, and for which refusal he has been convicted of contempt by your Honorable Court, had in such refusal no purpose or intention of contumacy or of interfering with or preventing the course of justice; on the contrary, he said, that he is indicted in the same Court, at No. 11, September Sessions, 1890, for the alleged offence of receiving bribes, offering to accept and receive bribes from William D. Wallace to give his vote, while a delegate to the same nominating convention charged in the indictment against Wallace, and employed counsel to conduct his defence in said case.

"That his counsel aforesaid had advised and counseled him and he verily believed that an answer to the said questions would tend to criminate him and could be used as evidence against him on the trial of the case against him. And further, he was so advised and verily believes that the course pursued by him as aforesaid was the only means by which he could protect his legal rights in the conduct of his own defence. He further shows to the Court, that with all due respect to your Honor's judgment, he was still advised by his counsel, that in their opinion the said adjudication is erroneous, and that he intends to remove the case to the Supreme Court in order that the said judgment may be reviewed therein. And further, he said, that if the Supreme Court should hold and decide that

he ought to answer said questions, and his answers would not tend to criminate him, and cannot hereafter be used against him, that he would then be willing to answer them. The Court thereupon sentenced your petitioner as follows:—

"And, now, December 17, 1890, the witnesses, Edwin Shaffer, alias Edward Shaffer, Thomas J. Downing, and John R. Tate, are each sentenced to pay a fine of two hundred dollars to the Commonwealth, and each to undergo an imprisonment in the common jail in and for the county of Lawrence until the 10th day of March next, and stand committed to the custody of the sheriff for the purpose of carrying this sentence into effect. By virtue of which your petitioner is now in the said common jail, in custody of Samuel W. Bell, sheriff.

"Your petitioner therefore avers, that he is unjustly restrained of his liberty and confined in the said common jail of the said county of Lawrence, in custody of the said Samuel W. Bell, Esq., high sheriff of said county, as appears by the warrant of commitment, a copy of which is hereunto attached.

"And therefore prays your Honor to grant a writ of habeas corpus directed to Samuel W. Bell, sheriff, to bring before your Honor your petitioner's body to do, submit to, receive and abide by whatsoever your Honor shall consider in that behalf."

Justice CLARK awarded the writ as prayed for and, upon the return of the same, made the following order: And now, December 23, 1890, this writ of habeas corpus having been served and return thereto made by the sheriff of Lawrence County in due form, the further hearing is continued to the second Monday in January next, at 11 o'clock A. M., before the Court in banc in the Eastern District, the proceedings to be duly certified by the prothonotary to the Eastern District, to that end. The relator upon his first entering bail with approved sureties in the sum of \$2500, conditioned for his appearance in the Supreme Court of Pennsylvania on the day and hour aforesaid, and that he remain and not depart without leave, but will abide the order of the Court in the premises, to be discharged from custody, otherwise the relator to be remanded to the custody of said sheriff. Bail having been entered with sureties as required, the relator is discharged from custody.

The matter was heard before the Court in banc on January 12, 1891.

Winternitz and J. Norman Martin (McConahy, S. W. Dana, and M. McConnell with them), for the relator.

James A. Gardner, Special District Attorney (D. B. Kurtz, J. M. Martin, and A. P. Marshall with him), for the Commonwealth.

October 5, 1891. STERRETT, J. In December, 1890, William D. Wallace was on trial in the Court of Quarter Sessions of Lawrence County, on an indictment charging him, in the second count, with offering John R. Tate, Edwin Shaffer, and Thomas J. Downing, electors and delegates to a nominating convention, money as a bribe, and, in the third count, with soliciting, encouraging, and requesting said John R. Tate, Edwin Shaffer, and Thomas J. Downing, delegates to a nominating convention, to receive and accept money as a bribe, to influence them to make and join in nominating a candidate for Congress.

The relator being called and sworn as a witness on behalf of the Commonwealth was asked certain questions which he refused to answer on the ground that his answers would tend to criminate him. Other questions were repeatedly propounded to the witness, and, for the same reason, he refused to answer either of them. The question of privilege claimed by him was then discussed, and after due consideration, the decision of the Court was announced to the witness as follows:—

“The question has been argued in regard to the privilege which you claim, and the Court has announced its decision that the witness must answer the questions asked, but that the answers cannot be used against you in any criminal proceeding.”

The witness having still declined to answer any of the questions propounded to him, the president of the Court, addressing him, said: “Are you aware of the fact, Mr. Tate, that your refusal to answer is contempt of Court, for which you may be punished by imprisonment?” To which he replied in the affirmative. Thereupon, the Court, after referring to the facts, adjudged the relator guilty of contempt and committed him “until such time as he will purge himself of said contempt.” On the following day, the case of the Commonwealth v. Wallace being still on trial, the relator was brought into Court, and being asked if he was then willing to answer the questions which had been propounded to him the day before, replied, “I still claim my privilege,” and refused to testify. The Court, having considered the premises, thereupon (December 17, 1890) sentenced him “to pay a fine of \$200 and undergo an imprisonment in the common jail . . . until the 10th day of March next, and stand committed,” etc.

Afterwards, on December 23, 1890, the relator was brought before our brother CLARK on this writ of habeas corpus issued by him at Chambers, etc., and by his order the hearing was continued to Jan. 12, 1891, before the Court in banc, and an order, admitting him to bail, etc., was made.

As ancillary to this writ of habeas corpus, the record of the criminal case in which the relator

refused to testify was brought before us and referred to, so far as it has any bearing upon the action of the Court of Quarter Sessions in adjudging him guilty of contempt of court, etc.

It is unnecessary to consider any technical objection to the sufficiency of the sheriff's return to the writ of habeas corpus, because, in his petition for the writ, the relator sets forth, *inter alia*, the fact that he was adjudged guilty of contempt of Court in refusing to testify as a witness in the case above referred to; that for said offence he was sentenced by the court to pay a fine of \$200 and undergo an imprisonment in the common jail of Lawrence County until the 10th day of March, 1891, “and stand committed to the custody of the sheriff for the purpose of carrying this sentence into effect. By virtue of which your petition is now in the said common jail in custody of Samuel W. Bell, sheriff.”

Nor is it necessary for us to consider the sufficiency of the indictment which Wallace was called upon to answer, whether it was properly framed or whether the acts charged therein constitute an indictable offence either at common law or by statute. These, and all other matters pertaining to it, were for the Court before whom the cause was being tried, to consider and determine in the first instance. When they come properly before us (if they ever do), after that Court has finally passed upon them, it will be time enough for us to consider them; but we may remark, in passing, that if the acts therein charged are not criminal, no time should be lost in making such acts highly penal. Delegate elections and nominating conventions are a necessary part of our representative and elective system, and as such they are recognized and to some extent guarded and regulated by law. Bribery and corruption in those sources of political and civil power are calculated, in a very high degree, to debauch and demoralize the people and undermine our institutions. Delegates to nominating conventions are the chosen representatives of the political party to which they profess to belong. In representing those by whom they are chosen, such delegates are called upon to discharge the most important duties that pertain to the elective franchise—the selection of proper persons as candidates for offices to be filled by the votes of the people. In many cases, a nomination is equivalent to an election.

Bribery of delegates to nominating conventions is a contemptibly mean fraud upon our elective system, and, as was well said by the present Chief Justice, in *Comm'th v. Walter* (83 Pa. 107), “a fraud upon the ballot is a crime against the nation.”

The relator appears to have been conscious that there was something criminal in the acts laid in the indictment, which, as a witness for the

Commonwealth, he was called to sustain; because, in refusing to answer any question that could have had even a remote bearing on those acts, and many that had none whatever, he assigned as his only reason for such refusal that his answer would tend to criminate himself. Assuming that he honestly believed in the reason thus assigned, he would appear to be more susceptible of crimination than the trial Court supposed he was; for, certainly fully responsive answers to any of the questions that were put to him, by the attorney for the Commonwealth, could not have had the slightest tendency to criminate him. Whether such answers might tend to criminate the defendant on trial, was a matter that concerned only the parties to that case. In a legal point of view, at least, it could not concern the relator.

After the relator's claim of privilege had been considered, and the Court had informed him that he must answer the questions asked, but that his answers could not be used against him in any criminal proceeding, and he still, for the same reason as before, repeatedly refused to answer, what remained to be done? Was his determination, in opposition to the judgment of the Court, to be accepted as a finality, and was the Court powerless to enforce its order in the premises? We think not. If it was, Courts of justice would be at the mercy of contumacious witnesses. It would be in the power of the latter, at any time, to cause a miscarriage of justice. The relator was not the final arbiter of the question, whether his answers to the interrogatories propounded would tend to criminate him. It was the plain duty of the trial Judge to decide that question. Men who are as conscious of extreme susceptibility of crimination as the relator appears to have been, would be badly qualified to decide such questions, especially in their own case. The tenth section of our Act of May 23, 1887 (P. L. 161), provides that "any competent witness, except defendants actually upon trial in the criminal Court, may be compelled to testify in any proceeding, civil or criminal; but he may not be compelled to answer any questions which, in the opinion of the trial Judge, would tend to criminate him." The trial Judge, and not the witness, is therefore the proper person to decide such questions; and it requires no argument to show that if it is his exclusive province to decide, he must necessarily have the power to enforce his decision by punishing the contumacious witness for refusing to obey. It is quite apparent from an examination of the questions which the relator refused to answer that he was contumacious. The following are some of the questions which the relator refused to answer:—

State whether you ever heard Mr. Wallace talk about drawing a check at any time during the convention.

State whether you heard him (Mr. Wallace) make any offers or promises of money to Thomas J. Downing or Edwin Shaffer in connection with any other person, in case they would vote for Major McDowell.

Did you have any conversation with William D. Wallace about how you should vote that day?

State whether Mr. Wallace had any envelopes there that day with packages of money in them.

State whether Mr. Wallace at the time you were in his office on the last day of the convention offered you, Thomas J. Downing and Edwin Shaffer, any money in case you would vote for Major McDowell, and, if so, how much, as an inducement to influence you to vote for Major McDowell?

It is difficult to see how responsive answers to these questions, without more, could have tended to criminate the relator. Suppose, in answer to the last question, relator had said, Yes, he did. At the time and place mentioned he offered each of us \$500 in case we would vote for Major McDowell, and the offer was made as an inducement to thus vote. That answer might tend to criminate the defendant then on trial, but certainly it would not tend to criminate the witness to whom with others the offer was made. It requires something more than the naked fact that the offer was made and the purpose for which it was made. If he had answered the question affirmatively, as above supposed, and had then been asked whether he accepted the offer, the question might or might not, according to circumstances, involve a self-criminating answer. But the question that was put to the witness did not necessarily involve a criminating answer. The action of the relator and other witnesses in refusing to answer questions which, apparently at least, did not involve self-criminating answers, has more the appearance of concerted action, on their part, wherein they mutually agreed to refuse to testify to anything that would tend to sustain the charges laid in the indictment against the defendant on trial. These were all matters for the consideration of the trial Court; and, except for extraordinary reasons, which do not appear in this case, its judgment must be regarded as final and conclusive. But it is claimed that, in adjudging the relator guilty of contempt of Court and sentencing him therefor, the Court below proceed upon the erroneous assumption that his case was within the purview of section 32, Article III., of the Constitution, which ordains as follows:—

"Any person may be compelled to testify in any lawful investigation, or judicial proceeding, against any person who may be charged with having committed the offence of bribery or corrupt solicitation, and shall not be permitted to withhold his testimony upon the ground that it may criminate himself, or subject him to public

infamy; but such testimony shall not be afterwards used against him in any judicial proceeding, except for perjury in giving such testimony," etc.

The relator's contention is that this provision relates solely to the crime of "bribery" and the offence of "corrupt solicitation," etc., specified in the 29th, 30th, and 31st sections of the same article and is necessarily restricted thereby.

This we think would be a too narrow construction of our organic law. In construing a Constitution it must be borne in mind that its provisions are necessarily general, and couched in the language of the people by whom it was ordained. Its words should therefore be taken in their popular, natural, and ordinary meaning, rather than in any technical or restricted sense. The object of construction, as applied to such an instrument, is to give full effect to the intent of its framers, and the people in adopting it. That intent, of course, is to be sought for in the instrument itself. If the words convey a definite meaning, involving no absurdity or conflict with other portions of the instrument, that meaning which is apparent on its face must be adopted. (3 Am. & Eng. Enc. of Law, 679, and cases there cited.) Little if any significance can be attached to the wording of the captions and title of the several articles of such an instrument. At most they are merely intended to indicate the general character of the articles to which they are prefixed. That they were intended as critical and precise definitions of the subject-matter of the articles, or as exercising restraining limitations upon the clear expressions therein contained, cannot be assumed. (*Houseman v. Comm'th*, 100 Pa. 222.) This will be apparent by reference to several articles of our Constitution. For example, Article XII., "Public officers," section 1, of which relates to election, etc.; section 2, to incompatibility of offices; and section 3, to duelling, etc., as a disqualification. It must be very apparent that the many different subjects to which its provisions relate are much more numerous than the 18 articles and schedule which constitute the instrument. "To impose a limitation upon words of comprehensive import, some express declaration to that effect, or inevitable inference would be requisite. Especially is this so in construing the organic law of the State. Such instruments deal with larger topics and are couched in broader phrase than are legislative Acts." (*Houseman v. Comm'th*, *supra*.)

The word "bribery" appears to be first used in section 7, article II., wherein it is declared that "No person hereafter convicted of embezzlement of public moneys, *bribery*, perjury or other infamous crime shall be eligible to the General Assembly, or capable of holding any office of trust or profit in this Commonwealth." These words,

bribery, perjury, etc., were doubtless used in their plain and ordinary meaning and without restriction, embracing both common law and statutory offences coming within the same designation. In section 9, article VIII., the word "bribery" is again used without restriction, but in a connection which shows its relation to our election laws. The "bribery" therein mentioned is complete by offers, promises, etc., as was held in *Leonard v. Comm'th* (112 Pa. 607).

The word "bribery" again occurs in section 29, article III., which, after defining what may be termed legislative bribery, declares that the offender "shall be held guilty of *bribery* within the meaning of this Constitution and shall incur the disabilities thereby provided for said offence, and such additional punishment as is or shall be provided by law."

Section 30, of the same article, declares that any person who shall, directly or indirectly, do certain things "shall be guilty of bribery," etc.

By these sections, 29 and 30, which are legislative in their character, it was doubtless intended that the kinds of bribery therein defined should be taken out of the hands of the General Assembly, so that they could not be changed by statutory enactment. Having thus given these provisions the force of organic law, the 32d section, now under consideration, makes provision for securing testimony, "in any lawful investigation, or judicial proceeding against any person who may be charged with the offence of bribery," etc., by declaring that "any person may be compelled to testify," etc.

We think the words "*offence of bribery*," employed in the 32d section, mean *all bribery*, whether bribery at common law, or under the Constitution itself, or any kind of statutory bribery. The learned Court was therefore right in saying to the relator that he must testify, and that his testimony could not afterwards be used against him in any judicial proceeding. But, whether the Court was right or wrong in holding that the relator was thus protected by the section under consideration, the decision itself would have shielded him. No Court would permit the testimony of a witness, truthfully given under such circumstances, to be afterwards used against him in any judicial proceeding.

As already intimated, we are not called upon in this case, at the instance of this relator, to decide whether the indictment against Wallace sufficiently charges him with the offence of bribery at common law or under any statute, or whether it charges any indictable offence. That was not the relator's affair. It concerned the defendant in that indictment, but not a witness called by the Commonwealth, to sustain the charge laid therein.

It follows, from what has been said, that in no

view of the case was the relator unjustly restrained of his liberty; and having been released on bail pending the hearing and consideration of this case, without having fully complied with the sentence of the Court below, he must be remanded into the custody of the respondent, to the end that said sentence may be fully executed.

It is accordingly ordered that the relator do forthwith surrender himself into the custody of the sheriff of Lawrence County, to the end that the sentence of the Court of Quarter Sessions of said county, pronounced against him on December 17, 1890, for contempt of said Court, may be fully executed; and it is further ordered that he pay the costs of this proceeding. W. M. S., Jr.

Oct. '91, 36.

January 12, 1891.

Commonwealth ex rel. Downing v. Bell.

Habeas corpus. The petition in this case was similar in all particulars with that in the preceding case of Commonwealth *ex rel.* Tate v. Bell (p. 333), and was argued with said case by the same counsel.

October 5, 1891. STERRETT, J. This case was argued with Commonwealth *ex rel.* John R. Tate against same defendant, No. 37, October Term, 1891, in which an opinion has just been filed. The relator in this case was adjudged guilty of contempt of court under circumstances referred to in that opinion, and what has been there said applies with equal force to him. For reasons there given a similar order must be made in this case.

It is accordingly ordered that the relator do forthwith surrender himself into the custody of the sheriff of Lawrence County, to the end that the sentence of the Court of Quarter Sessions of said county, pronounced against him on December 17, 1890, for contempt of said Court, may be fully executed; and it is further ordered that he pay the costs of this proceeding. W. M. S., Jr.

Oct. '91, 38.

January 12, 1891.

Commonwealth ex rel. Shaffer v. Bell.

Habeas corpus. The petition in this case was similar in all particulars with those in the preceding cases and was argued with them by the same counsel.

October 5, 1891. STERRETT, J. This case was argued with Commonwealth *ex rel.* John R. Tate, against same defendant, No. 37, October Term, 1891, in which an opinion has just been

filed. The relator in this case was adjudged guilty of contempt of Court under circumstances referred to in that opinion, and what has been there said applies with equal force to him. For reasons there given a similar order must be made in this case.

It is accordingly ordered that the relator do forthwith surrender himself into the custody of the sheriff of Lawrence County, to the end that the sentence of the Court of Quarter Sessions of said county, pronounced against him on December 17, 1890, for contempt of said Court, may be fully executed; and it is further ordered that he pay the costs of this proceeding. W. M. S., Jr.

Oct. '89, 191.

Oct. 10, 1889; Oct. 7, 1890.

Robb v. Carnegie Bros. & Co., Limited.

Injuries to surrounding property by conduct of lawful business—Damages—Measure of—Injuries capable of measurement by pecuniary standard—Evidence—Admission of—Trial judge—Duties of, where verdict arrived at by adoption of erroneous measure of damages.

The injury to surrounding property resulting from the manufacture of coke is in no sense the natural and necessary consequence of the legal right of the owner to develop the resources of his property, but is the consequence of his election to devote his land to the establishment of a particular sort of manufacturing, having no natural connection with the soil or the adjacent strata.

The interest of the public is higher than that of the individual, and when these interests are in conflict, the latter must give way. If the individual is thereby deprived of his property without fault, he is entitled to compensation; but if he is affected only in his tastes, his personal comfort or pleasure, or preferences, these he must surrender for the comfort and preferences of the many.

The production of iron, or steel, or glass, or coke, while of great public importance, stands on no different ground from any other branch of manufacturing, or from the cultivation of agricultural products. They are needed for use and consumption by the public, but they are the results of private enterprise conducted for private benefit and under the absolute control of the producer.

The fact that a plaintiff may regard his own property as less desirable than before because of the proximity of an undesirable business, or of undesirable neighbors, or the further fact that its selling value has been reduced by reason of such proximity, affords no ground for a recovery.

If, however, such business is so conducted as to affect the use of adjoining property or the health of its occupants, these tangible and substantial injuries, capable of measurement by a pecuniary standard, may sustain an action for damages.

In such cases, the ordinary rule for the ascertainment of damages where land has been entered and

appropriated under the right of eminent domain, does not furnish a measure of the plaintiff's right to recover. The nature of the business complained of is to be left out of view. The sole question is, What harm has been done to the plaintiff by, or as the direct result of, the prosecution of defendant's business at a place where he had a legal right to carry it on.

Plaintiff was the owner of a farm in the bituminous coal region of Pennsylvania, which he purchased in 1866. In 1877 he bought another tract, which he operated as a coal mine. Defendants purchased a tract of land some 300 feet below plaintiff's land, and in 1871 built coke ovens upon it. Additions were made until there were 300 ovens upon the land, in which \$200,000 were invested when plaintiff brought his suit. This piece of ground was centrally located and advantageous for the establishment of coke works, to utilize coal produced from mines in the vicinity. Plaintiff claimed, and offered testimony to show, that his land was damaged by reason of the operation of the coke ovens and the sulphurous, offensive, and noisome gases, fumes, smoke, and dirt emitted therefrom and poured over and upon his premises, whereby his timber and fruit trees and crops were injured and destroyed, and a black crust formed upon his land, which was a permanent injury. There was no claim that the coke ovens were improperly operated:

Held, the interests in conflict in this case are not those of the public and an individual, but those of private owners who stand on equal ground as engaged in their own private business.

Held further, (1) The shrinkage in quantity or value of each year's crops, so far as it was shown to be due to smoke or gas, should be shown in bushels or tons, or approximated as nearly as possible.

(2) Specimens of the crust and sterilizing substances alleged to be deposited upon the ground should be produced, and the effect of their presence ascertained and explained by chemical analysis and the testimony of witnesses competent to speak upon the subject.

(3) Evidence as to where defendants obtained the material which they used in making coke, what price they paid for it, or what the miners who brought it were paid, should have been excluded.

(4) Evidence as to what purposes the plaintiff might have devoted his farm, and what damages he would have sustained in that case, is inadmissible. The testimony should have been confined to the purposes it had been devoted to, and to what extent they had been interfered with by defendants' business.

The Court instructed the jury, *inter alia*, (1) that the owners of coal land may develop and operate the same even to the injury of adjoining land-owners, without remedy on the part of the latter, unless malice or negligence be shown; (2) that a Court of equity will not restrain the operation of works of an injurious nature where the best possible place to do the least injury to others has been selected; (3) that while equity will not restrain, law will give a remedy where actual, positive, serious injury has been done to another by being upon adjacent lands, and manufacturing material not part of the land, whether such harm be done to health or property:

Held, not to be error, except that the concession in the third clause was mistaken.

A trial Judge is, in an important sense, the thirteenth juror; and when the amount of a verdict shows that it must have been arrived at by the adoption of an erroneous measure of damages, or a mistake in computation, he should not hesitate to set it aside.

Penna. Coal Co. v. Sanderson (113 Pa. 126); Huckestine's Appeal (70 Id. 102); and Railroad Co. v. Lippincott (116 Id. 472), distinguished.

Appeal of Carnegie Brothers & Co., Limited, defendants, from the judgment of the Common Pleas of Westmoreland County, in an action of case brought by Adam Robb against defendants, to recover damages alleged to be sustained by reason of the operation of defendants' coke ovens, and the sulphurous, offensive, and noisome gases, fumes, smoke, and dirt emitted therefrom and poured over and upon his premises.

Upon the trial, before HUNTER, P. J., it appeared that plaintiff is the owner of a farm in North Huntingdon Township, Westmoreland County. This was purchased at two different times. He bought 82 acres, more or less, on March 24, 1866, for \$4000. And on September 22, 1877, bought 22 acres, the balance, for \$2000. The cost of his entire farm, therefore, was \$6000. This farm is situated about one-half mile west of the village of Larimer, about twenty miles east of the city of Pittsburgh, and is north of the Pennsylvania Railroad, the nearest property line being about fifty rods from the railroad, and running along the top of a high bluff, more than two hundred feet above the grade of the railroad, and three hundred feet above the location of the ovens. From this line the farm extends in a northerly direction. Part of the tract last purchased by Robb is underlaid with coal. Since his ownership of this last tract Robb has operated a coal mine thereon, and by the sale of coal to the operatives of defendants' works and others who have moved into the neighborhood since, and by reason of the erection of the works, he has derived a considerable revenue. The soil, according to defendants, has been termed second rate, and in comparison with the agricultural districts of Westmoreland County, it would be considered far below the average. According to plaintiff's testimony, it was limestone soil, part black loam, and all good.

Lying between the Pennsylvania Railroad and Robb's land is a low piece of ground, containing about twenty acres, at least three hundred feet below the land of Robb and nine hundred feet below the brow or top of the hill, where Robb's tillable land begins. This piece of ground was low and marshy, unfit for cultivation, and termed by the plaintiff as the frog pond, a swamp, bottom ground, never cultivated, grown up with under-brush, willows and sycamore trees. With respect to coal mining operations at Irwin, South Side, Larimer, Turtle Creek, and other points in that neighborhood, this low piece of ground is centrally located, and peculiarly advantageous for the establishment of coke works, to utilize the large quantities of coal from the several

mines. It was a secluded place, isolated from the thickly-settled country about the mining districts; full of papaw bushes, sycamore trees, and elms, and other shrubbery of that kind. Brush Creek runs through this land, and at the east end a small run empties into Brush Creek.

The defendants bought this low piece of ground, and in 1871 built some coke ovens on it. Additions were made to the plant at various times, until there were three hundred ovens in operation when suit was brought. These coke ovens, together with the washing and hoisting apparatus and all the machinery and appliances that belong to a coke plant or works, cost the defendants nearly \$200,000.

No notice was given by the plaintiff to the defendants not to erect the ovens, but, on the contrary, the plaintiff, with his boys and teams, at different times, assisted in building them. The defendants bought the coal from the several mines in the neighborhood, had it hauled to these ovens over the Pennsylvania Railroad, there washed it, removing all the sulphur and other impurities possible, and prepared it for coking by the use of the most improved machinery, and then burned it into coke in the ovens. They constantly have in their employ from one hundred and thirty to two hundred men, who either live in their own homes or the houses of the defendants built about these works since they were established.

The plaintiff called a number of witnesses, whose evidence tended to show that there was a gradual falling off in crops for six years prior to the time the suit was brought. There was evidence that he lost some timber and fruit trees; that crops put in grow to a certain height and then die away; that the stalks and blades of grass are covered with a black crust which prevents maturing. Fertilizers and manure produce no effect.

Plaintiff's son testified that the farm would have rented for \$350 in 1881; \$300 in 1882, and the same amount per year down to 1886; and in 1887 for \$275. Two years of the six before suit was brought, plaintiff rented the farm and received the rent. Any loss to the crops was suffered by the tenant.

Defendants produced about fifteen witnesses of the neighborhood who testified that plaintiff did not sustain any substantial injury; that he got reasonably fair crops, and as good as he could expect for the attention he gave his farm.

Dr. George Hay, a chemist, made an exhaustive analysis of the soil, and testified that it lacked many of the essential ingredients to make it fairly productive.

William Robb, one of plaintiff's witnesses, was asked, "Up till what time did this land produce good crops?" (Objected to by defendants' counsel

for the reason that the plaintiff cannot recover nor give in evidence, except within six years prior to the date of bringing suit. Objection overruled. Exception.) Q. Up till what time did this land produce good crops? A. Till 1871. (1st assignment of error.)

Q. State to the Court and jury what, if any, is the amount of damages done to this property by reason of these ovens, being built as they are, and the smoke from them, from March 30th, 1881, to March 30th, 1887?

Objected to for the reason that the question will elicit from the witness the injury done to the property without distinguishing or specifying how or to what part of the property. It therefore tends to obtain a lapping over or doubling up of the damages. The question is therefore improper and should be overruled unless the plaintiff distinguishes to what part of the property and in what way the injury is done. Objected to further because the charge against the defendants by the plaintiff is not for the taking of the land, but for injury done to plaintiff's land by the defendants; the ovens being on defendants' own land, the building of them there is no offence whatever. Objection overruled. Exception.

A. Well, I would place it at \$10,000. (2d assignment of error.)

Q. If that farm would have sold for \$150 or \$200 an acre; whatever it may have been in 1881, what would it have sold for now, as affected by these ovens, before this suit was brought two years ago? What would it bring in the market affected by the ovens?

A. Well, to the best of my knowledge, it would not bring more than \$25 or \$30 an acre. It might be of some use for other purposes, but it would not be for farming purposes.

Objected to as improper. Objection overruled. Exception. (Third assignment of error.)

On redirect examination he was asked:—

Q. In your estimate of damages you speak about the soil. Now state what damage, if any, this smoke has done to the soil, not to the crops, but to the soil of the farm?

Objected to, for the reason that it is part of the examination-in-chief and is no answer to the cross-examination. Objection overruled. Exception.

A. Well, to the best of my knowledge and from my experience, and looking at it, it puts a kind of black crust on the soil, just about that thick, that you can just break it off, and it dries up the top of the soil; it dries up and cracks; you can lift the cinders on top; it is about that thick; just about half an inch. (Fourth assignment of error.)

Charles McCarthy, one of plaintiff's witnesses, was asked:—

Q. The counsel asked you about the slack;

about the uses it had been brought there for; I want to know where they get this slack; I do not mean the mines, but where does it come from; in what part of the mine is it mined; is it slack that would be thrown away?

Q. I want to ask whether the men who mine the slack get paid for it? This for the purpose of showing by this witness that this is simply refuse stuff that nobody wants, that they gather up about the mines owned by other companies, and bring it there and manufacture it into coke; for the purpose of answering the cross-examination, as to the public benefit that is derived from this. Objected to by defendants as irrelevant, improper and impertinent to the issue; that the counsel themselves have proven that the slack was refuse; and now, to show that they did not pay anything for the digging of it would be utterly outside of the issue and no answer to the cross-examination.

Offer admitted. Exception.

Q. What do you know about this slack being brought there and from what mines; you say from Manor and Irwin and other places? A. Well, I cannot tell exactly, but I know it comes to their coke works from other works, and I seen the cars in the different mines. Q. What do you know about the kind of material that is, with regard to the mining of it; what do the owners of the mines do with that material? A. Well, in former times they used to dump it out; now, they sell it. Q. What do you know, if anything, about what they pay for it? A. No, sir; I do not know anything about that. Q. What do you know, if anything, about what the miners receive for mining that stuff? A. They get nothing. (Seventh assignment of error.)

John Nehrig, Jr., was asked:—

Q. How would this farm be for producing fruit, in your judgment, leaving the smoke out of the question? For the purpose of showing that the soil is suitable for planting and maintaining an orchard and growing fruit.

Objected to as incompetent, because it is too general and vague, and not calculated to prove any damages sustained by the plaintiff, the fact being that an orchard is planted on this farm, and testimony admitted already as to the condition of these trees, and their fruit-bearing qualities. Objection overruled. Exception. (Ninth assignment of error.)

The Court charged the jury, *inter alia*, as follows:—

“It is true that they may have selected a place where the least possible harm would be done to others, so that a Court of equity would not interfere to restrain them; but, if they do actual, positive harm by bringing material upon the land, and manufacturing it adjacent to plaintiff's land, to the injury of the same, are they not respon-

sible? We say, actual, positive, serious injury. If they do so, we are of opinion that they are responsible, and answerable for such damages done. After much thought we have arrived at these conclusions:—

“First. That the owners of coal lands may develop and operate the same, even to the injury of adjoining land-owners, without remedy upon the part of the latter, unless malice or negligence be shown.

“Second. That a Court of equity will not restrain the operation of works of an injurious nature, where the best possible place to do the least injury to others has been selected.

“Third. That while equity will not restrain, law will give a remedy, where actual, positive, serious harm has been done to another, by bringing upon adjacent land, and manufacturing, material not part of the land, whether such harm be to health or to property.” (12th assignment of error.)

Plaintiff requested the Court to charge:—

(1) If the jury believe from the evidence that the timber trees and fruit trees growing upon the plaintiff's land have been injured or destroyed by the smoke and gases from the defendants' coke ovens, the plaintiff will be entitled to your verdict for such an amount as will compensate him for the damages sustained by him during six years prior to the time suit was brought in this case. Affirmed. (15th assignment of error.)

(2) If the jury believe from the evidence that the crops growing upon the lands of the plaintiff have been injured or destroyed by reason of the smoke and gases from the defendants' coke ovens, the plaintiff is entitled to your verdict for such damages as will compensate him for the loss of or injury to his crops during six years prior to the time when this suit was brought. *Answer.* The plaintiff will be entitled to compensation for injury to crops for four years only, if an injury has been done them, because he leased the farm for a money rental for two years during this period of six years. (16th assignment of error.)

(3) If the jury believe from the evidence that the soil of the plaintiff's farm has been injured or destroyed by reason of the smoke or gases from the defendants' coke ovens, the plaintiff is entitled to your verdict for such damages as would compensate him for the injury done to his soil during six years prior to the time this suit was brought. Affirmed. (17th assignment of error.)

(4) The plaintiff is entitled to your verdict for such an amount as will compensate him for all the damages which he has sustained by reason of the smoke from the defendants' coke ovens passing over his farm from March 30, 1881, to March 30, 1887. *Answer.* Whether the smoke did actual, positive damage, is a question of fact for

you. If you find the fact so to be, then the plaintiff should be compensated as stated in the point. (18th assignment of error.)

(5) In making up your verdict you will disregard all testimony on the part of the defendants going to show that the making of coke by the defendants is useful or beneficial to the community or that the construction of the defendants' coke works has increased the value of the plaintiff's property or other property in that vicinity, by bringing a larger number of workmen into the neighborhood. *Answer.* We cannot see our way clear so to instruct you. The harm and the benefit may be considered together. If special benefit resulted to the plaintiff in any way from the construction of the ovens, there is no reason why the same may not be considered. The general benefit, however, or the benefit to the plaintiff, in common with others, may not be considered. (19th assignment of error.)

Defendants requested the Court to charge:—

(3) The defendants are engaged in a lawful business and if you believe they have selected a judicious location therefor, the plaintiff cannot recover in this action unless he has satisfactorily shown that the defendants have operated their works with negligence, unskillfulness, or malice. *Refused.* (20th assignment of error.)

(4) The manufacture of coke from coal is an independent industry, and as such may be lawfully carried on in a different location from that where the coal is mined. If you believe the defendants have chosen a secluded place for the erection of their ovens, where as few persons may be inconvenienced as possible, then we instruct you that the injuries resulting from their operation are *damnum absque injuria* and your verdict must be for the defendants. *Answer.* The first branch of this proposition is affirmed; the second is refused. (21st assignment of error.)

(5) Defendants being engaged in a line of business of great public interest, and employing many men in the prosecution of their works; having selected a location far distant from a densely populated community, and one best adapted for their operations, they are not liable for the injuries to plaintiff's land, which are the result merely of the subsequent prosecution of their works in a lawful manner, without negligence, unskillfulness or malice. *Answer.* We decline this proposition. While, in equity, the defendants would not be restrained under such circumstances, yet, if they establish their works contiguous to the lands of their neighbor, and bring material thereon, and manufacture it to the serious, positive injury of their neighbor's land, we cannot say that they are not responsible at law. This is not a case of where the owners of coal lands are developing the same. (22d assignment of error.)

Verdict for plaintiff for \$4798.10. A motion

for a new trial having been refused, defendants appealed, assigning error, *inter alia*, as above, and further: (24) The charge of the Court was misleading to the jury in the general doctrine of the charge. (25) The answers to the points, and especially to defendants' second point, were inconsistent with the doctrine of the charge. (26) The Court erred in laying down the law as to the damage done to the plaintiff, if any damage.

The case was argued in the Supreme Court on October 10, 1889. On January 6, 1890, a reargument was ordered, which was had on October 7, 1890.

Paul H. Gaither and John F. Wentling (J. A. Marchand and D. A. Miller with them), for appellants, cited—

Huckenstine's Appeal, 70 Pa. 106.

Penna. Coal Co. v. Sanderson, 113 Id. 144.

Richards's Appeal, 57 Id. 113.

Penna. R. R. v. Marchant, 119 Id. 560.

George Shiras, Jr., for the Southwest Coal and Coke Co., *W. F. McCook*, for H. C. Frick Coke Co., and *P. C. Knox* and *James H. Reed*, for United Coal and Coke Co., filed an intervening argument on behalf of appellants, in which they cited, in addition to the above cases—

Railroad Co. v. Yeiser, 8 Pa. 366.

Shrunk v. Navigation Co., 14 S. & R. 70.

Penna. R. R. v. Lippincott, 116 Pa. 472.

Edmundson v. R. R., 111 Id. 316.

John M. Peoples (D. S. Atkinson with him), for appellee, cited—

Penna. Lead Co.'s Appeal, 96 Pa. 127.

Brown v. Torrence, 58 Id. 186.

Railroad Co. v. Walsh, 124 Id. 544.

Price v. Grantz, 118 Id. 402.

Fletcher v. Rylands, 1 Ex. 280.

The arguments of counsel are sufficiently indicated in the opinion of the Supreme Court.

October 5, 1891. *WILLIAMS, J.* This case was tried with considerable care in the Court below, and was in most respects well tried. Some questions were however raised and considered on the trial which were not necessarily involved, and which hindered rather than helped the Court and jury in reaching a correct result. For this reason, and because the case as it is presented is one of considerable general importance, it seems desirable that the position of the parties and principles by which their relative rights are to be adjusted should be briefly considered. This may be done by answering the following questions: First. Has the plaintiff shown a cause of action for which he can recover in a Court of law? Second. If he has, what is the measure of his damages? Third. Was the evidence which was admitted under objection relevant to the issue before the jury?

The plaintiff shows that prior to 1871 he was the owner of a farm in Westmoreland County on the uplands north of Brush Creek. His cultivated fields began about one thousand

feet from, and about three hundred feet above, the stream, and extended back to and beyond his dwelling and farm buildings, which were about one-half mile from the stream. He shows that in 1871 the defendants bought a tract of land in the valley and extending up the slope some three or four hundred feet, on which they erected coke ovens on the flat on the north side of the creek. He alleges that the smoke and gas from these ovens pass over his farm, injuring thereby his crops, diminishing the productivity of the soil, and the desirability of his house as a place of residence. Evidence was given on the trial in support of this allegation.

The defendants deny that the plaintiff has suffered injury in his crops, his soil, or the comfort of his home, and they further deny that the injuries alleged, if actually sustained, would entitle the plaintiff to recover, and for this they give the following reasons: *a*, such injuries are the natural and necessary result of the development by the owner of the resources of his own land, as in *Penna. Coal Co. v. Sanderson* (113 Pa. 126); *b*, they result from a reasonable use of his own land for a lawful purpose, as in *Huckenstine's Appeal* (70 Pa. 102); *c*, they result from the pursuit of a lawful calling in a lawful manner, without either negligence or malice on the part of the owner or his employees, as in *Penna. R. R. Co. v. Lippincott* (116 Pa. 472).

In *Sanderson's Case*, the land of the coal company was coal land; its value could be realized by the owners in no other way than by bringing the coal to the surface, so that it could be prepared for the market. In the process of mining, subterranean veins of water are necessarily opened, and the water accumulating in the mines must be brought to the surface, where it naturally finds its way into the surface streams and pollutes them. If this could not be done, a great industry would be interfered with, and the owner of the coal land denied the exercise of the rights of ownership in his land, for the benefit of a neighboring owner whose title was no greater or higher than his own. The maxim "*Sic utero tuo ut alienum non lædas*," was therefore neither suspended nor modified in *Sanderson's Case*. The coal company was using its own land in the only manner practicable to it. The harm done thereby to others was the least in amount consistent with the natural and lawful use of its own. If this use was to be denied to the coal company because some injury or inconvenience to others was unavoidable, then the result would be practically confiscation of the coal lands for the benefit of householders living on lower ground.

But the defendants are not developing the minerals in their land or cultivating its surface. They

have erected coke ovens upon it and are engaged in the manufacture of coke. Their selection of this site rather than some other is due to its location and to their convenience, and has no relation to the character of the soil or to the presence or absence of underlying minerals. The selection was no doubt a wise one, quite secluded and quite convenient to the several mines from which the material was to be obtained for the making of coke, but it was the selection of a manufacturing site and is subject to the same considerations as though glass or lumber or iron had been the commodity to be produced instead of coke. The rule in *Sanderson's Case* has, therefore, no application to the facts of this case. The injury, if any, resulting from the manufacture of coke at this site is in no sense the natural and necessary consequence of the legal right of the owner to develop the resources of his property, but is the consequence of his election to devote his land to the establishment of a particular sort of manufacturing, having no natural connection with the soil or the subjacent strata.

The rule in *Huckenstine's Appeal* is equally inapplicable. The land of the appellant in that case had upon it a deposit of fine brick-clay which could be made into bricks with profit, if this was done near the pit from which the clay was taken. This is the usual, and probably a necessary way of converting the clay into brick. An effort was made to enjoin against the burning of the brick by *Huckenstine* on the field where the clay was obtained. The injunction was refused, and it was held that upon the case as presented *Huckenstine* was making a reasonable use of his own land which equity would not interfere with. Whether he would have been liable in an action of law for any substantial injury he might do to a neighbor by the burning of bricks, was not before the Court, and was not considered.

We think it is true, as held by the Judge of the Court below, that the evidence in this case would not justify an injunction. It shows a selection of a site as well adapted to the business and as remote from dwellings as any in that region. To enjoin the manufacture of coke at such a site would amount to a prohibition of its manufacture and the destruction of vast allied and dependent industries of immense value to the public as well as to those directly engaged in them. An injunction is not of right, but of grace, and will never be issued by a Court of equity when it will inflict a greater injury than it will prevent. In such a case the injured party will be left to his redress at law. No more than this is fairly covered by *Huckenstine's Case*. The plaintiff in this case is therefore in the right Court, and if he is substantially hurt by the use to which the defendants have seen fit to devote their land, we see no reason why he

may not recover, unless it is found in the last of the positions taken by the defendants, for which Lippincott's Case is cited.

It is a fundamental principle of our system of government that the interest of the public is higher than that of the individual, so that when these interests are in conflict the latter must give way. If the individual is thereby deprived of his property without fault on his part, he is entitled to compensation; but if he is affected only in his tastes, his personal comfort or pleasure, or preferences, these he must surrender for the comfort and preferences of the many. Thus highways are necessary to the public business and comfort. Some noise and dust are necessarily occasioned by the legitimate use of them. This may be disagreeable, perhaps in some cases positively harmful to some one or more of the persons living along them; but for this there is no remedy at law or in equity. It is one of the necessary consequences of subjecting the individual to the public in those things as to which their interests are in conflict. Railroads have become the great highways of travel and commerce. The turnpike and canal have been superseded, and the people and their products are transported at a great advance in speed and comfort over the modern highway by the power of steam. The law recognizes the public character of these highways. Their presence is necessary to the prosperity and comfort of the public. To some persons who live near them, as to some persons who live upon a busy city street, the incessant roar of business and the dust of passing vehicles or trains may be unpleasant or painful; but whether such persons live upon a country road, a paved street, or a railroad, they are alike remediless. No action will lie against the municipality, the turnpike, or the railroad company for the noise and dust caused by the legitimate use or operation of the highway in either case. For negligence or malice the wrong-doer is liable to the party injured, but for the lawful use of the road in the customary manner no liability attaches to the traveller or owner. The railroads are built, as is the turnpike or the street, under laws regulating their construction and use in the interest of the public which is to be served by them. The right to operate railroads is a necessary incident to the right to build them, and this was held in Lippincott's Case. But the production of iron, or steel, or glass, or coke, while of great public importance, stands on no different ground from any other branch of manufacturing or from the cultivation of agricultural products. They are needed for use and consumption by the public, but they are the results of private enterprise conducted for private profit, and under the absolute control of the producer. He may increase his business

at will or diminish it. He may transfer it to another person or place or State, or abandon it. He may sell to whom he pleases, at such price as he pleases, or he may hoard his productions and refuse to sell to any person, or at any price. He is serving himself in his own way, and has no right to claim exemption from the natural consequences of his own acts. The interests in conflict in this case are, therefore, not those of the public and of an individual, but those of private owners, who stand on equal ground as engaged in their own private business. Lippincott's Case is, therefore, no reply to the plaintiff's case.

What, then, is the measure of damages? The declaration charges an injury to the trees and crops growing on the surface and a permanent injury to the soil by the deposit upon it from the passing smoke and gas of sterilizing and poisonous substances. To the first of these the statute of limitations was properly applied. During two of the six years open to inquiry the farm was in the possession of a tenant who paid what is admitted to have been a full rent for it. The crops for those two years should therefore be excluded from consideration. As to the remaining four years if the crops were so affected as to reduce their quantity or value, the shrinkage upon each year's crops should be shown in bushels or tons or approximated as nearly as possible. For the acreage in wheat or corn in any one of these four years, for example, being shown, and the yield per acre, a comparison of the crop with that raised on the same farm before the ovens were built could be made, and so far as the difference was shown to be due to the smoke or gas it would afford some basis for an estimate of the damage sustained on that year's crop. In this manner the actual injury to the crops, if any, could be gotten at pretty nearly. As to a permanent injury to the soil by the deposit of injurious particles upon it, a chemical analysis will afford the only safe guide. Differences in the amount of the crop might be due to the effect of the smoke on the growing plant, to negligent tillage, to exhaustion of the soil by long cropping, or from many other causes; but if, as some of the witnesses have testified, a crust of foreign and sterilizing substances has been deposited over this farm varying from a quarter to a third of an inch in thickness, specimens of it can and should be produced and its composition, and the effect of its presence, ascertained and explained to the jury by those competent to speak on the subject. This is a question susceptible of a clear and satisfactory solution by the application of scientific tests which the Court and jury should have the benefit of. If the result is to show a permanent injury to the soil which impairs its productiveness to an appreciable degree, the extent of the loss in the value

of the farm can be readily computed. If such permanent impairment is not made to appear, this part of the plaintiff's claim should be rejected altogether. The fact that the plaintiff may regard his land as less desirable than before because of the proximity of an undesirable business or of undesirable neighbors, or the further fact that its selling value has been reduced by reason of such proximity, affords no ground for a recovery. The location of a livery stable, a restaurant, a distillery, and many other kinds of business close to one's home might diminish its comfort and its market value, but the owner would be without legal redress so far as the effect of mere proximity is concerned. If, however, the business was so conducted as to affect the use of adjoining property or the health of its occupants, these tangible and substantial injuries capable of measurement by a pecuniary standard might sustain an action for damages.

The ordinary rule for the ascertainment of damages where land has been entered and appropriated under the right of eminent domain, does not furnish a measure of the plaintiff's right to recover in this case for the reason already given. Where an entry and seizure has been made, the effect of the seizure and appropriation of part of the land of the owner to a particular use is to be considered, as well as the value of what is taken. This can be best adjusted by ascertaining the selling value of the whole property before the entry, and after it has been made. The difference, if any, shows the actual loss which the owner has suffered. But in this case there has been no entry upon or appropriation of the plaintiff's land. What he alleges is that the prosecution of the business of making coke by the defendants on their own land has hurt his crops and injured his soil. They have the right to make coke. If the establishment of that business near the plaintiff affects the selling value of his farm, he can no more recover for that than he could recover against the saloon keeper or the liveryman because the location of their business near him had made his property unsalable. The nature of the business is, therefore, to be left out of view. The sole question is what harm has been done the plaintiff by, or as the direct result of, the prosecution of the defendants' business at a place where they had a legal right to carry it on. The plaintiff might honestly think, and his neighbors might be willing to testify, that the mere location of the ovens on adjoining land reduced the value of his farm thirty or fifty per cent or more, and a comparison by them of the value before and after the building of these ovens would include this element, for which there can be no recovery.

What has been now said substantially disposes of the question relating to the testimony ob-

jected to. The second assignment of error is sustained. The question objected to should have been excluded, because it called for no fact, but for a lumping estimate which opened the way for the witness to introduce considerations that we have seen had no place in the adjustment of the damages.

The question referred to in the third assignment should have been excluded for reasons already given. The seventh assignment is also sustained. It was of no sort of consequence where the defendants obtained the material which they used in making coke, or what price they paid for it, or what the miners who brought it to the surface were paid for mining it, and such questions should have been excluded. The ninth assignment must also be sustained. The question was not to what purposes the plaintiff might have devoted his farm, and what damages he would have sustained in that case, but to what purposes had he devoted it, and to what extent had he been interfered with by the defendants' business.

An examination of the evidence shows that the plaintiff purchased his farm containing eight-two acres for four thousand dollars (\$4000) a few years before the ovens were built. Several years after they were built he bought twenty acres adjoining which contained coal, which he mined and sold to the employés of the defendants. So far as the evidence indicates the latter piece was not farmed but kept and used for mining coal.

For the injury to four years' crop and for permanent injury to his soil the plaintiff recovered nearly one thousand dollars more than his farm proper cost him, and still finds it to his advantage to reside upon it and to cultivate it. The fact that such a verdict was rendered shows that the Court and jury must have been misled to some extent by the irrelevant testimony, and by the improper measure of damages which the jury was thus left to apply.

It only remains to consider briefly the twelfth assignment of error. The learned Judge said to the jury: "After much thought we have arrived at these conclusions: First, that the owners of coal land may develop and operate the same even to the injury of adjoining land-owners, without remedy on the part of the latter unless malice or negligence be shown. Second, that a Court of equity will not restrain the operation of works of an injurious nature where the best possible place to do the least injury to others has been selected. Third, that while equity will not restrain, law will give a remedy where actual, positive, serious injury has been done to another by bringing upon adjacent lands, and manufacturing, material not part of the land, whether such harm be done to health or property." We cannot see that the appellants were hurt by this instruction. The first proposition is no more than a statement of the

rule which was held in Sanderson's Case. The second is all that the appellants could ask, and as a general rule is well settled. If there is any error in the third it is in the concession that the mine owner is under less obligation to his neighbors when he makes coke upon the tract from which the coal is mined than when he makes it elsewhere. If this concession was mistaken, as perhaps it was, it did not lay any burden on the appellants and they have no right to complain of it. Whether one who mines coal, or petroleum, or lead on his own land, has by virtue of that fact alone a right to manufacture or refine such product on the tract from which it was obtained under circumstances which would prevent its manufacture or render him liable for damages if he manufactured on some other tract, is a question not raised by the facts of this case. If the relation of the miner to his product, or the surface to the underlying minerals, could confer exemption from liability for the consequences of the manufacture of the material mined where the process was conducted on the same tract, the defendants were not within the range of such exemption. They did not mine the coal they used. It was not mined upon the land upon which the coke ovens stood. They were therefore under the general rule and not within the exemption, if such exemption really exists. At the same time the location of these parties, and the industries of the region are not to be lost sight of. The plaintiff's farm is in a region in which bituminous coal is obtained in large quantities. He himself mines coal upon his own land for sale. The conversion of coal into coke to supply fuel for the great iron and steel mills of western Pennsylvania is one of the great industries of the region. Many millions of money are invested in it, and many thousands of men are employed about its production. It has been largely instrumental in the development, growth, and general prosperity of the region. The plaintiff shares the general benefits and seems to possess some advantages that are special and grow directly out of the establishment of these works near him, for he has been thereby provided with customers for his coal and his farm products at his own door.

These considerations should be borne in mind in adjusting the damages, if any have been sustained, so that the plaintiff, while he recovers for his actual loss in the products of his farm or the destruction of his soil as the evidence may show the facts to be, shall not be allowed exemplary damages; and so that the defendants shall not be treated as wrong-doers in the establishment of their plant on a well-selected and secluded tract of land belonging to themselves.

As this case goes back for a new trial, it is quite proper for us to add that the trial Judge is in an important sense the thirteenth juror, and

when the amount of the verdict shows that it must have been arrived at by the adoption of an erroneous measure of damages, or a mistake in computation, he should not hesitate to set it aside.

The judgment is reversed and a venire facias de novo awarded.

H. C. O.

Oct. '90, 124.

October 21, 1890.

Western and Atlantic Pipe Lines v. Home Ins. Co.

Insurance—Removal of property—Removal by flood—Act of God—Refusal of company to pay loss for a given reason—Effect of upon other defences and upon running of interest upon amount subsequently found due.

An insurance company issued a policy of insurance from loss by fire to a pipe line company, "on oil while contained in the iron crude-oil tank, known as No. 1 on plan, situate detached 273 feet, on the Johnson farm, at Johnson Station, on line of Washington branch of the Pittsburgh, Cincinnati, and St. Louis Railroad, on leased ground, Washington County, Pa." By an extraordinary flood the tank was carried some five hundred feet away, but still on the Johnson farm, and deposited against the pier of a railroad bridge, where it remained a few hours, when the oil was burned. The company in a letter, and subsequently in the affidavit of defence, denied liability on the ground that the oil was not in the same or so safe a place when consumed as when insured. In a suit upon the policy:

Held, (1) That any doubt as to the meaning of the policy must be construed in favor of the insured.

(2) That the property being found by the jury to have been in the tank, and the tank on the J. farm at the time of the loss, there had been no removal of the insured property.

(3) That the description of the location of the tank, if a warranty at all, was so only of the location at the time the insurance was effected and not that the tank would thereafter remain in the same location.

On the trial the defendant, by cross-examination of the plaintiff's witnesses, set up the further defence that the oil insured was not the property of the plaintiff, but of its various customers:

Held, (1) That the defence came too late. *Castner v. Ins. Co.* (50 Mich. 273); *Brick v. Ins. Co.* (80 N. Y. 108); *Vos v. Robinson* (9 Johns. 192); *Stayton v. Graham* (139 Pa. 1), followed.

(2) That inasmuch as the plaintiff company was by its charter authorized merely to "transport, store, insure, and ship petroleum," it must be presumed that the defendant knew these facts and contracted with reference to them, and in any case was chargeable with knowledge of the usual and customary methods of conducting the business pertaining to the property it insured.

(3) That evidence that the plaintiff company contracted with its customers to insure the oil stored with it was admissible, and when received showed a state of facts that made it, to all intents and purposes, the owner.

An insurance company which denies *in toto* its liability for a loss is not entitled to a provision in the policy giving sixty days for adjustment and payment.

Appeal of the Home Insurance Company, of the city of New York, defendant, from the judgment of the Common Pleas of Washington County, in an action of assumpsit brought against it by the Western and Atlantic Pipe Lines, upon a policy of insurance upon "oil while contained in the iron crude-oil tank, known as No. 1 on the plan, situate detached 273 feet, on the Johnson farm, at Johnson's Station, on the line of the Washington branch of the Pittsburgh, Cincinnati, and St. Louis Railroad, on the leased ground, Washington County, Pennsylvania."

On August 21, 1888, by reason of very high stage of water in Chartiers Creek, the ground upon which tank No. 1 was built was overflowed, the tank was lifted from its base and carried by the current of the creek past the pump-house, and was wedged in an egg-shaped form between the abutments of the railroad bridge crossing the creek at a distance from its original location of from 400 to 500 feet, with the top partly torn off. The tank remained in that position from about nine o'clock on the evening of the 21st until the middle of the forenoon of the following day, when by some means oil which had, by this closing of the channel under the bridge, accumulated above it, took fire, the fire was communicated to the tank, and the oil contained in it was burned. The plaintiff submitted proofs of loss, as required by the policy.

In the affidavit of defence the defendant set up: "By its contract the defendant company only agreed to insure against loss by fire while the oil was in the tank at the spot where it stood when the insurance was effected; and the defendant is advised and believes that said tank and oil have been, by a visitation of Providence, moved therefrom; and the loss having occurred while the oil was in a place of danger not contemplated by the parties, the plaintiff is not entitled to recover. The affiant further avers that it is impossible to determine, under the circumstances of the case, what proportion of the oil was destroyed by fire and what was carried away by flood."

The defendant's secretary subsequently wrote to the agent of the plaintiff:—

DEAR SIR: We have your favor of 2d inst., and in reply beg to say we regret exceedingly the loss sustained by your company, and would be pleased to reimburse you if we could see wherein you had any claim upon us either in law or equity.

We insured oil in an iron tank located in a safe position upon a good foundation and charged you a premium which we considered adequate in view of its position; but an unforeseen disaster in the shape of a flood carried the tank from its position to a more dangerous one, whereby it is destroyed.

In denying liability in this case we fail to see wherein we hazard our "reputation for fair dealing," or do you any injustice.

Yours truly,

W. L. BIGELOW, Sec'y.

The policy contained stipulations that "if the risk be increased . . . by any means whatever within the control of the insured;" or that "if the interest of the assured . . . be untruly stated," or "be any other than entire, unconditional and sole ownership," the policy should be void.

On the trial, before McILVAINE, P. J., the plaintiff having shown the foregoing facts, it was developed on cross-examination that the oil in the tank when burned was the property of the plaintiff's customers on storage with the plaintiff.

Plaintiff's counsel thereupon asked the president of the company: I wish to know if you, or the Western & Atlantic Pipe Lines, had entered into any contract with the customers of the line by which you were bound to insure the oil in the tank. Objected to as incompetent and irrelevant. Objection overruled. (First assignment of error.)

Q. I wish to know if you did replace the oil that was burnt in this tank to your customers?

To show that in carrying out this contract we have proved he entered into with his customers, when this oil was lost to the customers, he replaced it barrel for barrel to the customers. Objected to as incompetent and irrelevant.

Q. On whom did the loss of this oil fall, on the customers or the pipe line? Objected to as incompetent and irrelevant, and a matter with which the insurance company had no concern. Objection overruled. Exception. (Second assignment of error.)

Q. At the time of the organization of the Western & Atlantic Pipe Line what action was taken by the stockholders in regard to the insurance of oil? The object simply is to show, they said to every person who ran oil into that line, that the Western & Atlantic Pipe Line would be responsible, and bound by the action of the company. Objected to as incompetent and irrelevant. Objection overruled. Exception.

A. When we organized the Western & Atlantic Pipe Line, the stockholders—I was made president of it, and we discussed pretty thoroughly the business we were going into; I was instructed to do this business to protect the customers from loss, the same way that the Tide Water Pipe Company had done, by promising to carry and keep it insured, and stand between them and any loss, as we couldn't get business unless we done it; and so went on and did it. (Third assignment of error.)

The plaintiff's charter, showing that it was invested with the right "to transport, store, insure and ship petroleum," was offered in evidence.

By the terms of the policy the loss was payable sixty days after proof.

In the general charge the Court said: "The insurance company claim that the proper construction of this policy, as it is written, would relieve them from any liability, for the reason that this iron tank, which contained the oil, had left the place where it was constructed, and that the oil was burned—if burned at all in the tank—at a different place from where it was described to be when it was insured.

"Now, gentlemen, this raises a very close question, but being a question of law we are bound to construe it as best we can, under the light that we have. We know of no cases in the books that cover it exactly, and what is the proper construction of this policy in this particular, to our minds, is a doubtful question. But, as there is undoubtedly a contract of indemnity here, we feel like giving the benefit of this doubt to the assured, and therefore [we instruct you that the simple fact that this iron tank had left the place where it was originally constructed, will not relieve the company, but that any oil which was burned while in tank No. 1, and while the tank was in such a state of preservation as to hold the oil there, as it was originally pumped into it, is covered by this policy, and that the burning of the oil, under such circumstances, would be such a burning as required this company to indemnify the plaintiff for any loss they may have sustained thereby. The plaintiff, under the contract, was under an implied promise to keep the oil insured in the tank; but under our construction of the policy, the fact that the tank was moved by reason of this flood, before the oil was burned, would not relieve the company, if the tank remained whole and sound and the oil was burned while in the tank.

"Now, gentlemen, if you conclude that this tank was picked up by this flood bodily and floated down the stream and lodged from three to five hundred feet away from the place where it was constructed, against the abutments of the bridge, and remained intact, and in that way held this oil as an oil tank would hold oil, so that it could have been recovered by the company, and while there, in place of on the original foundation, the oil in the tank was burned, why then the contract of indemnity would be binding, and the defendant would be liable for such loss as the plaintiff might sustain by reason of the fire, or their proportionate share of the loss." (Fourth assignment of error.)

Defendant requested the Court to charge, *inter alia* :—

(5) By the terms of the policy the insurance company contracted to indemnify the plaintiff against loss by fire, "on oil while contained in

the iron crude oil tank known as No. 1, on plan situate, detached 273 feet on the Johnson farm at Johnson's Station." The defendant did not contract to pay for oil which might be lost at any other place than that particularly mentioned in the policy, and the undisputed evidence showing that the oil was destroyed in a different location, the defendant is not liable under the terms of the contract. *Refused.* (Fifth assignment of error.)

(6) The question involved in this case is simply one of contract between the parties, and the tank known as No. 1, and which contained the oil covered by the insurance, having been carried away by the flood to a point different, and at a considerable distance from the location described in the policy, the jury cannot consider whether the insurance company would or would not have insured the oil in the place where the tank was left by the flood. By the contract the defendant only agreed to pay for oil destroyed by fire while contained in the tank as located at the time the policy was issued, and its liability ceased when the oil insured was carried away from that place. *Refused.* (Sixth assignment of error.)

(7) The plaintiff's evidence having disclosed the fact, that at the time the loss was incurred the oil insured was the property of various producers, patrons of the plaintiff company, held on storage by said company, and that the plaintiffs were not the "entire, unconditional, and sole owners" of said oil covered by the policy of the defendants, which facts were not stated in the policy, therefore under the terms of the contract in this case (see sec. 4 of said policy), the plaintiff cannot recover, and the verdict of the jury should be for the defendant. *Answer. Refused.* The written part of this policy shows that it was made with the Western & Atlantic Pipe Line Company, on oil while contained in the iron crude oil tank known as No. 1, on the plan situate on the Johnson farm, and as they were a chartered company with certain rights, among which was the transportation and storage of oil, the insurance company were bound to know that the oil on which the insurance was placed was oil held by this defendant company under its charter rights, and section 4 referred to, we think, has no application in this insurance, but was put in the original blank that it might be applied to insurance on other kinds of personal property, and on real estate. (Seventh assignment of error.)

(9) Under all the evidence in this case the verdict should be in favor of the defendant. *Answer. Refused.* We leave it to the jury to determine the questions of fact that have been submitted to them, under our instructions as to the law. (Eighth assignment of error.)

The jury having retired to consider their

verdict, returned into Court with the following question:—

JUDGE McILVAINE:

How long shall we calculate interest on the principal, from August 22d, or have the company 60 days to adjust the claim? J. N. SMILEY, Sec'y.

To which the Court replied: "Gentlemen of the jury: We have received your question; and we instruct you, that as the defendant company have denied their liability, the plaintiff would be entitled to interest on whatever amount you may find the plaintiff entitled to recover, from the date of the fire." (Ninth assignment of error.)

Verdict and judgment for the plaintiff for \$1274.96. Defendant thereupon appealed assigning, *inter alia*, error as above.

John H. Murdoch (W. S. Parker with him), for appellant.

According to the terms of the policy, it was avoided by the fact that the assured did not own the insured property, and the contract of the insured with its customers was inadmissible.

The description of the property and its locality were important elements in the minds of the contracting parties, and the language of the policy constitutes a warranty that the property was in the situation described and remains so.

Harris v. Ins. Co., 53 Iowa, 236.

McCluer v. Ins. Co., 43 Id. 350.

Wood v. Hartford Ins. Co., 13 Conn. 544.

Lyons v. Ins. Co., 14 R. I. 109.

Severance v. Ins. Co., 5 Bissell, 156.

Haws v. Association, 114 Pa. 434.

1 Wood on Ins. 114.

T. F. Birch (John W. & A. Donnan with him), for appellee.

The object of the contract was indemnity, and if any doubt exists it is to be resolved in favor of the assured.

1 Wood on Ins. 145.

May on Ins. 282.

The authorities cited by the appellant of instances of *removal* of the insured property from the place specified have no application, because the oil in question was "contained in iron crude oil tank known as No. 1" when burned. It would be adopting a forced construction to require that the tank should be in the same place, because the words used do not so require.

Giving to the company the benefit of the broadest possible construction, the words in the policy do not amount to anything more than a warranty that the insured will not voluntarily change the location of the property.

Sillem v. Thornton, 3 E. & B. 865.

May on Ins., p. 282.

The defence as to ownership of the property was not set up in the affidavit of defence, and was first heard of by the plaintiff on the trial. It came too late, therefore; but in any case it

was unavailing, because there was no pretence of fraudulent concealment, or that the company were not fully aware of the exact situation and ownership of the oil.

If an insurer, prior to the bringing of suit upon a policy, has stated its objection to paying the loss, it cannot after suit brought defend on any other ground.

Brink v. Hanover Ins. Co., 80 N. Y. 108.

Castner v. Ins. Co., 50 Mich. 273.

Vos v. Robinson, 9 Johnson, 192.

In addition to this, the plaintiff was a corporation chartered under the law of 29th of April, 1874, and its supplements of the 2d of June, 1883, and September 19, 1887, having the right to transport, store, insure, and ship petroleum. Under the 5th section of the 16th article of the Constitution, it was prohibited from engaging in any business other than that expressly authorized by its charter; and viewed as a common carrier, it was, under the 5th section of the 17th article of the Constitution, prohibited from directly or indirectly engaging in any other business than that of common carrier.

The insurance company must be presumed to have knowledge of these facts, and to have contracted with reference to them.

Citizens' Ins. Co. v. McLaughlin, 53 Pa. 487.

A clause in a policy of insurance giving the company sixty days in which to pay after proofs of loss, applies only where they agree to pay or are undecided about paying; but not when they peremptorily refuse to pay the loss, in which case suit may be brought immediately.

Ins. Co. v. Maguire, 51 Ill. 342.

Phillips v. Ins. Co., 14 Mo. 220.

October 5, 1891. STERRETT, J. This action is on a policy of insurance issued by the Home Insurance Company, defendant, insuring the Western and Atlantic Pipe Lines, for one year from June 28, 1888, against loss or damage by fire, to the amount of \$2500, "on oil, while contained in the iron crude-oil tank known as No. 1 on plan situate, detached 273 feet, on the Johnson farm, at Johnson's Station, on the line of the Washington branch of the Pittsburgh and St. Louis Railroad, on leased ground, Washington County, Pa."

By necessary implication the verdict established the fact, that during the life of the policy over thirty-six hundred barrels of oil were destroyed by fire while in said "iron crude-oil tank, known as No. 1," on the plan of oil tanks at Johnson's Station. The jury found in favor of the plaintiff for the value of the oil thus destroyed.

The company defendant, after being fully advised as to the loss, etc., denied its liability on two grounds:—

(1) Because the tank containing the oil in-

sured had been removed "by an unforeseen disaster in the shape of a flood," and carried about four or five hundred feet from the position it occupied when the policy was issued.

(2) Because the oil contained in said tank did not belong to the plaintiff company, but to its customers for whom it was held in storage, which fact was not stated on the face of the policy.

Conceding the fact, that at the time of the fire the tank had been removed by a flood about four or five hundred feet from the position in which it stood when the oil was insured, but not off the premises described in the policy, the plaintiff contends that the insurance company was not thereby relieved from liability for the loss. In that we think it is right.

The object of the contract was indemnity against destruction of the oil, described as "contained in the iron crude-oil tank known as No. 1," etc. With the view of attaining that object the terms of the policy should be construed liberally. If any doubt exists as to their meaning it should be resolved in favor of the insured rather than in the interest of the underwriter. When words employed in a policy of insurance are susceptible of two interpretations, that which will sustain the claim of the insured should be adopted (Wood on Ins. 145; May on Ins. 182).

Tested by these well-recognized principles of interpretation, the position contended for by the defendant company is untenable. In substance its position is that the above-quoted description of property insured is, in effect, a warranty that, in case of fire, the oil destroyed shall not only be contained in said iron tank, but that the tank itself shall remain where it was when the insurance was effected, otherwise the insurance company will not be liable. Authorities cited in support of that position, where property insured as contained in certain barns, houses, etc., was destroyed after removal to other buildings, have no application to the case before us. In those cases there was necessarily a failure to show that the insured property was in the designated buildings when destroyed. In this case the jury must have found that the oil insured was destroyed "while contained in the iron crude-oil tank, known as No. 1" on the plan of tanks at Johnson's Station, and that, we think, fully satisfies the terms of the contract. The parties were not contracting with reference to an insurance upon the tank, but only upon the oil contained in it.

With that construction of the company in view the learned president of the Common Pleas rightfully instructed the jury as follows: "If you conclude that this tank was picked up bodily by the flood and floated down the stream and lodged from three to five hundred feet away from the place where it was constructed, against the abutments of the bridge, and remained intact,

and in that way held the oil, as an oil tank would hold oil, so that it could have been recovered by the company, and while there, in place of on the original foundation, the oil in the tank was burned, then the contract of indemnity would be binding, and the defendant would be liable for such loss as the plaintiff might sustain by reason of the fire, or their proportionate share of the loss."

The jury under this instruction, having found for the plaintiff and assessed the damages, the necessary implication is that they found the facts of which the instruction is predicated to be true; that the oil tank No. 1 contained and held the oil, for the value of which they assessed damages in favor of the plaintiff, until it was destroyed by fire, etc.

But assuming merely for argument's sake that the description of the tank's location may be regarded as in the nature of a warranty, it can only be construed as a warranty of location at the time the insurance was effected and not that the tank would thereafter remain in the same location (Insurance Co. v. Mitchell, 48 Pa. 367). As a statement of then existing facts, it is not even pretended that the description of the location of the tank, etc., was not strictly true. If it was intended to make the continued location of the tank at the precise point where it then was a condition of the underwriter's liability it would have been an easy matter to have said so. It is not the province of Courts to indulge in conjectures favorable to such insurance companies as are disposed, upon mere technicalities, to avoid the payment of honest claims.

Cases are not unfrequent in which statements in regard to the use and character of buildings, etc., are construed as merely descriptive of the risk at the time the application is made, and not as a warranty that there shall be no change during the life of the policy (Wood on Ins. 444-446, and cases there cited). In *Everett v. Insurance Co.* (21 Minn. 76) a threshing machine was insured as "stored in a certain barn on section 36," etc., and it was held that this was a mere matter of description, operating to identify the property, and not a promissory stipulation on the part of the insured, nor a condition on the part of the insurer.

But, giving the defendant the benefit of the broadest construction, the language used in describing the location of the oil insured cannot amount to anything more than an implied warranty of the plaintiff company that it will not voluntarily change its location. This construction appears to have been recognized in *Sillem v. Thornton* (3 E. & B. 868), and was perhaps warranted by the facts of that case.

Even in that view we have on the one hand only an implied warranty that the insured will

not voluntarily change the location of the tank containing the oil, and on the other defendant's admission, in its affidavit of defence, that the location of the tank was changed "by a visitation of Providence."

Another ground of defence is that the oil in question did not belong to plaintiff, but to its customers, for whom it was held in storage.

For some reason, best known perhaps to the party who, on behalf of the defendant, wrote the sympathetic letter of October 11, 1888, and made the affidavit of defence April 16, 1889, this ground of defence was not even hinted at in either of those papers, and for aught that appears was a mere afterthought. In the letter he says "we regret exceedingly the loss sustained by your company, and would be pleased to reimburse you if we could see wherein you had any claim upon us either in law or equity. We insured oil in an iron tank located in a safe position, upon a good foundation, and charged you a premium which we considered adequate in view of its position; but, an unforeseen disaster, in the shape of a flood, carried the tank from its position to a more dangerous one whereby it is destroyed." In the affidavit, substantially the same defence, viz: removal of the tank "by a visitation of Providence," etc., is solely relied on.

It is not even pretended that there was any fraudulent concealment of ownership of the property, or that any untruthful representation was made, upon the faith of which the policy was issued, nor is it claimed that the defendant company was not fully aware of the exact situation and ownership of the oil when it accepted the risk. It had notice, by the proof of loss furnished by plaintiff, as to the manner in which the oil was held, but no objection on that ground was interposed or even intimated. Defendant's liability was denied solely on the ground that the tank containing the oil had been removed "by a visitation of Providence." The supplemental defence, afterwards sprung upon the plaintiff, that it was not the owner of the oil, might well be disposed of by saying that it came too late. (*Brink v. Ins. Co.*, 80 N. Y. 108; *Castner v. Farmers' Ins. Co.*, 50 Mich. 273; *Vos v. Robinson*, 9 Johnson, 192; *Stayton v. Graham*, 139 Pa. 1.) In *Brink v. Ins. Co.* (*supra*), the company denied liability on the ground of fraud and so declared to the assured. After suit brought, it raised the question as to time of filing proofs of loss, etc. In denying its right to do so, Chief Justice CHURCH said: "I think it was estopped from so doing. The plaintiff's claim was challenged for fraud, and that only. They acted upon it, and brought an action incurring large expenses in its prosecution. *Non constat*, if the failure to file the proofs in time has been insisted on, but that the plaintiffs would have acquiesced in it, and refrained from prosecuting,

and thus they might be injured by the change of ground on the part of the defendant. Every consideration of public policy demands that insurance companies should be required to deal with their customers with entire fairness and frankness. They may refuse to pay without specifying any ground, and insist upon any available ground, but if they plant themselves upon a specified defence, and so notify the assured, they should not be permitted to retract after the latter has acted upon their position as announced, and incurred expenses in consequence of it."

But aside from what has been said in answer to the last-mentioned ground of defence, we think it is also successfully met by the facts connected with the contract of insurance, etc. The plaintiff is a corporation chartered under the law of April 29, 1874, and supplements, and invested with the right to transport, store, insure, and ship petroleum, and under our Constitution, is prohibited from engaging in any other business than that specified in its charter. It should be presumed that the insurance company was cognizant of these facts and contracted with reference to them, but, whether it did or not, it is certainly chargeable with knowledge of the usual and customary methods of conducting the business pertaining to property which it insured. (*Ins. Co. v. McLaughlin*, 53 Pa. 487.)

While, in one sense, the plaintiff was not the owner of the oil, yet, in so far as risk from loss by fire was concerned, it may, to all intents and purposes, be considered as the owner. According to the contract made with its customers it was bound to protect, by insurance, the oil in its tanks at its own expense. In case of destruction by fire without insurance, it would have been bound to its customers to make good the loss. To the extent of the value of the oil, therefore, it certainly had an insurable interest, and in a certain sense was at least *quasi* owner of the oil.

The policy in suit issued without any application, or written request, describing the interest of the insured in the oil, and it does not appear that any actual representation, of any kind, was made by the insured. In view of these circumstances, the language of our brother WILLIAMS in *Tool Co. v. Assurance Co.* (132 Pa. 236), is especially applicable. He there said: "We ought to assume that a policy written under such circumstances was written upon the knowledge of the representative of the insurer, and intended to cover in good faith the interest which the insured had in the buildings. Fraud is never to be presumed, and in this case no fraudulent representation is shown or alleged, unless it can be deduced from the statements of the insurer, made, as we must presume, on the knowledge of its representative, and for which the insured is in no manner responsible. We must also remember

that this policy is to be interpreted most strongly against the company whose contract it is. Applying these principles to the question now raised, we conclude that the policy written on the knowledge of the insurer was made in view of the facts of the case, and was intended to cover such interest as the insured had."

So in the case before us, the defendant having insured the oil contained in tank No. 1 without any representation as to the *quantum* of plaintiff's interest therein, must be considered as having insured it against any loss which the plaintiff would suffer by fire. As already observed, the plaintiff had a right, and was bound by its contract with its customers, to protect the oil by insurance, so that its value could be accounted for to them in case of loss by fire.

As was said in *Waring v. Indemnity Co.* (45 N. Y. 606), "agents, commission merchants or others, having the custody of and being responsible for property, may insure in their own names, and they may, in their own names, recover from the insurer, not only a sum equal to their own interest in the property, by reason of any lien for advances, or charges, but the full amount named in the policy, up to the value of the property." To the same effect is *Story on Agency*, 126.

The testimony referred to in the first, second, and third specifications was rightly admitted. It tended to prove plaintiff's interest in the oil, and consequent right to insure.

The only other specification that requires further notice is the ninth, in relation to interest.

A sufficient answer to that is: The company denied *in toto* its liability, and was therefore not entitled to the benefit of the provision in the policy giving sixty days for adjustment and payment of loss. (*Nevins v. Ins. Co.*, 5 Foster (N. H.), 22; *Ætna Ins. Co. v. Maguire*, 51 Ill. 342; *Phillips v. Protection Ins. Co.*, 14 Mo. 220; *Fire Ins. Co. v. Routledge*, 7 Ind. 25; *Myers' Fed. Dec.* 535.)

In *Ætna Ins. Co. v. Maguire*, (*supra*), it was held that such a clause applies only where the insurance company agrees to pay, or is undecided in regard to paying, but not when it peremptorily refuses to pay the loss.

Further notice of the specifications is unnecessary. There is no merit in either of them.

Judgment affirmed.

R. H. N.

July, '90, 198.

January 27, 1891.

Williamson's Estate.

Decedent's estate—Will—Interpretation of—Trusts and trustees—Trusts for accumulation—Act of April 18, 1853.

A testator directed, by the fourteenth item of his will, "The rest, residue, and remainder of my estate,

real, personal, and mixed, wherever situated, vested, contingent, or future, after satisfying the foregoing bequests, as such remainder shall be realized and converted into proper securities by my executors as provided in item seventeenth of this will, shall be by them transferred and delivered to the P. Company, which company shall hold the same as a trustee and in special trust . . . to keep the same invested . . . and after deducting the proper charges and expenses . . . to add the interest and income thereof to the capital, and thus accumulate and increase the fund until the expiration of ten years after my decease, at which time it shall be divided amongst such of my grand nephews and grand nieces who shall then be living, as are the issue of my brothers and sisters named in the second item of this will," etc. The seventeenth item of the will was an absolute bequest of the entire personal estate to the executors "to enable them freely and fully to execute the various provisions of this will." The executors were given power and control over the whole of the estate, until the time of its being handed over to the residuary trustee, to as great an extent as testator had in his lifetime. Debts, costs, and expenses of administration, repairs, taxes, insurance, and other charges upon real estate, all legacies, gifts, and bequests of every description were to be paid by the executors before the residuary trust estate under item fourteen arises. Rents and income received by the executors were explicitly directed "to constitute part of my residuary estate." He also directed that his "executors shall apply the proceeds of sales of real estate equally and in like manner with the proceeds of sales of personal estate in payment of all or any of the bequests and legacies given by me."

Upon the filing of the executor's account, it appeared that the income collected by the executor for the first year after testator's death amounted to upwards of \$450,000. The payments of legacies, expenses, and charges were much greater than the first year's income, and the total estate was less at the end of the first year than at the time of testator's death:

Held, that the income for the first year entered into the general estate of the testator in the hands of his executor, and was applicable to the payment of debts, legacies, and expenses, and only the remainder after all these deductions were made, was payable to the residuary trustee:

Held, further, that there was no accumulation of income for the first year in transgression of the Act of April 18, 1853; and, therefore, that the same was not payable to the testator's next of kin.

Appeal of the Pennsylvania Company for Insurances on Lives and Granting Annuities, trustees under the will of Isaiah V. Williamson, deceased, from the decree of the Orphans' Court of Philadelphia County, dismissing exceptions filed by appellants to the adjudication making distribution of the estate of said Isaiah V. Williamson.

Isaiah V. Williamson, of Philadelphia, died March 7, 1889, at an advanced age, unmarried. The decedent left a will bearing date April 18, 1874, which was duly admitted to probate, and letters testamentary were granted to Daniel B. Cummins, as surviving executor. After sundry pecuniary legacies, large in amount, although

requiring for the payment only about one-third of the estate, the testator directed as follows :—

Item Fourteenth. The rest residue and remainder of my estate Real Personal and mixed, wherever situated, vested, contingent or future, after satisfying the foregoing bequests, as such remainder shall be realized and converted into proper securities by my executors as provided in item seventeenth of this will, shall be by them transferred and delivered to the Pennsylvania Company for Insurances on Lives and Granting Annuities, of this City, which company shall hold the same as a trustee and in special trust as follows: that is to keep the same invested in productive securities in manner provided in items sixteen and seventeen and after deducting the proper charges and expenses incident to the management of said investment and securities, to add the interest and income thereof to the capital, and thus accumulate and increase this fund until the expiration of ten years after my decease at which time it shall be divided amongst such of my Grand Nephews and Grand Nieces who shall then be living, as are the issue of my Brother and Sisters named in the second item of this will, which fund shall then be distributed to each one *per capita* and not *per stirpes* an equal share thereof: Provided, however, such shares shall not be paid until each person thus ascertained shall attain the age of twenty-one years, excepting, however, from this proviso the shares of all who would not attain the age of twenty-one years within twenty-one years after my decease—& I direct that this fund shall all be paid to the persons who shall become entitled as aforesaid at the end of ten years from my decease, within the period of twenty-one years therefrom; and all income accruing after said ten years shall be accumulated on each share and paid with the principal. The said entire fund and accumulated income must be paid over within twenty-one years after my decease.

The sixteenth and seventeenth paragraphs of the will contain full directions to the trustees for the investment and care of the fund, but do not vary the limitations contained in item fourteenth, and are sufficiently indicated in the opinion of the Supreme Court.

Under the provisions of the will, the executor collected this income until March 1, 1890. The balance of income so collected, as appeared by the account filed, amounted to \$457,456.73. The amount of the inventory as filed was \$9,811,922.93. There were gains realized upon the sale of some of the inventoried securities, and there were amounts of principal collected not included in the inventory, which brought the amount of the original estate up to \$10,380,654.86. Its amount was diminished through payment of expenses of settlement, and of \$700,000 of legacies, by the amount of \$1,574,552.60. Included in the expenses of settlement was a payment of collateral inheritance tax to the amount of \$448,114.94. Practically the only other expense of settlement was for payment of executor's commissions and counsel fees. The debts were exceedingly small.

There were awarded to the trustees, to cover the trusts under the second item of the will, securities and cash to the aggregate of \$1,083,000.

To cover the bequests in the third item of the will there were awarded securities and cash to the aggregate of \$142,500. The amount appropriated for the trust legacies specified in the thirteenth item of the will was \$285,000.

There remained, therefore, after payment of these three sets of trust legacies, of the principal of the residuary estate, in cash and securities, the sum of \$7,295,602.26, of which \$5,780,503 was directed to be transferred to the trustees immediately, whilst securities to the amount of \$1,515,099.26 were ordered to be retained by the executor for further accounting.

The trustees of the residuary estate claimed that they were entitled to the said sum of \$457,456.73, to be held by them, together with said principal of \$7,295,602.26, for the purposes of the will, so far as such purposes should be found valid.

This claim was disputed by the next of kin of the testator, who contended that if it was conceded, an illegal accumulation would result, and that they were entitled to receive the sum because it was part of an illegal accumulation not disposed of by the will.

The Auditing Judge, FERGUSON, J., held, *inter alia*, as follows :—

“There is no difficulty in this case in ascertaining what was the intention of the testator. He had spent a long life in accumulating an enormous fortune. The time was near at hand when he must leave it. He was reluctant to see scattered what he had, with so much diligence in business and economy in life, gathered together.

“He and the draftsman of his will have therefore attempted to keep the bulk of this vast estate together, so that it might go on accumulating for the period of ten years from his death, by which time the income thereof would have produced another immense estate almost as large as that which we are now distributing.

“While this was undoubtedly the desire and purpose of the testator, it was to prevent the accomplishment of such a purpose that the aid of the legislative branch of the government has been invoked both in this country and in England. The tying up of large estates for the purpose of accumulation was found to be against public policy, detrimental to the best interests of all concerned, and answered no purpose whatever except to gratify the vanity or the sordid wishes of the testator.

“The Legislature of this State, therefore, by the Act of April 18, 1853, enacted :—

“That no person or persons shall, after the passing of this Act, by any deed, will, or otherwise, settle or dispose of any real or personal property, so and in such manner that the rents, issues, interest, or profits thereof, shall be wholly or partially accumulated for any longer time than the life or lives of any such grantor or grantors, settler or settlers, or testator, and

the term of twenty-one years from the death of any such grantor, settlor, or testator, that is to say, only after such decease during the minority or respective minorities with allowance for the usual period of gestation of any person or persons who, under the uses and trusts of the deed, will, or other assurance directing such accumulation would, for the time being if of full age, be entitled unto the rents, issues, interest, and profits so directed to accumulate, and in every case where any accumulation shall be directed otherwise than aforesaid, such direction shall be null and void in so far as it shall exceed the limits of this Act, and the rents, issues, interest, and profits so directed to be accumulated contrary to the provisions of this Act shall go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed.'

"This Act has received judicial interpretation in a number of cases in this State, beginning with Washington's Estate (75 Pa. 102), and followed by Carson's Appeal (99 Id. 325), Schwartz's Appeal (119 Id. 337), Mitcheson's Estate (11 WEEKLY NOTES, 547), Stille's Estate (11 Phila. 31), Grim's Appeal (109 Pa. 391), McKee's Appeal (96 Id. 277), Eberly's Appeal (110 Id. 95.)

"It is not necessary to refer particularly to all that was decided by these cases or the reasoning by which the conclusions were reached; it is sufficient for the purposes of this case to say, that in the opinion of the Auditing Judge they settle conclusively that while under the British statute upon this subject there might be accumulations for an absolute period of twenty-one years from the death of the testator, under our statute the accumulation is confined to the minority of the beneficiary who under the will takes the fund at majority.

"In other words, there can be no trust for accumulation except for minors, and as twenty-one years is the limit of minority, that is the utmost period of time for which any trust for accumulations can exist in this State.

"Is the trust created by this testator's will transgressive of this statute? The answer to this question depends upon whether it is a trust for minors who were in existence at the time of the testator's death and who would be entitled to take upon attaining their majority. There are no persons to-day who answer this description, because it is impossible to ascertain now who will be the persons ultimately entitled to receive this residuary estate.

"The testator says: 'At which time (the expiration of ten years after his decease) it shall be divided amongst such of my grand-nephews and grand-nieces, *who shall then be living.*' This estate is therefore not vested in any one. It is purely contingent and it is absolutely impossible to-day to determine who are to take it.

"They cannot now be ascertained. There may be grand-nephews and grand-nieces living to-day, who may be dead on the seventh day of

March, 1899, and there are children now unborn who, when that time arrives, will answer in full the description of those who are to take. So that we must wait until the expiration of the time fixed by the testator, before we can know who are to be the recipients of his bounty. (McBride v. Smyth, 54 Pa. 245; Holmes's Estate, 126 Id. 223.)

"Such being the case, how can we conclude that this trust for accumulations is for the benefit of minors, when we do not know who it is for? And if we cannot so conclude, this trust must fall.

"If this trust is null and void, as the Auditing Judge thinks it is, to whom do the 'rents, issues, interest, and profits so directed to be accumulated contrary to this Act' go? By the provisions of the Act they 'shall go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed.'

"As a rule the residuary clause of a will carries all of an estate which has not been otherwise thereby disposed of, and therefore covers all void and lapsed legacies.

"If this direction for accumulation had been with reference to some portion of the testator's estate other than the residue, it would then have fallen into and been disposed of by the residuary clause, but it is the income of the residuary estate itself which is to be accumulated, and if this direction is void, there is but one conclusion that can be reached, and that is, that as to the income which the testator has failed to legally dispose of by the residuary clause of his will he died intestate, and the same must go to and be distributed among his next of kin, according to the intestate laws of this Commonwealth. (Grim's Appeal, *supra*; Mellon's Estate, 16 Phila. 323.)

"The account shows that the income of this estate in the hands of the accountants for the first year amounts to the sum of \$457,456.73. The question was raised whether this fell into and became a part of the principal which passed to the trustees under the residuary clause, or whether it remained income, and as such, if the direction to accumulate is void, was undisposed of by the will.

"Mr. Johnson, for the trustees, claimed that this income became principal and passed under the residuary clause.

"Every will takes effect from the death of the testator, and all its provisions must be presumed to relate to things as they existed at that time. When, therefore, a testator bequeaths all the rest, residue, and remainder of his estate, he means all that is then left after debts, expenses, and legacies previously given by him have been paid. While one year from the time of death has been fixed by the law, and in this particular case by

the testator himself, as the time within which his estate must be settled, this does not alter the fact that the status of the corpus of the estate is fixed as of the time of the death of the testator. For this reason, in every properly stated account, as in the one now before us, the account of the corpus of the estate is kept separate and distinct from the income, whether of the first or any subsequent years.

"This has been frequently held to be the only way to state accounts for the proper settlement and distribution of estates. In fact, it has been made one of the rules of this Court that accounts must be so stated. Where in most cases would be the use of this care, and particularly with reference to principal and income, if after all the provisions of the will had been carried out what was left, whether principal or income, fell into the residue? That the income does not fall into the residue has been held in a number of cases to which the Auditing Judge will simply call attention. (*Bird's Estate*, 2 Parsons, 168; *King's Estate*, 11 Phila. 26; *Sergeant's Estate*, 9 Id. 346.)

"In his will the testator directed that 'all income given by this will shall begin to accrue to the beneficiaries after one year from my decease and not before,' so that there can be no question but that the beneficiaries under this testator's will do not take the income until a year after his death, but this direction can have no application to the income of the residue, which he did not give to any one, but which he directed to accumulate. That must either be accumulated as directed by the will, or, if this direction is void, go to the next of kin.

"It was urged that the estate which is to pass under the residuary clause of testator's will to the trustees is not the residuary estate as it existed at testator's death, but as it existed a year afterwards, when it was augmented by nearly a half a million dollars income; because the testator fixed that time for the settlement of his estate, and until then the residuary estate could not be ascertained. This, however, presents no different case than we have in every decedent's estate where the law fixes the same time for its settlement. In no case can the exact amount of the residue, in dollars and cents, be ascertained until the account is filed and adjudicated, but this does not alter the fact that the estate is what existed at the moment of his death, and the residue thereof is what is then left, after all the conditions of the will have been fulfilled, even though the amount cannot be ascertained until the settlement. It would hardly be contended that this income would be subject to the collateral inheritance tax, yet to hold that it became part of the principal of the estate would make it so liable.

"It was further claimed that one year was the time fixed for the settlement of this estate, and the handing over of the residue to the trustees, and that as this will directed accumulation of the residuary estate by them only after it came into their hands, this income of the first year could not be considered as accumulation of income, but as principal. If this position is tenable, then the testator might have avoided the statute altogether by simply postponing the settlement of his estate for several years. If he could thus accumulate for one year, he might continue it for ten years without the intervention of a trustee, or without any direction in his will to accumulate, but by simply leaving it in the hands of his executor and fixing a distant time for the settlement of his estate: when that time arrived, after the legacies, etc., were paid, all that would be left, principal and income, would be residue and pass under the residuary clause, and thus by indirection he might accomplish what he could not do directly.

"It is further claimed that there has been no accumulation during the first year, because the estate, taking it as a whole, is not now as large as it was when the testator died, having been diminished by the payment of legacies, taxes, expenses, etc., to an amount greater than the income, and therefore there has been no violation of the statute. The answer to this is, that there was no direction to accumulate the whole estate, but only the residue, and that consists only of what is left after the other things have all been paid. If to this residue is added this large sum of money, it seems to the Auditing Judge as if this were an accumulation. The corpus of the estate may have been diminished, but the residuary to which the trust for accumulation alone referred has been largely increased.

"Without any further discussion of this matter the Act itself in terms provides that there shall be no accumulation 'only after such decease during the minority,' etc. Any accumulation after the death of the testator is therefore prohibited.

"The Auditing Judge awards the income for the year, as shown by the account, to the next of kin of the testator."

Exceptions filed to this adjudication by the Pennsylvania Company were dismissed by the Court in banc, which adopted the opinion of the Auditing Judge; whereupon this appeal was taken, the errors assigned being the refusal to award to the trustees the sum of \$457,456.73, the balance of income collected during the period of one year from the death of the testator, and the distribution of the same among his next of kin.

John G. Johnson, for appellants.

The mere citation of the fourteenth and seventeenth items of the will is enough to show that the trustees were entitled to the income in question.

Their right can only be defeated by a clear statutory provision to the contrary, and it is the duty of those who deny the right of the trustees to establish the existence of such a provision, which they have failed to do.

The income collected by the executor was not accumulated by him in pursuance of any settlement or disposition to accumulate. It was collected as part of his general administration, under a duty, after performance of the work of administration, to turn over the residue to trustees, to be held by them in trust to do certain things thereafter concerning the future income, some of which are possibly illegal.

There was no settlement or disposition of the estate until after the work of administration had been accomplished. It might well be that if the testator had directed this administration to be continued for such a period of time as would have resulted in the turning over to trustees of a residuary estate greater than the original, such direction would amount to a disposition contrary to the law. We do not contend that an estate may be held permanently in trust, greater in amount than that possessed by the testator at the time of his death. We do contend, however, where the estate ultimately turned over to the trustee is less than was the one of which the testator died possessed, that if the trustee be compelled to distribute the income, as it shall accrue, of such residuary estate so delivered to him, the statute will not be violated.

The statute strikes at "*accumulation*." Under certain circumstances this may result where an executor receives and retains as principal more than he pays out. It must necessarily result wherever a defined trust fund is held upon a trust to accumulate any portion of the income to be earned after its delivery.

We contend:—

(1) The testator, by apt language, might have legally directed his whole estate, inclusive of the \$457,456.73, after payment of legacies thereout, to be paid over to the trustees to be held as a principal sum to bear interest in their hands thereafter.

(2) Under the will as worded, the executor might legally have paid over to the trustees property inclusive of said income of \$457,456.73, thereafter to be held as a residuary estate to bear interest in their hands.

(3) The true reading of the will amounts to a direction to pay over a residuary estate, inclusive of said sum of \$457,456.73, under such circumstances as made legal the subsequent holding of the whole in trust.

George Tucker Bispham and Richard C. Dale, for appellees.

The direction to accumulate is in conflict with sec. 9 of the Act of April 18, 1853.

The language of the will transgressive of the statute is:—

The rest, residue and remainder of my estate . . . shall be transferred and delivered to the Pennsylvania Company for Insurances on Lives and Granting Annuities of this city upon trust to keep same invested, . . . to add the interest and income thereof to the capital thus accumulated, and increase this fund until the expiration of ten years after my decease, at which time it shall be divided amongst such of my grand-nephews and grand-nieces, who shall then be living as are the issue of my brothers and sisters named in the second item of this will, which fund shall then be distributed to each one *per capita* and not *per stirpes* an equal share thereof.

By this clause an absolute accumulation of income is directed, and no beneficial interest in the estate is created which takes effect until the end of ten years.

The statutory rule forbidding accumulations has been strictly enforced in aid of the purpose of the statute, the accumulation forbidden being contrary to the recognized policy of the law.

Washington's Estate, 75 Pa. 102.

Carson's Appeal, 99 Id. 325.

Schwartz's Appeal, 119 Id. 337.

Mitchesen's Estate, 11 WEEKLY NOTES, 547; 22 Id. 46.

Sergeant's Estate, 11 Phila. 8.

Stillé's Estate, Id. 31; 4 WEEKLY NOTES, 42.

Grim's Appeal, 109 Pa. 391.

McKee's Appeal, 96 Id. 277.

Eberly's Appeal, 110 Id. 95.

The effect of a direction to accumulate transgressive of the statute is "that the rents, issues, interests, and profits so directed to be accumulated contrary to the provisions of the statute, shall go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed." See—

Sergeant's Estate, *supra*.

The clause of the will in which the accumulation is directed is the residuary clause, and under that no right vests in the residuary legatees until the expiration of ten years from the testator's death. The class named in the residuary clause, then to receive the testator's bounty, is a class which remains undetermined until March 7, 1899. The language is: "It shall be divided among such of my grand-nephews and grand-nieces who shall then be living as are the issue of my brothers and sisters named in the second item of this will, which fund shall then be distributed to each one *per capita* and not *per stirpes* an equal share thereof."

It is a condition precedent to the title of the grand-nephews and grand-nieces that they should be living on the 7th day of March, 1899. Until that day, who are to be in the fortunate class is uncertain. Deaths and births from now until then may vary the number of those who by living in that day will prove their title to the ownership of the fund.

As a necessary consequence, the testator died intestate as to the income which may accrue upon the residuary estate until the title to the principal of the estate shall vest in the grand-nephews and grand-nieces who shall then (March 7, 1899) be living. See—

Grim's Appeal, *supra*.

Counsel for the appellants does not seriously controvert this proposition, but seeks to secure an accumulation of the income for the first year by arguing—

That as the personal estate of a decedent is not distributable until a year after his death, the interest which accrues during that year is to be added to the corpus of the estate for the purpose of ascertaining what the residue is, and such an addition is not an accumulation within the meaning of the Act of 1853, nor is it an accumulation directed to be made by the testator, but is simply the result of postponing the distribution of the estate for a year according to law. And this proposition is sought to be strengthened by the consideration of the fact that when all specific legacies are paid the assets of the estate forming the residue will be in amount less than the estate existing at testator's death.

The answer to this proposition will be found in the following suggestions:—

(1) The residue of the estate is the capital thereof, after deducting therefrom the expenses of administration, debts and legacies. All those charges are, as is well known, payable out of the capital of the estate and not out of the income. This is necessarily so; otherwise, where there is a residuary gift for life with remainder over, the income of a tenant for life during the entire period of his estate might be taken to pay pecuniary legacies. It is, therefore, perfectly plain that all such charges (legacies, debts and expenses) are to be paid out of the principal of the estate.

This being so in the present case, it is perfectly clear that it is the principal of the estate alone, and not the total composed of principal and income during the past year, which is diminished by the legacies, debts, and expenses of administration. The estate, therefore, now brought before the Court by the executor consists in law of two parts: First, the corpus or principal thus diminished; and, secondly, the income which has accrued during the year. To this conclusion of law may be added the fact which appears by the account, namely: That the executor of the estate has very properly kept the principal and income separate, and has exhibited to the Court a separate income account. It is the balance appearing in this income account that the next of kin claim should be paid to them, upon the ground that by the terms of the will the accumulation of

this income is directed, which direction is in violation of the statute.

(2) There being income on hand which has accrued during the year, the question is, to whom does it belong? It is well settled that where there is a gift for life or for any other limited period with remainder over, the tenant of the particular estate is entitled to income from the date of the testator's death, and not from the end of the year after the death. See—

Bird's Estate, 2 Parsons, 168.

King's Estate, 11 Phila. 26.

Sergeant's Estate, *supra*.

In the present estate there is a division of the entire ownership of the residuary fund into a particular estate and estates in remainder; the particular estate being the term of ten years devoted by the testator to accumulation; and the estates in remainder being the interests which arise under the will after the expiration of ten years. If our main contention is correct, and the next of kin are entitled to the income, they are entitled to it from the date of testator's death. It is immaterial whether it is to be considered as distributable by the executor or the trustees.

October 5, 1891. GREEN, J. The practical and only question in this case is whether the residuary clause of the testator's will is in conflict with the provision against accumulations of the Act of April 18, 1853, sec. 9 (P. L. 503), so far as the income of the estate for the first year after the testator's death is concerned. As to the remaining nine years of the period of ten years, during which the residuary income is to be accumulated, there is no question before us, and probably never will be, in view of the very direct provision for accumulation contained in the residuary clause of the will.

If the will does not direct an accumulation which may, or must be, operative upon the income of the first year, it does not transgress the statute. In order to determine this question we must first regard the residuary clause of the will by itself. It is the fourteenth item of the will. It first directs as follows: "The rest, residue, and remainder of my estate, real, personal, and mixed, wherever situated, vested, contingent, or future, after satisfying the foregoing bequests, as such remainder shall be realized and converted into proper securities, by my executors as provided in item seventeenth of this will, shall be by them transferred and delivered to the Pennsylvania Company for Insurances on Lives and Granting Annuities, of this city, which company shall hold the same as a trustee and in special trust as follows."

It will be observed that there is no direct gift of the general residue of the estate to the trustee.

The testamentary direction is, that the executors shall transfer and deliver to the trustee the residue of the estate, left after satisfying all of the previously-mentioned bequests, and after the "remainder shall be realized and converted into proper securities as provided in item seventeenth of this will." Turning to item seventeenth we find that it is an absolute bequest of the entire personal estate of the testator to the executors, "to enable them freely and fully to execute the various provisions of this will." Next, it provides that the executors may pay the special bequests given by items fourth to eleventh, both inclusive, either by assigning any of the personal property (excepting the St. Louis investments) to the legatees at its fair value, "or they may pay the same in money." Next, the executors are directed to make up the fund provided for by the second item by selecting real estate loans in St. Louis, to be valued by the executors at par, and for any deficiency of the same they shall select any good securities out of the estate and at their own valuation. The clause next directs the executors to make up the fund required by the third item by either selecting any good securities of which the testator died possessed, "or by purchasing or investing in new ones," and they "shall settle and fix the value of the securities which they turn over to the trustees." Next, the executors are directed to select and hand over to the institutions named in the twelfth item the several amounts therein specified, "out of the good stocks, bonds, or other securities which I may die possessed of, or which may come to the hands of the executors thereafter by purchase," with power to make up any deficiency of good securities by selling such as are not deemed good and replace them by others which are good. This item disposes of seven hundred thousand dollars and the executors alone are required to pay it all. The fund required by the thirteenth item is directed to be made up by the executors, by handing over such securities as they think best, or they may convey to the trustee named in the thirteenth item, any of the testator's real estate upon the trust mentioned in the item. This item carries three hundred thousand dollars, all of which is to be paid by the executors. In the next place the entire residue of the testator's whole estate, real and personal, and of whatever character, is given absolutely to the executors with positive direction to sell it all and convert it into money (excepting only such personal investments as may enter into the trust provided in the fourteenth item), and then reinvest the same in bonds, loans, or other investments, at their discretion, for the benefit of the residuary trust in the fourteenth item, and the executors are directed, as such residuary portions of the estate are converted and reinvested, to

hand them over to the trustee of the residue to be held according to the fourteenth item. Full power is given to the executors to carry out this portion of the will by making any kind of sales and upon any kind of terms of "all and every part of my estate in this will in any way mentioned," with no restriction of any kind. And then this item of the will (17th) proceeds thus, "And the net proceeds of all such sales, as well as all rents and income derived from any part of said property, shall constitute a part of my residuary estate, and be invested as herein-before expressed. And until sale of my real estate, my executors shall have full control over the same, and are authorized to lease or rent it, and to make such repairs, alterations, and changes therein as they may deem proper; and to pay all taxes, other proper charges against the same, and make all insurances thereon deemed proper by them, and generally they may do and perform all acts touching such property as they may deem to the advantage of my estate in as full and ample a manner as I can do." We think it manifest from the provisions of this section that the executors were to have the fullest and most absolute power, control, management, and disposition of every fragment of the estate, including its income and its rents, issues, and profits, until the time of its being handed over to the residuary trustee, to as great an extent as the testator himself had in his lifetime. All rents, and all income derived from any part of the property of the testator, are expressly and absolutely given to the executors under this clause of the will by way of a residuary bequest, and everything that is to be done to or with the estate or its proceeds, prior to the taking effect of the residuary trust, is to be done by the executors. All the debts, all the costs and expenses of the administration, all repairs, taxes, insurance and other charges upon real estate, all legacies, gifts, and bequests of every description are to be paid by the executors before the residuary trust estate under the fourteenth item arises. And the rents and income received by the executors before the residuary trust comes into being, are explicitly directed "to constitute a part of my residuary estate." We think it cannot be doubted that under this provision not only the estate of which the testator died seised or possessed, but all rents and income, "derived from any part of said property," after his death, entered into and formed part of the general residuary estate in the hands of the executors prior to the existence of the residuary trust estate. More than this, although this was residuary estate in terms, it was given to the executors with express directions to apply it to the payment of all bequests and legacies by a further clause of the seventeenth item of the will, in these words: "And I direct that my executors

shall apply the proceeds of sales of real estate equally, and in like manner with the proceeds of sales of personal estate, in payment of all or any of the bequests and legacies given by me." The will is peculiar. It gives the whole estate to the executors in the first clause of the seventeenth item for the express purpose of executing the various provisions of the will, and further on in the same item it gives them the absolute and entire residue of the estate, no matter how, or in what manner, or from what source derived, expressly including rents and income; also with express instructions to pay all kinds of expenses and charges, and, in addition, all bequests and legacies. It may be that there is redundancy in these provisions, but it is entirely true that the testator fully intended to place every kind of asset, including rents and income received after his death, in the hands of his executors, to be by them applied to the full settlement of his estate before the residuary trust created by the fourteenth item came into existence.

If there were no other provision in the will applicable to the subject of the present contention, we would be clearly of opinion that income which accrued in the hands of executors prior to the commencement of the residuary trust estate under the fourteenth item, would constitute part of the general estate of the testator in the hands of the executors, applicable to any of the purposes of its administration. But there are additional provisions of the will which are strongly confirmatory of this view. In the latter part of the seventeenth item there is this provision: "And all income given by this will shall begin to accrue to the beneficiaries after one year from my decease and not before then, excepting the annuity in item third, which shall accrue from the date of my decease, and which the executors shall pay during the first year in order to prevent any delay in paying that." This provision is a positive prohibition against the payment of any income to any beneficiary except the one mentioned in the third item. It is *all* income, and not merely the income upon the several legacies specifically bequeathed, that begins to accrue at the end of the first year. By necessary consequence all the income that does accrue during that year goes into the general estate and becomes part of its corpus, with only the one exception otherwise directed. A positive direction to the contrary in the bequest of the residuary trust might overcome the force and meaning of the language we are now considering, but there is no such direction as appears by the further language of the fourteenth item, to which we will now recur. After the first portion of that item, which we have already considered, immediately follows the provision as to what is to be done by the trustee with the securities transferred by the executors,

in these words, "that is to keep the same invested in productive securities in manner provided in items sixteenth and seventeenth, and after deducting the proper charges and expenses incident to the management of said investments and securities, to add the interest and income thereof to the capital, and thus accumulate and increase the fund until the expiration of ten years after my decease, at which time it shall be divided amongst such of my grand-nephews and grand-nieces who shall then be living, as are the issue of my brothers and sisters named in the second item of this will," etc.

It will be observed at once that there is no provision for the accumulation of interest for each one of the ten years next following the testator's death. The expiration of ten years after the testator's death is simply the period at which the accumulation shall cease, and there is no provision as to when that period shall commence. It could not commence immediately at the testator's death because the trust fund did not, and could not, then come into the hands of the trustee of the residuary trust estate. On the contrary, the settlement of the estate by the executors must proceed and be completed before the residuary trust fund could reach the trustee, or the amount of it be known. It is the residuary trustee who is to accumulate the interest, but nothing of that kind could be done until the trust fund came into the possession of the trustee. The executors had very large sums to pay before the estate could be settled and the residue ascertained. The legacies alone far exceeded one million dollars. The payment of the collateral inheritance tax consumed nearly \$450,000, and the executors' commissions were over \$200,000. There was nothing in the will to prevent the executor from using any assets of the estate, whether principal or income, to pay these legacies, taxes and expenses. The will made no distinction between principal and income, as assets, and required no interest to be paid during the first year to any legatee but the one mentioned in the third item. It prohibited the payment of all other income as such, until after the expiration of the first year. How then can it be said that the will directed the accumulation of the income for the first year, when there is not only no such provision in the will, but an express direction to the contrary? There is neither a necessary implication, nor any implication, either that the testator intended such an accumulation, or that such an accumulation is possible under the will. The residuary trustee did not have the fund from the death of the testator, and consequently could not accumulate it by income from that time. In point of fact, there was no accumulation of the first year's income even by the executor. The payments made by them of legacies, expenses

and charges, were very much greater than the first year's income, and the total estate at the end of the first year was much less than at the death of the testator. Where then is the accumulation of the first year's income? It does not exist in fact, it is not directed by the will, it is not within the power of the executors to produce it, and the residuary trustee is prohibited from doing so, because no income can begin to accrue to any beneficiary until after the end of the first year, and it would be only from that time that any increase of the principal of the trust fund from accumulating income could commence. This money has not been paid to the residuary trustee nor can that trustee ever have it under the terms of the will. It has all been needed for use in the settlement of the estate by the executors, and it has been so used. By the positive provision of the seventeenth item of the will all rents and income derived by the executors from property which the testator thus describes, "all and every part of my estate in this will in any way mentioned, including all my lands and tenements," shall constitute a part of the residuary estate. As such it entered into the general estate of the testator in the hands of the executors, and was applicable by them to the payment of debts, legacies, and expenses, and only the remainder after all these deductions were made, was payable to the residuary trustee. That trustee never did, and never could, accumulate that portion of the income which accrued during the first year, and hence the Statute of 1853 has not been, and cannot be, transgressed so far as that year's income is concerned.

The judgment of the Orphans' Court is reversed at the cost of the appellees, and the record is remitted with instruction to restate and correct the account in accordance with this opinion.

H. C. O.

July '90, 44.

April 13, 1891.

Hoffman v. Bloomsburg and Sullivan R. R. Co.

Railroad companies—Eminent domain—Contract to receive damages in stock—Construction of—Admission by party litigant during trial—What disadvantages to be considered by the jury in assessing damages—View of land by trial jury—What license allowed jury to disregard testimony.

A. made an agreement with a railroad company about to construct its road across his land, as follows: "That I will release to the company, which undertakes to construct such road, the right of way of lawful width through my land, the damages to be assessed when the road is located, and the amount of said damages to be paid in stock in said railroad. Cost of

fencing not included in damages provided no damage is done my buildings, race, or water power."

Held, that the clear meaning of these words is that the cost of fencing was not to be included in the damages if no damage is done to the buildings, race, or water power, and that the words "the damages" meant all damages.

If a litigant party to a suit asks the Court to take a certain view of a contested question, and the Court does so at his request, he cannot be heard to assign such action for error.

Benson v. Maxwell, 105 Pa. 274; Ritter v. Sieger, Id. 400, approved.

Where, however, in a suit against a railroad company, the paper above quoted being offered in evidence, counsel in answer to a request to state his offer replies that he offers it to show " . . . that there has been a voluntary assessment of damages . . . payable in stock," and adds, "we do not question that if the water power is damaged, the defendant under that agreement is liable to a money assessment in this suit," and the paper was thereupon received in evidence without any question as to its construction, it is manifest that counsel could not have meant to surrender the whole question of construction, and meant only that if the water power were damaged, that damage was to be payable in money, and was therefore at liberty to maintain an assignment of error to an instruction by the trial Judge, that "the proviso or provision . . . relates to the whole agreement and not to the single item of cost of fencing."

The fact that, in such a case, specific evidence was not given in relation to damage from fire, does not exclude that subject from consideration, when it is shown that there are buildings on the land, and their proximity to the road is in evidence.

While in one sense, it is true that a trial jury having viewed the land which is claimed to be damaged, are not bound by the opinion of the witnesses, and are bound to discriminate and form the best judgment they can as to the real amount of damages, they may not substitute their own opinion for that of the witnesses regarded as a whole.

Appeal of the Bloomsburg and Sullivan R. R. Co., defendant, from the judgment of the Common Pleas of Columbia County, in an action brought by John W. Hoffman to recover damages for taking, and injury to, his land by the location and construction of the defendant's road.

On May 13, 1887, upon petition of John W. Hoffman, viewers were appointed to assess damages to his land by reason of the location and construction of the Bloomsburg and Sullivan Railroad through it. The company obtained a rule to show cause why the appointment should not be revoked, and on depositions taken thereunder offered in evidence the following paper signed by the petitioner:—

I hereby agree in behalf of a railroad to be constructed along the valley of the Big Fishing Creek, from a point near its mouth, and following its general course, to Cole's Creek; thence by the most eligible route along the gorge of its eastern branch into Sullivan County, to connect with the State Line and Sullivan Railroad, or to be extended to the State Line at

or near Waverly; that I will release to the company which undertakes to construct such road the right of way of lawful width through my land in Orange Township, Columbia County, Penn.; the damages to be assessed when the road is located, and the amount of said damages to be paid in stock in said railroad. Cost of fencing not included in damages, provided no damage is done my buildings, race, or water-power.

JOHN W. HOFFMAN.

Witness: H. J. CONNER.

The rule was discharged by the Court. The viewers proceeded and reported damages to the amount of \$3745 for the plaintiff. The defendant appealed, and on the trial, before IKELER, P. J., it was contended by the plaintiff that injury had been done to his water-power, and much testimony on both sides was taken. No testimony was given in relation to damage by reason of danger of fire. It further appeared that by agreement the trial jury was taken to view the land. The remaining facts sufficiently appear in the charge of the Court and the opinion of the Supreme Court.

In the general charge the Court said:—

“The railroad is located seventy-two feet from the shed, seventy-four feet from the barn, one hundred forty-nine feet from the grist mill, thirty-four feet from the tenant house, forty feet from the saw mill; and you will judge, as men of experience, knowing how railroads are located, how near to buildings, and how they are managed, whether there is any danger apparent of injury from close proximity of these buildings to the railroad, arising from the careful and ordinary use and operation of the railway;] because if the buildings should be injured or destroyed or if any other damage should occur from the careless or negligent use and operation of the road, the plaintiff would be entitled to recover in a separate action for such injuries.” (First assignment of error.)

“It seems that in 1882 or 1883 persons were prospecting for the location and building of a railroad upon the branch of Big Fishing Creek; and that some time in 1882 Captain Conner, now a director and the secretary of the company, with Hoffman, the plaintiff here, made an agreement, put in evidence as a ‘release,’ and it will be before you, formal in terms and in writing signed by John W. Hoffman and witnessed by H. J. Conner, which instrument provides as follows: [Here the Court read the agreement.]

“[It is our duty to instruct you in reference to this agreement of release. If you find that no damage is done or has been done to the buildings, race, or water power, then, according to this release, whatever damage has been done to the property in general, as for land taken, would be payable in stock of the railroad company, according to this agreement. Our construction of this agreement is that the cost of fencing was excepted

from that kind of payment, and to be ascertained and assessed, if any, deducting from the general value of the whole premises; and is payable in money value. The proviso or provision that no damage is done to my buildings, race, or water power, that, we hold, relates to the whole agreement, and not to the single item of cost of fencing.] (Second assignment of error.)

“[That is, if any injury accrued to the water power the damage would be payable in dollars and cents to be paid in cash; and if there was no injury to the water power, then, as we have instructed you, the land damages, if there should be any, you should find payable in stock. The fencing and burden of fencing, whatever it may be, as deducting from the value of the whole tract, that you will find payable in cash. (Eleventh assignment of error.)

... “Now you have seen an illustration of the power given here in the argument of counsel for the plaintiff. It is self-evident that the height of water above gives weight, force, and power to this discharge as conclusively illustrated by Mr. Scarlet in this case.] (Third assignment of error.)

“By order of the Court and with consent of the parties, you went upon the premises and viewed them, so that you might have a more intelligent understanding of the evidence from knowing the lay of the land and the location of the railroad over it; [and you may and should use your own observation and judgment, together with all the other evidence in the case, as to the damage sustained, if any, and the advantages accruing, if any, as well.] ...

“The opinions of witnesses are to aid and assist you, if possible, in arriving at a just conclusion; [but you are not to lay aside your own observation and judgment and accept the conclusions of witnesses, if you think them extravagant in being either too high or too low or incorrect.] ...

“It is entirely a question for the exercise of your best judgment, adapting the testimony of the witnesses to the land and to the location and construction of the road upon it, as you saw it, [and also using your own judgment and knowledge in the matter.] ...

“In making up your verdict, or in order to arrive at a just conclusion, you may consider separate items of alleged particular injury to the property, not suffered by the community in general; such as the land taken, the manner of taking and cutting the land, increased difficulty of operating the remainder, if there be any; the cost of fencing and of maintaining fences, if any are necessary; [the danger to buildings, crops, and fences by fire], from a careful and ordinary operation of the road, not resulting from negligence in the use of the road;” the injury to water power, if any.

(Fourth, fifth, sixth, seventh, and twelfth assignments of error.)

The plaintiff requested the Court to charge, *inter alia*, as follows:—

(2) That the measure of damages to the property of the plaintiff as a water power and mill property is the difference in the market value before and after the construction of the railroad and works of the defendant; and in determining this difference the jury should take into consideration the difference between the working capacity of the power upon the mills before and after; and the jury should also consider any unused or surplus water power of the plaintiff for good and useful purposes, the water power and mill property remaining as it was before the road was constructed; and should also consider all matters of inconvenience and increased expense and burden and risk in the use, maintenance, and occupancy of the water power and mills, occasioned by the works of the defendant, and also the danger of fire and the inconvenience of access and use of the buildings and grounds therewith connected. *Answer.* We affirm this point also; with the explanation, if with the careful and ordinary use and management and operation of the road; and we have also instructed you with reference to fire. This point is correct, with that explanation. (Eighth assignment of error.)

(6) That the jury in estimating the damages to the plaintiff's property as a farm property should take into consideration the depreciation in its market value by reason of quantity and quality of land taken and the manner of taking, the inconvenience arising from a division of the property or from increased difficulty of access, the burden of increased fencing, the ordinary danger of accidental fires to the fences, fields, or farm buildings, not resulting from negligence, and, generally, all such matters as (owing to the particular location and manner of construction of the railroad) may affect the convenient use and future enjoyment of the property. *Answer.* This point is correct. These elements are proper for your consideration, with the addition that the special advantages, not general to the whole community, are also a matter to be considered and set off against any damages arising from these several elements. (Ninth assignment of error.)

(7) That under the agreement offered by the defendant, it was the duty of the defendant so to construct the railroad as not to interfere with the plaintiff's water power and race; and in this case the defendant should be held to a strict compliance with the conditions of the license in all respects. *Answer.* That point is affirmed. (Tenth assignment of error.)

On the argument of the case, the counsel for the plaintiff introduced, by instruments he had provided for the purpose, and which had not pre-

viously been exhibited, nor put in evidence, a hydraulic experiment, in alleged contradiction of James C. Brown, a witness for defendant, to which instruments and experiment the defendant's counsel at the time objected and excepted, and to which the Court referred in the charge to the jury in the language quoted in the third assignment of error.

Verdict and judgment for the plaintiff for \$4975.50. Defendant thereupon appealed, assigning error as above.

John G. Freeze and Charles R. Bucklew (L. E. Waller with them), for appellant.

It was error to permit counsel to illustrate his arguments by instruments not in evidence, and for the court to emphasize the experiments performed by a reference in the charge.

Abbott's Trial Brief, 138.

People v. Hope, 62 Cal. 291.

Smith v. Com'rs, 2 Ohio, 312.

Farmers' Ins. Co. v. Walden, 7 Am. Dec. 340.

Gordon v. Little, 8 S. & R. 533.

It was error to instruct the jury that having viewed the land they were authorized to reject the testimony of the witnesses.

Wright v. Carpenter, 49 Cal. 607.

Close v. Sainm, 27 Iowa, 503.

Flower v. R. R., 132 Pa. 524.

The learned Court misconstrued the contract, and the jury were misled. The second division of the contract is a perfectly clear and comprehensive provision for right of way not exceeding sixty feet through the Hoffman land, and for the assessment of damages therefor, payable in stock of the railroad company. Considered by itself the division includes all damages to his property resulting from the location, construction, and proper operation of the proposed railroad line. The last or final division of the contract is plainly a conditional exception from the division which precedes it, if judged and taken according to the natural and necessary import and construction of the language employed. It says simply and plainly that if the railroad is so laid as to do no injury to his buildings, race, or water power, the cost of fencing shall not be included in the damages to be assessed and paid by the railroad company under the prior division of the agreement. Substantially and in form Mr. Hoffman agrees to take his damages for right of way in company stock, and if they will locate the line according to his desire and interest, with regard to buildings and water power, he will make no claim for the cost of fencing upon his premises.

James Scarlet and Charles G. Barkley (L. S. Wintersteen with them), for appellee.

The illustration by counsel which is objected to and is covered by the third assignment was simply of a well-known fact. It therefore could not have misled the jury. The Court below reached the same conclusion and refused a new

trial. Where, then, is the error? It becomes immaterial. The Court will not reverse for immaterial error.

Heysham v. Dettre, 89 Pa. 506.

Bank v. Henninger, 105 Id. 496.

Dunkle v. Harrington, 101 Id. 465.

Entwisle v. Carey, 22 WEEKLY NOTES, 127.

The charge, if considered as a whole, correctly presents the law in regard to the duty of the jury as to the view.

R. R. v. Coon, 111 Pa. 430.

Flower v. R. R., 132 Id. 524.

A party litigant cannot complain if the Court submit his case to the jury from the point of view from which he himself presented it to the Court, even if such point of view be erroneous. Such error is not ground for reversal.

Ritter v. Sieger, 105 Pa. 400.

Benson v. Maxwell, Id. 274.

October 5, 1891. GREEN, J. We are not able to agree with the learned Court below in the interpretation given to the agreement signed by the plaintiff in relation to the construction of the defendant's road on his land. It is in the following words, viz.: "I hereby agree in behalf of the railroad to be constructed along the Big Fishing Creek from a point near its mouth, and following its general course to Cole's Creek; thence by the most eligible route along the gorge of its eastern branch into Sullivan County, to connect with the State Line and Sullivan Railroad, or to be extended to the State Line at or near Waverly: That I will release to the company which undertakes to construct such road the right of way of lawful width through my land in Orange Township, Columbia County, Penna. The damages to be assessed when the road is located, and the amount of said damages to be paid in stock in said railroad. Cost of fencing not included in damages, provided no damage is done my buildings, race, or water power.

Witness,

H. J. CONNER.

JOHN W. HOFFMAN."

The learned Court below instructed the jury that the proviso at the end of the paper related to the whole agreement and not merely to the cost of fencing, and, therefore, that if the jury found that no damage was done to the plaintiff's buildings, race or water power, they could find that the general damage done by taking the land was payable in stock, or otherwise "the damage would be in dollars and cents, to be paid in cash." We cannot so read this paper. We can only judge of its meaning by the plain reading of its words. In the photographic copy of the paper, as in the printed copy, the word "cost" in the final sentence is the beginning of a new and independent sentence, dissociated from the one preceding, and it reads, "Cost of fencing not

included in damages, provided no damage is done my buildings, race, or water power." The clear meaning of these words is that the cost of fencing shall not be included in the damages if no damage is done to the buildings, race, or water power. That is, if no damage is done to the buildings, race, or water power no damage is to be allowed for the cost of fencing. This is the natural construction and meaning of the words. But the Court below held that the cost of fencing was to be "payable in money value," and that the words "provided no damage is done my buildings, race, or water power," did not relate to the cost of fencing, but did relate to the damages mentioned in the preceding sentence. That sentence is in these words, "The damages to be assessed when the road is located, and the amount of said damages to be paid in stock in said railroad." What damages? Manifestly "the damages," all the damages resulting from the location and construction of the railroad through the plaintiff's land. This appears by the preceding sentence, "that I will release to the company which undertakes to construct such road the right of way of lawful width through my land in Orange Township, Columbia County, Penna." Immediately following is the provision for assessing the damages in the sentence above quoted. Certainly the words "the damages" in that sentence mean all the damages. There is no distinction between damages arising from the taking of the land and those which arise from injury to the buildings, race, or water power. But the plaintiff was willing to waive any claim to damages for cost of building fences if no damage was done to his buildings, race, or water power, and says so in the final sentence. We are quite unable to read the paper in any other way than this, and hence find that the Court was in error in the reading adopted in the charge.

But the appellee contends now that the appellant is not at liberty to raise this question, because one of the counsel for the appellant on the trial admitted that if the water power was damaged the defendant was liable to a money assessment in this suit. Of course, if a litigant party to a suit asks the trial Court to take a certain view of a contested question, and the Court does so at his request, he cannot be heard to assign such action of the Court as error. This was what was done in the cases cited by the appellee upon this subject. In Benson v. Maxwell (105 Pa. 274), we held that where a party requests the Court to instruct the jury in a particular way, and the Court charges substantially as requested, he cannot afterwards assign such instruction as error. And in Ritter v. Sieger (Id. 400), we held that a party litigant cannot complain if the Court below submits his case to the

jury from the point of view from which he himself presented it to the Court, even if such point of view be erroneous. In both these cases the action of the Court below was taken at the express instance of the complaining party, and we decided that he could not be heard to assign such action for error. But we find nothing of that kind on this record. There was no request by the defendant to the Court to charge that the proviso of the license was limited to the cost of fencing, or that the agreement to take stock in payment for damages done by the location and construction of the railroad was inapplicable if damage was done to the buildings, race, or water power of the defendant. All that is alleged in support of the appellee's argument on this subject is a verbal statement by one of the counsel for the appellant, made on the trial, to the effect that if the water power was injured the damage was to be a money assessment. Upon looking at the record of the bill of exceptions we find that the written agreement signed by the defendant had been offered in evidence and one objection to it overruled, when some additional testimony was taken to connect the plaintiff with it and his knowledge of its acceptance by the defendant. Thereupon one of the counsel for the plaintiff requested defendant's counsel to state the object of the offer, to which one of the counsel replied by saying, "the object is to show that the railroad company entered by consent of the defendant (plaintiff?) upon his premises to construct their line of road; secondly, that there was an agreement between the parties for the assessment, voluntary assessment, of any damages that might be occasioned to his property, and for the payment in capital stock of the company. We do not question that if the water power is damaged the defendant under that agreement is liable to a money assessment in this suit. We do not deny that if the water power is injured the damage is to be a money assessment in this suit."

THE COURT: "Merely remarking that we think the offer is proper, we overrule the objection and admit this release or paper, without any further comment at this time, and give the plaintiff a bill."

It is manifest that the paper was admitted in evidence without any reference to the question of its construction, and also that the defendant's counsel could not have meant to surrender the whole question of the manner in which the damages were to be paid, because a part of the offer, as he stated it, was to show that the damages were to be paid in stock of the company. What he said in addition to that was that they did not deny that if the water power was injured the damage was to be a money assessment. As we understand this, the counsel meant that if the water power was damaged that damage was to be

payable in money. But that is a very different thing from admitting that the whole of the damage arising out of the location and construction of the road was to be payable in money. We do not agree with the defendant's counsel in his understanding of the proviso clause of the agreement, but that would not help him if he had given up the whole question. We do not understand him to have done so, and therefore hold that he is at liberty to maintain the second assignment of error, and we sustain the assignment because we think the learned Court below was in error in its interpretation of the paper in question. But while we sustain this assignment it is on the bare question of the interpretation of the instrument only. We do not assume to decide whether there are facts in the case which disable the defendant from taking advantage of the provision for payment in stock. That subject is not before us under any assignment, and without intimating whether there are any such facts we simply say that subject is not considered.

We sustain the tenth assignment because we do not think the agreement prohibited the defendant from interfering with the water power and race, but only provided that the cost of fencing should not be included in the damages, if no damage was done to the buildings, race or water power. But, of course, we do not mean to say that damage to buildings, race or water is not to be considered by the jury. Under the general law all the disadvantages arising from the location and construction of the road are to be taken into account in estimating the value of the whole property before the road was built and after it was finished.

What was said by the Court in reference to the possible damage to buildings by fire from the ordinary operation of the railroad, without negligence, was in accord with the decisions of this Court upon that subject, and we therefore do not sustain the first, seventh, eighth and ninth assignments. The fact that specific evidence was not given in relation to damage from fire does not exclude that subject from consideration, when it was shown conclusively that, in point of fact, there were several buildings on the premises, and their respective proximity to the road was given in evidence. Of course, the subject could only be considered in the general way of estimating the value of the whole property before and after the building of the road, and not at all as an object of specific allowance. And this is the way it was presented by the Court in the charge and answers.

We do not think there is any merit in the third assignment. The counsel merely presented to the jury an illustration of a physical fact which spoke for itself. The jury simply saw the natural and self-evident fact that a column of water

higher than another column, but of the same dimensions otherwise, would discharge itself with more force than the lower column. It cannot be doubted that the counsel had a perfect right to contend in argument that such would be the case, and we can see no good reason why he could not show the jury the actual natural occurrence in support of his argument. It was an illustration merely and not an experiment.

We are inclined to sustain the fourth, fifth and sixth assignments for the reason that while the Court stated, in the main correctly, the proper functions of the jury after a view of the premises, we think somewhat more license was allowed to the jury in the direction of substituting their own opinion for that of the witnesses, than is consistent with our recent decisions. This is rather more manifest in parts of the charge which are not assigned for error than in those that are, but the same idea is followed up and practically repeated in the latter portions. For instance, the Court said to the jury: "But it is the duty of the Court to say to you that such opinions are subject to the qualification that the opinions of witnesses are not binding upon you, but are persuasive merely; if you are of a different opinion you may find according to your own opinion." Then immediately following is the language contained in the fifth assignment and the inference which the jury may have drawn, or which it was possible for them to draw from this part of the charge, is that they might substitute their own opinion for that of the witnesses, if they saw fit to do so. The vice of the charge is in contrasting the opinion of the jury with that of the whole body of the witnesses in a collective sense, and that would be error. Probably the Court did not mean to be so understood, but the language warrants such a conclusion. Of course, in one sense it is true that the jury is not bound by the opinions of witnesses on such questions, that is of some witnesses, as where extravagant and unreasonable estimates are given. But there are in all cases the estimates of other witnesses of a very different kind, and among these, and especially where there has been a view, it is not only the right but the duty of the jury to discriminate and to form the best judgment they can as to the real amount of the damages. This will doubtless involve the rejection of some or much of the testimony, and that is within the right of the jury, but yet some of the language of the charge seems to authorize the substitution by the jury of their own opinion, for that of the witnesses regarded in a mass. In one of the most recent cases (*Flower v. B. & P. R. R. Co.* 132 Pa. 524), the Court below charged: "You are only permitted to view the land that you may better understand the testimony. The value of the land you are to ascertain from the witnesses." Referring to this we said: "We see no error in

this. The jurors were sworn to render a true verdict according to the evidence. It was never intended that the visit of the jury should be substituted for the evidence, and that they should make up their verdict from the view in disregard thereof. The object of the view is, as was correctly said by the learned Judge, to enable them the better to understand the testimony; to weigh conflicting testimony, and, thus aided, to arrive at a sound and just conclusion." We are of opinion that the charge of the learned Court below in the present case is obnoxious to this ruling in the three assignments of error we are now considering, and therefore they are sustained.

The eleventh assignment is sustained for reasons already stated. The twelfth assignment is not sustained. The matters discussed by the appellant under this assignment are proper for the jury, but they do not involve any matters of law with which we can interfere.

Judgment reversed and new venire awarded.

R. H. N.

Common Pleas.

C. P. No. 4.

September 22, 1891.

Crall v. Ford, deft., and Wilcox, garnishee.

Set-off—Foreign attachment—Insolvency.

The garnishee in a foreign attachment cannot set-off notes given to him by the defendant before the attachment and not due at the time of the issue of the writ of attachment.

The fact that the defendant is insolvent will not enable an undue note given by him to be set-off by the garnishee, unless something has been done before attachment to show an application of the undue demand to the debt due by the garnishee.

Rule to open judgment and let garnishee into a defence.

This was a foreign attachment. The attachment issued December 14, 1889, returnable to March Term, 1890. The writ was duly served on the garnishee, no appearance was entered, and after interrogatories had been served judgment was taken for want of answers on December 29, 1890, for the sum of \$457. Shortly after the issue of the attachment the defendant made an assignment in Connecticut, for the benefit of his creditors. The depositions on the rule showed that at the time of the service of the writ of attachment, the garnishee was indebted to the defendant upon two bills for advertising, aggregating over five hundred dollars; also that the garnishee held three notes of

the defendant, in all amounting to \$375, which notes were not due at the time of the attachment, but fell due in January, April, and July, 1890. There was some evidence that in December, 1889, shortly after the attachment the garnishee had stated to a witness that he owed the defendant between four and five hundred dollars and that he made the same statement to the plaintiff himself in April, 1890, and that on neither occasion did he mention nor claim any set-off on account of the notes.

William A. Manderson, for the rule.

The garnishee has a right to set off the notes. He has owned them all along; they were his at the time of the attachment. The attaching creditor has no right greater than that of the debtor.

Henry Budd (*William C. Stoecker* with him), contra.

A set-off is in the nature of a cross action, and like an action must be upon a cause which is complete. It must be complete at the time the writ in the original action is issued. Except under very peculiar circumstances a debt must be both due and demandable before it can be set off.

Morrison v. Moreland, 15 S. & R. 61.

Huling v. Hugg, 1 W. & S. 418.

Pennell v. Grubb, 13 Pa. 552.

As to a garnishee the issue of the attachment stands as the issue of a writ to an ordinary defendant.

Roig v. Tim, 103 Pa. 115.

[*HAYER*, P. J. Was the garnishee payee or indorsee of these notes?]

Payee.

[*HAYER*, P. J. Is not this then a case of *debitum in presenti solvendum in futuro*?]

To be a subject of set-off the right of action must be complete. It is not enough that the right of action be complete before plea pleaded; it must be complete when the writ issues. The precise question here involved has been decided in Delaware, where it has been held that a note not due at the time of attachment laid, cannot be set off, though due before plea pleaded.

Edwards v. Delaplaine, 2 Harringt. 322.

Insolvency will make no difference. In the cases in which such a set-off has been allowed, there has been something done before attachment to show an application of the undue demand as a set-off. In the case of *Dougherty Bros. & Co. v. Central Nat. Bank* (12 Norris, 227), the Court did not proceed upon the ground of set-off, but analogy to a stoppage *in transitu*.

Here the garnishee has admitted an indebtedness equal to the amount of the judgment entered against him.

C. A. V.

October 3, 1891. Rule discharged.

Orphans' Court.

May, 1891.

Lynch's Estate.

Issue devisavit vel non—When not granted—Burden of proof upon those alleging undue influence.

Sur appeal from register, and demand for an issue.

On September 16, 1890, the register admitted to probate a paper-writing, dated September 8, 1890, purporting to be the last will and testament of Margaret Lynch, deceased, and granted letters testamentary thereon to Frank T. Anderson. On October 23, 1890, Thomas Lynch, a nephew of the decedent, filed his petition with the register, praying for a rehearing in relation to the said will, and that the probate thereof be vacated and the letters testamentary granted thereon be revoked, alleging as the grounds thereof testamentary incapacity, fraud, duress, imposition, and undue influence. On October 25, 1890, the register refused the hearing and dismissed the petition. Thereupon Thomas Lynch took this appeal, and requested an issue to determine the validity of the said alleged will.

Appellant's testimony showed that the decedent was a woman of about seventy-two years of age, a servant by occupation. Some time in August, 1890, she became sick and went to St. Joseph's Hospital for treatment. While there, on August 26, 1890, she sent for George H. Parker, a real estate dealer and conveyancer, and instructed him to draw her will, in which she bequeathed \$200 to her friend Margaret Clark, \$200 to her niece Mary Jane Lynch (the proponent in this contest), made Thomas Lynch, her nephew (the contestant), her residuary legatee and devisee, and Mr. Parker (the scrivener), her executor. She was then suffering from valvular disease of the heart, and grew worse. On the following Sunday, August 31, 1890, Mary Jane Lynch came to the hospital and took her aunt, the decedent, from the hospital to the house of one Phillip McDermott, in Darby, Delaware County, Pa. On September 8, 1890, another will was made, leaving all of her estate to Mary Jane Lynch. Three days after that, on September 11, the testatrix died.

J. Whitaker Thompson, for appellant.

The single question is whether, upon the evidence submitted, the Court would allow a verdict against the will to stand. If there is a material fact in dispute upon which a jury should pass, an issue is of right.

Sharpless's Estate, 26 WEEKLY NOTES, 126.

Knauss and Seip's Appeal, 114 Pa. 10.

Herster v. Herster, 116 Id. 612.

Shaver v. McCarthy, 110 Id. 339.

Wilson v. Mitchell, 101 Id. 495.

Boyd v. Boyd, 66 Id. 283.

Steadman v. Steadman, 14 Atlantic Rep. 406.

Redfield on Wills, 124.

W. Righter Fisher, contra.

May 29, 1891. HANNA, P. J. After a careful examination of the testimony, we fail to discover such a conflict upon the questions of fact raised by the appeal as would warrant granting an issue to determine the validity of the will of testatrix. The weight of the evidence is strongly in favor of the testamentary capacity of testatrix. While it is undoubtedly true that at the date of the execution of the will she was prostrated physically by disease, yet it is also equally clear that she was mentally capable of the disposition of her property. This appears from the testimony of the justice of the peace who prepared the will, and the other subscribing witness, both disinterested; also from that of the attending physician, also having no interest, other than as the executor named, in the will, and all strangers to the testatrix until their services were required, either as witnesses to the testamentary paper, or as physician.

And as to the allegation of undue influence there is not a scintilla of proof. There is not the slightest evidence that the execution of the will was procured by the improper solicitation of any one, much less the sole legatee, whose uncontradicted testimony is, that she was ignorant of its existence until after the death of her aunt, the testatrix. Under all the facts shown, it would not only be needless, but improper, to grant the issue. The burden of proving undue influence is upon those who allege it. (*Hardy's Will*, 12 Philada. 22; *Stokes v. Miller*, 10 WEEKLY NOTES, 241; *Fow's Estate*, 27 Id. 373.) The will having been properly proved, the appeal from the decision of the register must be dismissed, and demand for an issue refused.

W. C. S.

U. S. District Court— Eastern District.

Street v. "The Progresso."

*Costs—Depositions—Witness fees of party—
Mileage of witnesses from over one hundred
miles from place of holding Court.*

Where depositions of witnesses, whose testimony, even if in the district, could be taken only by deposition, might have been taken abroad, mileage will not be taxed for their travel into the district where the Court sits, to be examined.

A libellant testifying, unless called by his opponents, will not be allowed witness fees.

In Admiralty. Sur exceptions to clerk's taxation of costs.

Libel by Street Brothers against James M. Waterbury, owner of the steamship *Progresso*. The libellants claimed \$4.50 witness fees of Thomas Street, one of the libellants, and mileage of two journeys from Charleston to Philadelphia and return, 2840 miles, \$142; and mileage of Paul Fatman from same place, \$71. The clerk refused to allow Street's witness fees and mileage, and the mileage of Fatman, over 100 miles, to which refusal libellants excepted.

N. Dubois Miller (*George W. Biddle, J. Rodman Paul and Henry Galbraith Ward* with him), for libellants, cited—

As to right of libellant to recover his witness fees and mileage—

Tuck v. Olds, 29 Fed. Rep. 883.

Howes v. Garver, 10 Eng. L. & E. 465.

Hanna v. Dexter, 15 Abb. Pr. 135.

Van Dusen v. Bissell, 29 How. Pr. 481.

Barry v. McGrade, 14 Minn. 163.

As to right to recover mileage for actual distance covered—

U. S. v. Sanborn, 28 Fed. Rep. 299.

Prouty v. Draper, 2 Story, 199.

J. Warren Coulston and Alfred Driver, contra, cited as to right to receive mileage for distance over 100 miles—

Smith v. Ry. Co., 38 Fed. Rep. 321.

Beckwith v. Easton, 4 Benedict, 358.

The Steamship Leo, 5 Id. 486.

September 21, 1891. BUTLER, D. J. The exceptions must be dismissed. As respects the mileage of witnesses brought from beyond the district, the clerk's ruling corresponds with our practice. Depositions might have been taken abroad and the costs avoided. Inasmuch as the testimony could only be heard by deposition, there was no advantage in bringing the witness here. The rule on this subject is not harmonious throughout the country, but any discussion of the subject in support of our practice, in view of what has been said heretofore respecting it, would be a waste of time. In "*The Vernon*," (36 Fed. Rep. 115), *Wooster v. Hill* (44 Id. 819), *Haines v. McLaughlin* (29 Id. 70), *Insurance Co. v. Providence Co.* (Id. 237), the subject was fully discussed.

As relates to the \$4.50 claimed by the libellant for his attendance as a witness, the clerk's ruling is sustained. Ordinarily, where a party is present at the taking of testimony, his presence is, presumably, necessary on his own behalf, whether his personal testimony is required or not. The instances must be rare where he can safely absent himself, and where he does not avail himself of the opportunity thus afforded of forwarding his interest in the cause generally. Parties have not been allowed witness fees in this district, and I think should not be, except in case their presence is required by the other side.

M. W. C.

WEEKLY NOTES OF CASES.

VOL. XXVIII.] FRIDAY, OCT. 23, 1891. [No. 27.]

Supreme Court.

Jan. '91, 263.

February 19, 1891.

Keiser v. Mahanoy City Gas Co.

Injuries to others by conduct of lawful business—Damages—Measure of—When equity will restrain such business—Gas company—Consequential damages—Evidence—Admission of—Burden of proof.

The manufacture of illuminating gas in a town or city, by an incorporated gas company, is a lawful business; and if the ordinary processes of manufacture are employed and conducted in the ordinary manner, equity will not restrain the prosecution of the business; but if the company neglects to make use of the ordinary processes or the ordinary precautions, and harm is thereby done to others, the negligence will justify intervention by a Court of equity to restrain its continuance and sustain an action at law for the recovery of damages by the injured party.

In such cases the right of action grows, not out of the exercise of its corporate franchises by the company, but out of the negligence of which it is guilty in the manner of conducting its business.

A loss in the selling or rental value of real estate by reason of the establishment of a lawful but undesirable business in the vicinity, does not give a cause of action; nor does the fact that such business is a source of some personal discomfort or annoyance, so long as the business is lawful and conducted in a lawful manner.

In order to give a right of action there must be substantial injury done, and the act or negligence complained of must be the cause of the injury.

In an action to recover damages against a duly incorporated gas company for noxious odors emitted from its works, and from waste alleged to be discharged into a stream running through plaintiff's premises, whereby plaintiff, who was a hotel keeper, and his family, were injured in health, and the value of his business depreciated, it was:

Held, (1) that the burden of showing the nature and extent of loss, if any, is upon plaintiff.

(2) The character and duration of the sickness alleged should be shown, and the expenses or suffering incident to it; and the fact that it was caused by the presence of the odor arising from the waste should be made to appear.

(3) The facts from which the jury may determine whether there has been a loss of business at the hotel due to the presence of the odor must be shown, together with the amount of the loss, although absolute accuracy is not required.

Suit having been brought for the injury complained of, plaintiff filed a bill in equity to restrain the con-

tinuance of the alleged negligent practice by the defendant, and an injunction was granted. Plaintiff subsequently applied for an attachment on the ground of a violation of the injunction, which was pending at the time of trial. Proof of these facts was admitted upon the trial of the action for damages:

Held, that the fact that the defendant continued the negligent practice complained of after the suit was brought, was, if shown, a proper subject for consideration in determining whether exemplary damages should be awarded or not; but to allow the jury to inquire "whether or not said injunction was violated by defendant," with a view to the imposition of such damages, was error.

Appeal of the Mahanoy City Gas Company, defendant, from the judgment of the Common Pleas of Schuylkill County, in an action of case brought by Francis Keiser to recover damages on account of the alleged negligent conduct of defendant's gas works.

Upon the trial, before PERSHING, P. J., it appeared that in 1873 plaintiff leased and moved into a hotel which he subsequently purchased, situate in Mahanoy City, having a width of forty-two feet and a depth of about eighty feet, containing twenty-five sleeping rooms, in addition to offices, etc. There was also erected upon the property a large stable, seventy-five feet by forty feet, together with other out-buildings. The North Mahanoy Creek, a stream a few feet in width, runs through the lot on the western side of the hotel. Before the building was erected a wall eight or nine feet high was built on each side of the creek, through the lot, to confine the waters of the creek. The western foundation of the building was in part set upon the eastern creek-wall. The creek has its source about three miles northwest of the city, and flows through a considerable portion of the built-up part of the city, which is thickly populated. Plaintiff covered the creek with planking throughout the whole length of his lot, for the purpose of utilizing the whole surface, and after suit brought built on his lot two three-story dwelling-houses and store-rooms, which he let to tenants. The hotel was licensed from 1873 to the time of trial, and plaintiff and his family, consisting of his wife and eight children, lived there while carrying on his hotel business.

Defendant was incorporated in 1874, and located and erected its gas works on a lot in said borough, between the right of way of the Philadelphia & Reading Railroad Co. and the Lehigh Valley Railroad Co., and abutting on the east on said North Mahanoy Creek. The distance from the defendant's premises along the creek to the place where the same enters the premises of the plaintiff is about two hundred feet. A street called Railroad Alley and the Reading Railroad intervene between the plaintiff's and defendant's properties. The railroad

is constructed upon an embankment from fifteen to twenty feet higher than the level of the plaintiff's lot, and the defendant's premises are about six feet lower than the railroad embankment. On the defendant's property are erected a gas factory, a refuse house, a heating house, and gas receiver, in which illuminating gas is manufactured and distributed to various parts of said city. These improvements, except the gas receiver, are situated about one hundred feet west of North Mahanoy Creek. The company commenced to manufacture gas in the fall of 1873 or the spring of 1874. Plaintiff's evidence was that in the manufacture of gas at its factory large quantities of waste matter, consisting of a tarry or pitchy nature and an oily substance strongly impregnated with the odor of gas, were generated and produced, which were collected in a vat in the refuse house, and conducted from thence to the creek by a six-inch pipe. When the company first commenced the manufacture of gas, and for some time thereafter, the matter aforesaid was discharged from said pipe directly into the creek, by which it was carried down through the plaintiff's premises across Centre Street into Mahanoy Creek. Plaintiff had the smell of gas in his premises during the time, and made frequent complaints to the officers of the company, requesting them to abate the nuisance. Thereupon the company constructed a conduit or series of pipes from their works in and along the western side of North Mahanoy Creek, southwardly to Mahanoy Creek. These pipes were laid on the bed, or a short distance above the bed, of the stream, and the testimony of the plaintiff's witnesses was that they were defectively constructed, or at least soon became obstructed and out of repair, and the material sought to be discharged through them escaped from the pipes at the points where they were joined, and again floated upon the waters of said stream, into and through the premises of the plaintiff, rendering the atmosphere in and adjacent to the plaintiff's messuage and premises impure and full of the odor of gas. The plaintiff again complained to the officers of the company, and requested them to abate the nuisance, to which the defendant paid no attention for a considerable length of time. The company then, being unable to use the pipes, carried the waste and refuse material aforesaid across North Mahanoy Creek and deposited it on or near its banks, from whence it again found its way into the Creek and was carried into and through the premises of the plaintiff, impregnating the atmosphere with the odor of gas and other offensive smells.

After this suit was brought, the alleged nuisance was continued, whereupon plaintiff filed a bill in equity for a preliminary injunction to re-

strain defendant from discharging the waste and refuse matter into the creek. A preliminary injunction was granted and continued until final hearing or further decree of the Court. The admission of evidence as to the injunction constituted the 19th assignment of error.

There was evidence to show that after the injunction was granted, the refuse matter was seen floating on the waters of the creek, upon plaintiff's premises, and that the smell of gas continued.

Defendant's testimony tended to show that along the creek and over it, above the property of Keiser, are five slaughter houses where a large number of animals are weekly slaughtered sufficient to supply with meat Mahanoy City, containing over eleven thousand inhabitants. The offal of these slaughter houses has been thrown or deposited in the North Mahanoy Creek for twenty years and upwards until about two or three years ago, since which last time it has in summer been taken in part elsewhere. There are from twenty to twenty-five water-closets emptying into this creek within said borough and above Keiser's hotel. The water from five or six collieries is pumped from slopes and shafts and runs into the creek above Keiser's. The water of the creek as it flows past Keiser's hotel is foul and offensive, from the sources of pollution mentioned above; on account of Keiser's covering the creek through the length of his lot, the foul and noxious gases and odors generated by the decaying and putrefying matter deposited in the creek from the slaughter houses and privies above referred to, and carried along the creek by the current, are pent up in the culvert made by planking over the creek, and they will seek an outlet through any and every opening made into it. Some years after Keiser purchased the hotel, he broke a door through the side of the hotel building and erected a water-closet or privy against the hotel building, resting the water-closet building upon the plank covering of the creek and cutting away the planks underneath the water-closet, so that the excrement fell directly from the hole or seat of the water-closet to the ground beneath at the side of the bed of the creek, and there accumulated and remained until high water or a flood washed it away. This privy was attached to and was an addition to the hotel building, the door of the privy opening into the wash-room, the door of the wash-room opening into the bar-room and thus communicating with all the parts of the hotel building by means of the doors to the several apartments. There was a strong up current or draught through the hole in this privy. As early as 1880 Keiser was informed by E. S. Silliman, one of the officers of the Mahanoy City Gas Company, that this open privy was the source of any offensive odors detected in his

hotel. This privy was removed about 1885, since which time, according to the testimony of Keiser himself, he has had far less trouble with smells. There was an opening from the cellar of Keiser's hotel through the foundation walls out beneath this privy, and at times, if not all the time, some or all the panes of glass were out. Keiser had and has another privy in the yard over the creek.

Defendant claimed that its works were erected and equipped after the best and most approved plans and arrangements, and have always been operated carefully and without negligence.

Plaintiff and his wife testified that they were both made sick by the smell of the gas, as was also one of their children; that the doctor called in to attend the latter told them that they must get rid of the smell of the gas: that they lost custom by reason of the odor, but the wife admitted that business had been increasing for four years. Plaintiff estimated his loss at \$700 or \$800 a year, but said he guessed at it, and produced no account of his receipts or expenditures.

A great number of witnesses were examined on both sides, employes and guests of plaintiff testifying that they had left on account of the smell of gas. Other guests testified that they were forced to leave the hotel from other causes, and that there was no odor of gas. There was evidence on defendant's part that there was no odor from the refuse from the works, and that it was not allowed to run into the creek. Physicians and others testified that the odors complained of came from the excrement discharged from plaintiff's privies, and the offal in the creek, and that any gas from the works would act as a disinfectant and prevent disease.

Plaintiff was asked: Q. At the time you brought him to see the child he attributed the sickness to the gas in your house and told you to take the child away from home, that he could not cure it there? (Objected to as a leading question and incompetent evidence.) Q. State whether or not at the time you called the doctor in to see the child, he told you that the sickness was caused by the gas in your house, and advised you to take it away, that he could not cure it there? Objected to. Objection overruled. Exception. (Twenty-second assignment of error.) A. Yes, sir. Q. How did the child complain at this particular time? A. At that time she was lying in a sleepy condition, and he said it was no natural sleep she had; he recommended me to get another doctor to her. Q. Did he say anything about her condition at the time being caused by the gas? A. It was no natural sleep; it was gas that worked that way on her. Q. That was the time when you called him, when the child was sleeping? A. Yes, sir. Q. Did

this gas about your house and premises affect your business, and, if so, state how? A. Strangers have told me they would not stop there on account of it. Objected to.

THE COURT. I think he may state the fact that guests left and they would not stay on account of the gas. Exception. (Twenty-third assignment of error.)

A. Yes, sir; they did. Q. On account of the smell of gas at your house, was your business diminished? A. I should think so. Q. Do you know that it is from that fact that guests left you? A. I know that they have left me on account of it. Q. Do you know whether or not your house has the reputation among travelling men as having the smell of gas in it? Objected to.

THE COURT. He may state the fact that guests left and they left on account of the gas, and the gas affected his business.

The Court charged the jury, *inter alia*, as follows:—

"There is another question which has been raised here as a legal point, and to which I perhaps may as well refer now as later on in my charge to you: that is, that this was a business authorized by the Legislature, that it was a lawful business. The charter of the company is in evidence before you, showing that they had the authority of the State for the manufacture of gas; but that this will relieve them from a responsibility to a private party who is injured, is not the law. The charter does not go to that extent under the law, and now, particularly under our Constitution, consequential damages may be recovered from any person or corporation who injures the property or destroys the property of another. There can be no taking of property nor injury to property without making compensation on the part of the corporation, although it may be armed with the authority of the State for the business which it follows. And a man's property may be as effectually destroyed by rendering it uninhabitable, destroy it for the purpose for which he desires to use it by rendering it uninhabitable, as it would be to take hold of it and tear it down. In the one case the act is direct, it is the taking of the property actually in the other; the damages are consequential—in consequence of the act on the part of the defendant charged with the offence. We have it laid down by the very highest legal authority that that which is authorized by the Legislature within the strict scope of the power given, cannot be a public nuisance. They could not be indicted for exercising the powers vested in them by the State. But it may be a private nuisance, and the legislative grant is no protection against a private action for damages resulting therefrom." (First assignment of error.) . . .

"The Legislature may authorize a use of property which will operate to produce a public nuisance, but it cannot authorize a use of it which will create a private nuisance by an actual invasion of one's premises by noxious vapors, malarial gases, or disagreeable smells, without compensation therefor. We not only have a large number of authorities outside of this State, but our own State authorities are to the same point; that is, that the trade may be strictly lawful and armed with the power of the State; the company may be protected as against the public from an indictment, but it is not protected by its charter from an action by a private party who has sustained special injury in consequence of noxious smells, gases, vapors, etc., which may be the result of carrying on the business." (Second assignment of error.) . . .

"There was nothing that prevented the smell that proceeded from the water-closets and the slaughter houses from entering the premises of the plaintiff, any more than there was to prevent the gas from entering. He has described to you the condition of his premises. Whilst we do not think Mr. Keiser was bound to erect barricades against the infliction of a nuisance upon him by other parties, yet, the condition of his premises is a matter for your consideration, as bearing upon the question whether other noxious vapors, other noxious smells, did not find their way into that house, there being no more difficulty about their getting in, as claimed here by the defendant, than there was about the smell of gas getting in. It was alike open to all offensive smells and noxious vapors proceeding from that creek in that neighborhood." (Third assignment of error.)

"Now, having considered all of this testimony produced on both sides, the question for to determine would be whether the plaintiff has a right to recover. If you find that he has the right to recover, then it devolves upon you to fix the amount of his damages.

"Damages are said to be compensatory, that is, in popular language, sufficient to make a man whole, or they may go beyond that and be what are called vindictive damages, that is, a party may, under certain circumstances, recover what will make him whole, and in addition what will punish the party who has inflicted the injury.

"The claim made here on the part of the plaintiff is for what are called vindictive damages. It is alleged that the conduct of the defendant was such as to require a jury to impose more than what would be mere compensation, to give an additional amount so as to punish the defendant. It will be for you to determine, if you find for the plaintiff, which his damages shall be, how you will assess them. It has been said in cases of this kind that a mere invasion of a right

would be sufficient to authorize nominal damages, damages that would be less than compensation; that has been decided in a number of cases." (Fourth assignment of error.)

Plaintiff requested the Court to charge, *inter alia* :—

(1) If you find from the evidence that in the process of manufacturing gas at the defendant's works, large quantities of waste and refuse matter and materials were generated and produced; that said product was impregnated with the odor of gas and other foul, noisome, and offensive smells and vapors; that the defendant emptied and discharged said product into the waters of North Mahanoy Creek, and that the same floated upon and was carried by the current of said stream into, upon, and through the plaintiff's message and premises; that thereby the air in and around the plaintiff's message and premises was made and became corrupt, impure, foul, unwholesome, and offensive, and that by reason thereof the message and premises of the plaintiff became and were made uncomfortable; that the plaintiff and his family were incommoded and annoyed in the use, occupation, and enjoyment of the same, you will find a verdict for the plaintiff. *Answer.* We affirm this if you find the facts to be as stated here, and we call your attention to what we have already given you from the authorities that the injury must be substantial. The fact that there is some smell unavoidable in the manufacture of gas is shown by the testimony here all around. The Supreme Court say that a certain degree of offensive odor is unavoidably incident to the business, and that must be endured by the public. This was said in a case against a gas company somewhat similar to the one we have before us. With this statement of the law we will affirm this point. (Fifth assignment of error.)

(2) If you find a verdict for the plaintiff, you will then inquire: First, to what extent the plaintiff has been injured in the use, occupation, and enjoyment of his message and premises, and in so doing you may take into consideration the inconvenience and discomfort, if any, suffered by the plaintiff and his family. The fact that the place was licensed as a hotel and that he carried on therein the business of an inn-keeper, the patronage and business the hotel had acquired before the committing of the wrong complained of, and the loss of patronage and business, if any, he has sustained by reason thereof, and allow him for such injury such an equivalent in damages as a fair and reasonable consideration of the testimony warrants. *Answer.* That we affirm, in connection with what we said in answer to the other point. (Sixth assignment of error.)

Second, to what extent, if any, the plaintiff was injured in his health, and in so doing you

may take into consideration the nature and character of the disease, the suffering, if any he endured, the money, if any, he expended for medicine and medical attendance, and also allow therefor such an equivalent in damages as in your judgment a fair consideration of the evidence warrants. *Answer.* We have already virtually said yes to this; but so far as the expenditure of money is concerned there is no evidence here. The plaintiff has not shown in his own or any other evidence what amount of money he expended for doctors in consequence of sickness in his family. He does not show that he even had a physician for himself. The only evidence of having a physician was that in reference to the little girl, and there it was omitted to state what amount of money he paid to the doctor for his services. That certainly could have been in his power to have told the jury. I mention this so that you will exercise your reasonable judgment in ascertaining the amount. (Seventh assignment of error.)

(3) If upon a fair and just consideration of all the evidence in the case you should come to the conclusion that the injury complained of, and by the plaintiff, was characterized by wantonness, vexation, oppression, or gross carelessness on the part of the defendant, then you may give the plaintiff, in addition to the damages above specified, such reasonable sum as in your judgment the evidence may warrant, and in determining this question you may take into consideration whether or not the injury complained of was continued after the bringing of the present suit, the fact that an injunction was issued by the Court to restrain the defendant, and whether or not said injunction was violated by the defendant. *Answer.* We affirm this, calling your attention to what we have already said on the subject of vindictive damages, in addition to the loss which the plaintiff has actually suffered, if you find he has suffered any loss. (Eighth assignment of error.)

Defendant requested the Court to charge, *inter alia* :—

(1) The defendant, the Mahanoy City Gas Company, was incorporated by letters patent, dated 21st day of September, 1874, with the right and power to erect in Mahanoy City gas-works to manufacture illuminating gas to supply the streets and the inhabitants of Mahanoy City with light. That the business carried on in pursuance of and under said charter, being by law a legal and authorized business, cannot be held in law or equity to be a nuisance, although it may occasion inconvenience and discomfort to inhabitants being in proximity to said works, by reason of the escape of gaseous and noxious smells. *Answer.* We have already said to you that this company had a charter, and therefore that its business is a

lawful business; and so far as the public was concerned it could not be interfered with. No indictment could lie against it for what would be called a common nuisance, a common injury to the public. But if the plaintiff here has sustained a special damage, a damage outside of that which the public was called upon to endure in the manufacture of gas, also calling your attention to the rule of law, that some smell is unavoidable, we could not affirm this point. We do not affirm it just as it stands here in the broad terms in which it is put. It would depend upon circumstances. (Ninth assignment of error.)

(3) That the manufacture of gas by the defendant, as stated in the preceding point, for the purpose of supplying public and private wants, is impressed with the character of lawfulness, and had the sanction of the supreme legislative power of the State; and though carrying on the said business within the scope of chartered rights may be injurious to private rights, and may subject private persons to injurious and disagreeable smells, the defendant cannot be held liable therefor. *Answer.* We answer this in the negative. (Eleventh assignment of error.)

(4) That under the charter of the Mahanoy City Gas Company the defendant cannot be held liable to the plaintiff for the injury complained of by him if the business of making illuminating gas was conducted in a proper manner under the chartered rights of the company, unless the plaintiff has shown by the evidence that the defendant was guilty of negligence in the making of gas and conducting said business, whereby the plaintiff received said injury. *Answer.* We answer this in the negative. We have already read to you from the authorities that while the business may be entirely lawful, yet if it is carried on so that the injury results to a private individual—injury above that which is sustained by the public—he may have his action. We think the proposition is stated too broadly here. (Twelfth assignment of error.)

(5) That if the plaintiff covered over the creek with planking through his lot, and erected one or more water-closets over said creek, and connected the same with his hotel and yard, whereby the gases floating in said creek and under the planking were permitted to escape into his house, he thereby contributed to the injury of which he complains, and the verdict should be for the defendant. *Answer.* We answer this in the negative. (Thirteenth assignment of error.)

(6) The plaintiff was bound to use reasonable care and caution to protect his house from noxious and unwholesome smells in said creek, and if he neglected said duty and made a connection between his house and the creek, whereby the odors from the creek and his water-closets passed into his house, he was guilty of contributory negli-

gence, and the verdict must be for the defendant. *Answer.* As a question of law we negative this. No question of contributory negligence arises in this case. (Fourteenth assignment of error.)

(8) If the plaintiff knew that noxious smells entered his house though the openings made in the culvert over the creek for a water-closet, and through the openings made in the basement wall next to the creek, it was his duty to close such openings; and if he neglected to close the same he cannot recover in this case, and the verdict must be for the defendant. *Answer.* We answer this in the negative. (Sixteenth assignment of error.)

(9) The loss of profits from boarders and from casual and transient visitors is too remote and uncertain to constitute any measure of damages in this case, and if the plaintiff has not proved any other damage the verdict must be for the defendant. *Answer.* We answer this in the negative, although it presents a question of some difficulty. The evidence was admitted and I have discussed it in what I have said to you, and therefore could not consistently affirm the point now. I have examined the case, and I find that in *Sedgwick on Damages*, which, I think, would authorize the admission of the testimony as you have it before you—that is, as to the loss sustained. I find also a case in our own Supreme Court (*Hanover Railroad Company v. Coyle*, 55 Pa. 390), where a party was injured in his person and his property both by a railroad, and evidence of the loss of his profits was ruled to be admissible. With the explanation I have already given you of the testimony which accompanies the evidence of the loss sustained—that is, that he kept no account of what he took in or what he paid out—I leave the matter for your consideration, and therefore negative this point. (Seventeenth assignment of error.)

(10) The plaintiff has not offered any evidence to show that the defendant did any voluntary injury to him or his property, or that the business carried on by the defendant was not conducted with all due care to prevent injury resulting from the business carried on by said defendant, and under such circumstances the verdict should be for the defendant. *Answer.* He has offered evidence, and it is a matter for your consideration. I have called your attention to that and the rule of law that no vindictive damages could be recovered if there was no wilful or voluntary injury done to the plaintiff. With this explanation we negative this point. (Eighteenth assignment of error.)

Verdict for plaintiff for \$3000. A rule for a new trial having been discharged, defendant appealed, assigning error, *inter alia*, as above.

T. H. B. Lyon and John W. Ryon, for appellant.

G. H. Gerber and F. W. Bechtel, for appellee.

October 5, 1891. **WILLIAMS, J.** The manufacture of illuminating gas, in a town or city, by an incorporated gas company is a lawful business. If the ordinary processes of manufacture are employed and conducted in the ordinary manner, equity will not restrain the prosecution of the business; but if the company neglects to make use of the ordinary processes or the ordinary precautions, and harm is thereby done to others, the negligence will justify intervention by a Court of equity to restrain its continuance, and sustain an action at law for the recovery of damages by the injured party. The right of action in such cases grows, not out of the exercise of its corporate franchises by the company, but out of the negligence of which it is guilty in the manner of conducting its business. Artificial persons are bound equally with natural persons by the maxim, "*Sic utere tuo ut alienum non lædas*," and are liable in like manner to those who may be injured by their neglect to observe its requirements. (*Pottstown Gas Co. v. Murphy*, 39 Pa. 257.)

The plaintiff in this case seeks to recover damages, not for the establishment of the gas works or the manufacture of gas in his neighborhood, but for negligence in the manner in which the manufacture is conducted. He alleges that the waste from the works is turned into the North Mahanoy Creek, a small stream which passes the gas works and crosses his own lot, and that by reason of the smell of gas arising from the waste his house is filled at times with offensive odors, affecting injuriously the health of himself and family and the comfort of his guests. The defendant denies that the unwholesome odors noticeable at times in the plaintiff's house are due to waste in the stream, or are the odors of gas, and asserts that they are due to the presence of slaughter houses and privies along the stream, by which its waters are loaded with impurities, and to the defective arrangement of the privies connected with the plaintiff's hotel and stables. The defendant further denies that any appreciable injury has been sustained by the plaintiff by reason of the odors complained of, whatever may be their source.

Two questions are thus raised for consideration: first, is the defendant guilty of negligence in the management of the business of producing gas? This is a question of fact, which was submitted to the jury upon all the evidence in a manner of which neither party can justly complain. The remaining question relates to the measure of damages, and is brought to our atten-

tion by the fourth, sixth, eighth, nineteenth, and twenty-third assignments of error.

The rule is well settled, as we have said, in an opinion just filed, in the case of *Robb v. Carnegie Bros. & Co., Limited* (*ante*, p. 339), that a loss in the selling or rental value of real estate by reason of the establishment of a lawful but undesirable business in the vicinity, does not give a cause of action. A licensed hotel or a livery stable, a saloon or meat market, and many other kinds of business are calculated to affect the desirability of a neighborhood as a place of residence and consequently to depreciate the value of adjoining property, but the owners of such property are without legal remedy for their loss. Nor will the fact that the business of the adjoining owner is a source of some personal discomfort and annoyance, give a right of action so long as the business is lawful and conducted in a lawful manner. There must be substantial injury done and the act or negligence complained of must be the cause of the injury. If therefore the jury find that the defendant has been guilty of negligence in the care of its waste, and that the plaintiff has suffered a substantial loss as the result of the presence of the waste in the stream, then a cause of action has been established and compensation should be made for the loss sustained. What is that loss? The burden of showing its nature and extent is on the plaintiff. If sickness of himself or other member of his family is alleged, the character and duration of the sickness should be shown and the expenses or suffering incident to it; and the fact that it was caused by the presence of the odor arising from the waste should be made to appear. If loss of business is alleged this should be shown with the degree of certainty. The facts from which the jury may determine whether there has been a loss of custom at the hotel due to the presence of the odor of the waste, and how great that loss has been, should be shown. It is not enough for the plaintiff, after having shown that a few transients went elsewhere for a night or failed to return to his hotel on their next visit to Mahanoy City, to guess that his loss of profits due to this single cause would reach \$800 per annum. If he has any knowledge of what his income was during the six years preceding the bringing of this suit, whether there was a falling off in its amount, and what that falling off was, he should lay the facts before the jury. If he does not know the facts or does not choose to disclose them, he cannot substitute a mere conjecture. Absolute accuracy is not required, but such facts as fairly lead to a conclusion and guide the jury in fixing the amount of his loss from this cause, should be laid before them.

The plaintiff also claimed exemplary damages. This subject was brought to the attention of the learned Judge by the plaintiff's third point, which

asked that the jury be instructed that "in determining this question you may take into consideration whether or not the injury complained of, was continued after the beginning of the present suit; the fact that an injunction was issued by the Court to restrain the defendant, and whether or not said injunction was violated by the defendant." The fact that the defendant continued the negligent practice complained of after the suit was brought was, if shown, a proper subject for consideration in determining whether exemplary damages should be awarded or not. But the equity case was pending and undecided when this case was tried. The plaintiff had a right to go into equity in order to restrain, and to go into a Court of law to recover damages for the negligent manner of dealing with the waste of the gas works; but the fact that an action at law was pending would not help a chancellor in reaching a proper conclusion, nor would the fact that a bill was pending in equity be of any service to a jury in settling the damages which should be awarded to the plaintiff. Equally without significance was the fact that an application for an attachment was pending in the equity case. The application is the act of the plaintiff. When it is heard and determined, the defendant, if found guilty, will be punished for the contempt in the Court whose mandate he has disregarded. But the jury in this case have no right to inquire "whether or not said injunction was violated by the defendant," and punish him for such violation by imposing exemplary damages upon it. It is not the violation of an order of a Court of equity, but some act of wantonness directed toward the plaintiff that must be found by the jury as a basis for the imposition of exemplary damages. If this was not so it might happen that the Court whose process it is charged has been violated, might on full hearing acquit the defendant of the alleged contempt and discharge the rule for the attachment, while in the meantime a jury sitting in another Court may have convicted and punished him for the offence which a chancellor after full investigation finds that he did not commit.

For the reasons now given, the judgment in this case is reversed and a new venire ordered.

H. C. O.

Jan. '91, 111.

March 26, 1891.

Jones v. Pennsylvania R. R. Co.

Eminent Domain—Consequential damages—Defence to action therefor—Breach of contract to submit to valuation of parties named.

In an action to recover consequential damages for injuries to plaintiff's land, it is a good defence to show that after the action was begun an agreement in writ-

ing and under seal was executed between the parties, wherein it was stipulated that the question of the valuation of plaintiff's premises should be submitted to persons named, and the defendant should pay the amount of the valuation to the plaintiff upon a good fee-simple title being given clear of incumbrance, which payment should operate as a release of all claims of every character to the date of the purchase, it also being shown that a valuation was duly made and payment tendered in accordance therewith, but the plaintiff refused to make conveyance, and gave notice that he would not be bound by the action of the appraisers.

The contract, as above, was a lawful one, and such as the parties were competent to make. The plaintiff, therefore, cannot be permitted to recover damages for a consequential injury to his land, and also keep the land, when he agreed with the defendant that he would release the damages if the defendant would pay him for the land a price to be fixed by persons agreed upon, and the defendant has offered to pay the price, and tendered the money for it. If the plaintiff chooses he can keep his land, but he cannot keep his land and recover damages contrary to his agreement besides.

North and West Branch Railway Co. v. Swank, 105 Pa. 555, followed.

Appeal of the Pennsylvania Railroad Company, defendant, from the judgment of the Common Pleas No. 2, of Philadelphia County, in an action brought by William Jones to recover consequential damages for injuries to his property, none of which was taken. Before the entry of judgment the plaintiff died, and Sarah M. Jones and Annie E. Jones, the executrices of his will, were substituted as plaintiffs.

On the trial the following facts appeared: This suit was instituted on June 21, 1882, but before narr. filed or anything further was done in the case, the parties entered into the following agreement:—

PHILADELPHIA, November 7, 1883.

Now these presents witness that the undersigned hereby agree that the question as to the fair market value of each of said properties, No. 2129 Filbert Street and northeast corner of Twenty-second and Filbert streets, immediately before the Filbert Street branch was known to be contemplated, say July 1, 1881, shall be submitted to the final decision of Henry R. Gumme and Craig D. Ritchie, Esqs., if they can agree upon the same, if not they shall have power to select an umpire whose decision shall be final (it being agreed that the premises northeast corner Twenty-second and Filbert streets have been occupied for many years past as a blacksmith and wheelwright shop by said William Jones, and that that fact shall be taken into consideration by the arbitrators, but no valuation shall be made of the good-will of the business—but a reasonable time [say three months without rent] and after that, if necessary, six months under such rent as may be fixed by the arbitrators, shall be allowed said Jones to remove).

The Pennsylvania Railroad Company agreeing to pay in cash the price so ascertained, with interest at three per cent., from said time at which the said properties are so valued and the owners agreeing to give to said company a good fee-simple title to said premises

clear of incumbrances. And it is expressly understood that the price when paid for the property in pursuance of this agreement shall operate as a release to all claims of every character that the owners could make from the time of the location of the Filbert Street branch to the date of said purchase.

WILLIAM JONES. [SEAL.]
HENRY K. FOX,
WAYNE MACVEAGH,
By H. K. FOX,
For Pennsylvania Railroad Company. [SEAL.]

In pursuance of this agreement the arbitrators met and made the following award:—

The undersigned arbitrators, to whom was referred the question of the values of certain properties situate on Twenty-first, Filbert, and Twenty-second streets, proposed to be purchased by the Pennsylvania Railroad Company, and specifically delineated on a plan thereof hereto annexed, hereby report the following award:—

[To various parties included in the award.]

William Jones, premises No. 2129 Filbert Street	\$5,000
William Jones, premises northeast corner Filbert and Twenty-second streets	11,200

The above sums being awarded to the owners respectively of the premises severally above mentioned as the full consideration therefor, and on payment thereof to the said several owners respectively, together with interest on the said several sums, at the rate of three per centum per annum from the first day of January, A. D. 1881, they, the said several owners, shall, by proper deeds of conveyance, grant, assnre, and convey the said premises respectively to the said Pennsylvania Railroad Company, or to such person or persons as it may designate in absolute fee simple, clear of all ground-rents and all incumbrances whatsoever. Titles to said premises to be made satisfactory to the counsel of the said railroad company, and rent and taxes to be adjusted to dates of the respective settlements. And the said owners shall, at the same time, execute and deliver to the said railroad company a full and absolute release and discharge of all claims for any loss or damage by reason of the construction and use of the elevated railroad on the said Filbert Street.

By the terms of submissal the said William Jones has the right to the occupancy of the premises now owned by him for the space of three months after conveyance thereof by him as aforesaid clear of rent, and the right further to continue to occupy the same for the further term of six months at such rent as the arbitrators may determine. The undersigned decide that during the free occupancy of the premises the said Jones shall pay the taxes and water rent thereon, and that if further occupied the rent of No. 2129 Filbert Street shall be twenty-five dollars per month, and the rent of premises at the corner of Twenty-second and Filbert streets at the rate of seven hundred dollars per annum.

The expenses of this arbitration shall be paid, one-half by the owners of the premises valued, and one-half by the Pennsylvania Railroad Company.

Witness our hands and seals the twenty-sixth day of November, 1883.

C. D. RITCHIE. [SEAL.]
HENRY R. GUMMEY. [SEAL.]

It also appeared that plaintiff gave notice that he would not be bound by the finding of the ap-

praisers, and that his wife refused to release her dower and join in the deed of conveyance.

The finding of the appraisers was approved by the defendant company, and a tender made of the amount due under the award upon the conveyance of a fee simple title clear of incumbrance. The tender was refused, and afterward the present case was proceeded with to issue. The defendant filed as a special plea the foregoing agreement and award.

The following points, *inter alia*, were submitted by defendant:—

(2) If the jury believe that the plaintiff agreed with the defendant to sell to it the properties in suit at values or prices to be determined by arbitrators, and that the arbitrators duly fixed said values or prices and awarded the sums to the plaintiff, and that the defendant accepted and approved said award, and tendered to the plaintiff the said sums fixed, and also tendered to the plaintiff, for execution, a deed and release to be signed by him, but which was declined and refused by said plaintiff, the verdict in this action for damages to the properties must be for the defendant. *Answer.* I decline that point. (Fourth assignment of error.)

(7) Under the special plea filed in this case on October 12, 1886, if the jury find the following facts, viz., that in the year 1883, after the bringing of this suit, the plaintiff and the defendant entered into the agreement in writing, dated November 7, 1883, which has been admitted in evidence; that afterwards, viz., on November 26, 1883, Henry R. Gumme and Craig D. Ritchie made the appraisement in writing, which has been offered in evidence; that before any repudiation or attempted repudiation of the said agreement on the part of the plaintiff, the defendant afterwards, viz., on December 26, 1883, by resolution of its board of directors, accepted the terms of the said agreement and appraisement; and that afterwards, to wit, December 31, 1884, the defendant tendered to the plaintiff the sum of \$17,658, being the full consideration for the said property with interest, together with the deeds for execution, which have been also offered in evidence; and that the plaintiff thereupon refused to accept the said purchase-money and to execute, or cause to be executed, the said deeds, their verdict should be for the defendant. *Answer.* I decline that point. (Second assignment of error.)

(8) If the jury believe from the evidence that the facts set forth in the additional special plea filed October 12, 1886, are true, their verdict should be for the defendant. *Answer.* I decline that point. (Third assignment of error.)

The Court in the general charge further instructed the jury: "The agreement and the action under it is not a defence to this action, and

its consideration as a defence is withdrawn from the jury."

Verdict for plaintiff for \$10,000, and judgment thereon; whereupon defendant took this appeal assigning for error, *inter alia*, the answers to the foregoing points and the above instruction to the jury.

George Tucker Bispham (*A. H. Wintersteen* with him), for appellant.

Theodore F. Jenkins, for appellee.

October 5, 1891. GREEN, J. This proceeding is not a bill in equity to compel the specific performance of a contract for the sale of land, nor is it an action to recover damages for the breach of such a contract. On the contrary, it is an action of case, brought by the owner of land against a railroad company to recover consequential damages for injury to, without taking any part of, the plaintiff's land. On the trial the defendant gave in evidence an agreement, in writing, and under seal, between the parties, which was made after the action was brought and while it was pending, the substance of which was, that the parties agreed to submit the question of the valuation of the plaintiff's premises to persons named, and that thereupon the defendant should pay the amount of the valuation to the plaintiff upon his giving a good fee simple title for the premises to the defendant clear of incumbrances. It was further agreed that the price, when paid, should operate as a release of all claims of every character which the owner could make, from the location of the road to the date of the purchase. The defendant further gave in evidence proof that a valuation was subsequently made by the persons named, that the defendant thereupon tendered payment of the amount of the valuation, together with a deed for execution, and also proper releases of liens, but that the plaintiff positively refused either to receive the money or to execute any deed for the premises, or to obtain any release of liens. He also gave notice that he would not be bound by the valuation of the appraisers because they had not given him as much as he wanted. In short he simply violated his contract, and then proceeded to try his action to recover damages in entire disregard of his agreement.

The learned Court below instructed the jury that the agreement and the action under it were not a defence to the present action, and withdrew it from the consideration of the jury altogether. No reason was given by the Court for this ruling, and no opinion having been filed, we are not informed as to what the reasons were. As we are not able to take that view of the contract between the parties, we would have been glad to know upon what grounds the learned Court proceeded in rejecting the agreement altogether. It is a perfectly lawful contract which the parties were

entirely competent to make. It was carried into effect by the appraisers, having made the valuation in question; it was never revoked by the plaintiff, and the defendant tendered full compliance with its terms. Why was not the plaintiff bound to perform it on his part? It is contended by the learned counsel for the appellee, that the only remedies available to the defendant under it would be by a bill for specific performance, or an action to recover damages for its breach, and that at most it can be considered as an accord and satisfaction, but void as a defence, because there was no satisfaction. But these propositions do not meet the question. The agreement is set up by the defendant to prevent the recovery of damages, in accordance with the terms of the agreement. Why is it not a defence? It is no answer to say that the defendant might have filed a bill for a specific performance, or might have brought an action to recover damages for its breach. The defendant has done nothing of that kind. It has simply asked that the plaintiff shall be held to his contract. No bill for specific performance has been filed, and the rules which pertain to that kind of remedy have no place in the discussion. The same is true as to the action to recover damages for breach of the contract. No such action has been brought, and the consideration of that subject is not pertinent. The question simply is shall the plaintiff be permitted to recover damages for a consequential injury to his land, and also keep the land, when he agreed with the defendant that he would release the damages if the defendant would pay him for the land a price to be fixed by persons agreed upon, and the defendant has offered to pay the price and tendered the money for it. Why should he be permitted to do this in violation of his contract? There is nothing contrary to law in such a contract. In the case of the North and West Branch Railway Co. v. Swank (105 Pa. 555) we sustained such a contract and compelled the owner to abide by it, although it was not by any means so precise and specific as this one, and contained no express provision releasing damages, and although, also, in that case the land of the owner was taken, whereas here it is not. We held there that "an agreement between a land-owner and a railroad company to sell the latter a right of way across the premises of the former, covers all damages of whatsoever sort suffered by the land-owner, all for which he is legally entitled to compensation." In the present case there is an express provision in the contract that the payment of the price shall release "all claims of every character that the owners could make." It cannot be that the owner shall be permitted to refuse payment of the price, and then say, "the price has not been paid, and, therefore, I am not bound." Moreover, in this case, no land

is taken by the defendant. If the plaintiff chooses he can keep his land, all of it, but it cannot be tolerated that he shall both keep his land and recover damages contrary to his agreement besides, and therefore it is, that the refusal of the wife to join in the deed for the land is of no possible consequence. The only result of such refusal is that a conveyance of the land can not be compelled without a tender of the whole price for a deed signed by the husband alone. But here there is no question of compelling a conveyance of the land. The defendant is not obliged to have such a conveyance in order to make out its defence. The only question is shall the plaintiff keep his contract. We know of no reason why he should not. If he chooses to break his contract and refuse to receive what he agreed he would receive for his land, with a release of his consequential damages, he can keep his land, but he cannot keep his land and recover the damages both. There is no question of accord and satisfaction in the case, and a discussion of that question is without relevancy. The first, second, third, and fourth assignments are sustained, and on them the judgment is reversed.

Judgment reversed, and new venire awarded.

H. S. P. N.

July, '90, 202.

March 31, 1891.

Arrott Steam-Power Mills Co. v. Way Manufacturing Co.

Witnesses—Competency of—Act of May 23, 1887, § 5, e—Evidence.

When a lessor of premises by an oral lease conveys the same to a corporation subject to the lease, and afterwards dies, and the lessee, a partnership, becomes incorporated with the same parties as members of the corporation, which corporation assumes all liability on the lease, in an action by the landlord corporation against the tenant corporation on the lease, it is not competent under the Act of May 23, 1887, § 5, e (P. L. 159), for a member of the defendant corporation, who was also a member of the original partnership lessee, to prove the terms of the original letting.

When, in an action by a landlord against a tenant to recover rent alleged to be due upon an oral lease, originally made by the landlord's vendor of the premises who was dead at the time the action was brought, the only question in dispute is what were the terms of the lease, any inquiry as to the custom of the landlord's vendor in leasing properties, or as to what he may have said about this lease to a third party, or as to the usage of the plaintiff in like cases, is irrelevant and inadmissible.

In 1883 A. leased orally a portion of certain premises to B. et al., and then conveyed the same to P. Company, of which A. was president, and thereafter A. died. B. et al. were a partnership, the membership of which was subsequently changed, and thereafter B.

et al. were incorporated as D. Company, the stockholders being the same persons who composed the original firm. During these changes as to lessor and lessee, the original lease was continued, and other portions of the same premises were leased orally to the same parties. In 1889, D. Company having given a month's notice vacated the premises. In an action by P. Company against D. Company to recover for rent due upon the lease alleged to have been a lease from year to year, the only question being as to the terms of the lease:

Held, that B. was not competent under the Act of May 23, 1887, § 5, e (P. L. 159), to testify as to the terms of the original lease made by A. to B. *et al.*; and

Held further, that any inquiry as to the custom of A. in leasing properties, or as to what he may have said as to this lease to a third party or as to the usage of P. Company in like cases, was irrelevant and inadmissible.

Appeal of the Arrott Steam-Power Mills Company, plaintiff, from the judgment of the Common Pleas No. 3, of Philadelphia County, in an action of assumpsit, wherein the Way Manufacturing Company, Limited, was defendant.

On the trial, before FINLETTER, P. J., the following facts appeared: The plaintiff brought suit to recover from the defendant two months' rental of certain premises, which the plaintiff claimed were leased from year to year, and the defendant claimed were leased from month to month. There was no written lease, but the facts proved or admitted were as follows: On April 1, 1883, William Arrott leased the fifth floor of a certain building to J. Howard Way, Pennington Way, A. T. Evanson, and Hunter Evanson, trading as J. H. Way, Brother & Co., at an annual rental of \$1500, payable monthly. On July 9, 1883, plaintiff company was organized, and William Arrott conveyed to it the premises in question, subject to all existing leases. On April 15, 1885, plaintiff company, through its president, said William Arrott, leased to J. H. Way, Brother & Co., one-half of the fourth floor of the same premises for \$1000 a year, payable monthly; and on January 20, 1886, the other one-half on same terms; and on October 15, 1885, a warehouse connected with said building at \$250 a year, payable monthly. On September 11, 1886, William Arrott died, and his son, William Henry Arrott, succeeded him as president of plaintiff company. In 1886 defendant firm dissolved, and was succeeded by a new firm of J. H. Way & Brother, composed of J. Howard Way and Pennington Way, which latter firm was succeeded in July, 1888, by defendant company, composed of the same individuals who had formerly carried on business under name of J. H. Way, Brother & Co., each of these organizations assuming its predecessor's liabilities on existing leases. On November 6, 1886, the third floor of the building was leased at \$2000 per annum, payable monthly. On January 31, 1889, defendant com-

pany vacated the premises, having given a month's notice of their intention so to do.

The above facts having been proved or admitted, J. H. Way, a witness for defendant, was questioned as follows: Q. State what those terms were under which you held the property you rented from William Arrott, Sr. State the terms of your tenancy, and what conversation you had with Mr. William Arrott? (Objected to. Objection overruled. Exception.) A. I went to him to get the terms of the room, or to know whether we could rent it.

By Mr. Page. Q. When was that? A. That was in March of 1883, prior to the renting of April 1st. I was not clear whether we could rent it or not for the fact that having another room rented, or another factory rented, which we did not know but what would run for a year, or for the finishing of that year, which was from April 1st to October, and which we had taken month by month— (Objected to as immaterial.)

By Mr. Bispham. Q. This is what you told Mr. Arrott? A. This is what I told Mr. Arrott. I stated the case to him. He says, "Oh, that is easily fixed." He gave me his idea of it. He says: "There is no law can hold you in there if you give them a month's notice." And he gave me his reason for it, that under such letting by giving a month's notice we were entirely clear of any continuous renting of that property that we were in, and told me that if I didn't believe him to go to his lawyer, and referred me to Mr. T. Elliott Patterson, to whom I went. (Objected to.) He confirmed Mr. Arrott's view of the case. Q. Then you went back to Mr. William Arrott? A. I went back to Mr. William Arrott, and on that assurance that that was the case rented his mill, and we wanted to rent that mill— (Objected to.) Q. You told Mr. William Arrott what you wanted? A. Yes, sir; told Mr. William Arrott what we wanted, we wanted a lease for two years, and he said: "I don't give leases; I never have a lease; I want my tenants to be perfectly satisfied. If they are not satisfied I want them to get right out, and I want them in there in such a shape that if I am not satisfied with them I can make them get right out," and he says, "I have them in there on those terms, and, therefore, I want them in there on this monthly rental." That was exactly it, and on top of that, the lawyer's decision and all, we rented that room at the rate of \$125 a month. Q. The first floor you rented was what floor? A. The fifth floor. Q. And you settled to take that from month to month at \$125 a month? A. At \$125 a month, and if we were not satisfied with it at the end of the month we should get out, and if he wasn't satisfied he assured us he would kick us out. And on that

original leasing we rented all the others. Q. Tell what passed from time to time as you took the rooms, or the substance of it, if you cannot recollect in detail. A. No; I cannot. About all I can recollect—it was so thoroughly settled at that conversation what way he wanted his room let that after that we simply told him we would take such and such a room; never questioned his rent, because we knew he was a man of decision, and gave him his terms; and we would either send to Mr. McMaster, the superintendent, or down at the office— Q. State the substance of the conversation. A. I don't recollect any conversation at the other rentals any further than stating we would take the rooms or such portion of the rooms at the usual way of renting.

By Mr. Page. Q. Were those your words? A. I say I don't remember the words at all. I know in some of the conversations there were other things that were more important that I do remember; in some of the later conversations. The second leasing that we had was a part of a cellar, on December 1st. On April 15th was the third renting, or the south half of the fourth floor. (Second and third assignments of error.)

The same witness was interrogated as follows: Q. Then I understand you to say that the original letting was from month to month? (Objected to. Objection overruled. Exception.) Q. My understanding of what you said was that the original letting in 1883 was from month to month, and the additional rooms were taken upon the same terms? A. Yes, sir. (Fourth assignment of error.)

In rebuttal, plaintiff offered to show William Arrott's custom in the way of renting. Objected to. Offer overruled. Exception. (Fifth assignment of error.)

Plaintiff also offered in rebuttal to show by J. P. Murphy, what William Arrott told him as to the renting to these parties. Objection. Offer overruled. Exception. (Sixth assignment of error.)

William Henry Arrott, a witness for plaintiff, in rebuttal, was asked: Q. What is the usage of the Arrott Steam-Power Mills Company as to renting in like cases since these gentlemen first went in there? Objected to. Objection sustained. Exception. (Seventh assignment of error.)

The Court charged the jury, *inter alia*, as follows: "So it is very important that you should at the very outset determine what the contract between William Arrott, deceased, and these parties was, because as it referred to a large proportion of the premises, it must of course be considered that it in some way entered into the arrangement which was made in November, 1886. . . .

"Under such circumstances it would be very natural to suppose that William H. Arrott had some understanding of the terms under which the defendants held under his father. At all events, if that conversation was had, it was his duty at that time either to ascertain what the terms were, or, not having done that, the presumption would naturally be that he understood what they were. (Ninth assignment of error.)

"So that whilst ordinarily a renting, if nothing is said, is from year to year, it might very well be that the proper way to let out a large factory like this would be to let it out in such a manner as that the landlord would have reasonable control over all of the tenants, and be able to put out an objectionable man whenever the necessity arose." (Tenth assignment of error.)

Verdict for plaintiff for an amount (\$222.57) admitted to be due and judgment thereon. Whereupon the plaintiff took this appeal, assigning as error the admission of evidence and the rejection of evidence as above set forth, and the portions of the charge above quoted.

S. Davis Page and Richard P. White (Howard W. Page, Edward P. Allinson and Boies Penrose with them), for appellants.

George Tucker Bispham (A. H. Wintersteen with him), for appellee.

October 5, 1891. STERRETT, J. The first specification of error was abandoned. The main question presented by the second to fourth specifications, inclusive, is as to the competency of the witness, John H. Way (a member of the company defendant, and also of the companies which preceded it), to prove conversations with William Arrott, deceased, the lessor, in relation to terms of first lease made in April, 1883, etc. The facts bearing on the question are somewhat complicated. Some of them are embodied in the specifications, and others necessary to an understanding of the question are found in the history of the case.

It was claimed by plaintiff company, and evidence was introduced tending to prove, that in April, 1883, William Arrott, the then owner of the "Ontario Mills" building, leased the fifth floor thereof to J. H. Way, Brother & Co., composed of the witness John H. Way, Pennington Way, A. T. Evanson, and Hunter Evanson, at an annual rent of \$1500, payable monthly.

In July following plaintiff company was organized under the Act of 1874, and a few days thereafter William Arrott conveyed said building and appurtenances to the new corporation subject to all existing leases.

In April, 1885, plaintiff company, acting through its president and agent, William Arrott, leased to said firm, composed of same persons, one-half of

the fourth floor of said building at an annual rent of \$1000, payable monthly, and in January, 1886, leased to it the remaining half of same floor on same terms.

In October, 1885, the plaintiff company, still acting through its said president and agent, leased to same firm a warehouse connected with said building at an annual rent of \$250, payable monthly.

On September 11, 1886, William Arrott died, and his son, William H. Arrott, succeeded him as president of the company plaintiff. Between January and November, 1886, the said firm, J. H. Way, Brother & Co., dissolved, and was succeeded by J. H. Way & Bro., composed of John H. Way, the witness, and Pennington Way. In July, 1888, this latter firm was succeeded by the defendant, "Way Manufacturing Company, Limited," composed of the four persons who constituted the first-mentioned firm of J. H. Way, Brother & Co.

As each of these organizations succeeded the other, it assumed all the liabilities of its predecessor on existing leases of parts of the "Ontario Mills" building.

In November, 1886, the plaintiff company, acting through its president and agent, William H. Arrott, leased to J. H. Way & Bro., above named, the third floor of said building at \$2000 per annum, payable monthly.

On January 31, 1888, after having given a month's notice of its intention to do so, the defendant company vacated the leased premises. In doing this, it acted on the assumption that the leasing above mentioned was "from month to month and not an annual leasing," though the rent had been, upon each increase of the space taken, so adjusted that it ran from the first of the month then last past at the aggregate annual rate agreed upon, amounting since November 6, 1886, to \$5750 per annum, payable monthly in sums of \$476.16.

The alleged contracts, above referred to, were altogether verbal; there was nothing in writing. The main question in dispute between the parties was whether the lettings were from year to year as contended by the plaintiff, or from month to month as maintained by the defendant. If it was the former, the defendant was liable for the rent until the end of the year; if the latter, it had a right to remove from the premises on the last day of January, as it did, upon giving one month's notice.

In view of what has been said, it was important, as the learned Judge observed in his charge, to determine what was the contract between William Arrott, deceased, and his lessees. If it could be shown to the satisfaction of the jury that it was an annual lease and not a monthly letting of the fifth floor, it would go

very far towards settling the question as to the subsequent contracts. William Arrott, it will be remembered, was the sole lessor in the first contract, and his interest in that lease subsequently passed to the company plaintiff, and is one of the things or contracts in this action. The witness, John H. Way, one of the original lessees, and by his membership of the company defendant a party to the record, was permitted to testify to conversations with the lessor, since deceased, for the avowed purpose of proving that the lease was not by the year, but from month to month. This appears to bring the case directly within the letter as well as the spirit of the proviso to the Act of 1887, sect. 5 (e) (P. L. 159): "Nor where any party to a thing or contract in action is dead, and his right thereto or therein has passed, either by his own act or by the act of the law to a party on the record, who represents his interest in the subject in controversy, shall any surviving party to such thing or contract, or any other person whose interest shall be adverse to the said right of such deceased party, be a competent witness to any matter accruing before the death of said party."

Nor was he a competent witness to prove the first lease, for the purpose of showing the terms of the subsequent leases, made by William Arrott as president of the company.

There was no error in excluding the offers of evidence referred to in the 5th to 7th specifications. As to the leasing in question, it was claimed by both parties that there was a verbal contract, and the only question was what were the terms of that contract? Any inquiry as to the custom of William Arrott in renting, or as to what he may have said to the witness Murphy, or as to the usage of plaintiff company in like cases, was irrelevant. For aught that appears, the witness Murphy was a stranger to the transaction, and what William Arrott may have said to him was immaterial.

There is nothing in the remaining specifications that requires special notice.

Judgment reversed, and a venire facias de novo awarded.

C. K. Z.

Jan. '91, 441, 442, 443.

May 26, 1891.

Wheeler & Wilson Mfg. Co. v. Aughey.

Agency—Surety—Principal bound by representations of agent.

A., on a settlement of his accounts with B. Company, was found to be indebted to it, and was directed to go to C. and get him to go on certain judgment notes as security. C. signed such notes, and, when they were entered up, moved to have them stricken off, for the reason that A. had informed him when he came to get his signature to the notes that

they were to be given as security for machines to be sent in the future to A., and that no such machines were sent; in this he was corroborated by his son. A. denied he had made these representations:

Held, that A. was the agent of B. in getting these notes as security, and that his representations having been found to be false, B. could not recover on the notes.

A principal who adopts a contract of his agent made without authority, must adopt it as a whole.

Appeals of the Wheeler & Wilson Manufacturing Company from judgments of the Common Pleas of Juniata County.

The plaintiffs entered up in the Common Pleas of Juniata County three judgment notes against Lyman Aughey and Mary J. Landis. These judgments were subsequently stricken off as to Mary J. Landis, on the ground of her coverture.

Defendant, Lyman Aughey, obtained a rule on plaintiff to show cause why the judgments should not be opened and he be let into a defence, alleging that his signatures were secured by H. C. Landis, an agent for plaintiff company, by false and fraudulent representations.

Defendant offered in support of the rule depositions of himself and his son, to the effect that H. C. Landis, who had been acting as agent for plaintiff company, brought the notes to him already made out, and said he was sent by the plaintiff to get him (Aughey) to sign the notes; that they were intended as security for machines to be sent to him for sale—six machines to each note; that on these representations defendant signed the notes in suit, and that plaintiff never sent the machines.

Plaintiff produced the deposition of George H. Pixley, one of its agents, to the effect that H. C. Landis had been an agent for plaintiff, and that there was a settlement with him in 1889, and Landis was found to be indebted to plaintiff in about \$800; that to settle this account he secured the judgment notes in suit to be signed by Mary J. Landis and Lyman Aughey.

The deposition of H. C. Landis was also produced to the same effect, and that he told his mother, Mary J. Landis, and his uncle, Lyman Aughey, when they signed the notes that it was as security for what he owed to the plaintiff.

The Court, BARNETT, P. J., made absolute the rule to open the judgments. (First assignment of error.)

On the trial plaintiff put in evidence the notes given by defendant, and rested. The following is a copy of one of these notes:—

MIFFLINTOWN, PA., June 17, 1889.

\$220.78.

Four months after date we promise to pay to the order of Wheeler & Wilson Manufacturing Company, two hundred and twenty dollars and seventy-eight cents, payable at 1312 Chestnut Street, Philadelphia, Pa., with interest from date. Value received, without

defalcation. And we do hereby confess judgment in favor of said Wheeler & Wilson Manufacturing Company for the said amount, with costs and attorney's fees. We do hereby release all errors and waive all stay of execution, and all benefit from any exemption laws.

(Signed) MARY J. LANDIS, [SEAL.]
LYMAN AUGHEY. [SEAL.]

Witness: G. H. PIXLEY,
ANN E. MCCONARY.

Defendant's counsel proposed to prove by defendant, that on the 17th day of June, 1889, H. C. Landis, an agent of the plaintiff company, came to the witness with four notes, dated the 17th of June, 1889, for \$220.78 each. That the said notes were signed by Mary J. Landis, and that Landis said that the company desired the witness to sign these notes, for which they would send him six sewing-machines for each note. That he owed the company nothing at that time, and that under this representation the witness signed these notes, and that these representations were false and fraudulent, and that the company never forwarded to H. C. Landis the amounts in question. Also to be followed by proof that Landis was directed by G. H. Pixley, the general agent of the company, to go and have Mr. Aughey sign these notes in question.

Plaintiff's counsel objected because the notes given in evidence show that they are payable to the Wheeler & Wilson Manufacturing Company, and not to Landis himself. The agency of Landis for plaintiff cannot be proved by Landis's own declarations. That there is no evidence that Landis was agent of the plaintiff in this or any other transaction. It is not competent to give declarations of any alleged agent until the agency is proved by competent testimony.

THE COURT: We think the evidence is admissible. We, therefore, overrule the objection, admit the evidence. To which the plaintiff excepts and bill sealed. (Third assignment of error.)

The witness then testified as follows: Q. Now, state what, if anything, Landis said the company desired to be done by you. A. Mr. Landis said that the company desired me to sign these notes, for which the company promised to send him six sewing machines. Q. Six sewing machines on what? A. On each note. Q. When did he say the company would send these sewing machines? A. As soon as the notes were signed and sent to the company. Q. What did you say? A. I said I did not want to go on the notes; I refused to go on. Q. What did Landis say to you in return? A. He said he did not owe the company anything at that time; he said that they were for collateral security for machines that he was to get in the future. Q. Did he say anything as to whether you would get into trouble? A. He said that I would have no trouble; he said that he had been doing a good

business and did not owe the company anything at that time. Q. State whether you had any knowledge at all, at that time, that there was any indebtedness on the part of Landis to the company. A. No, sir. I did not know that he owed the company anything at that time. Q. Now, state whether or not, under these representations, you signed these notes. A. Yes, sir; under these representations. Had I known the representations were false, I would never have signed them; had I known he owed the company anything I would never have signed them. Q. When did you learn that these notes had been entered up? A. About six weeks after I had signed the notes I learned that the notes were entered up, and Landis owed the company the amount of these notes. That was my first knowledge that I had of him owing the company. Q. State what, if any, conversation you had with Landis in regard to the matter afterwards? A. After I learned that he was indebted to the company I went to see Landis at Port Royal, and he seemed to be very cross about the company, because it did not send him the machines. He said he had places for a couple of them, but he said I didn't need to fear, that he had turned over accounts enough to the company to pay all he owed them. Q. Did he state what accounts he had turned over to the company? A. Sewing machine accounts that he had sold machines to—machines that had been bought from Landis's lease and paid. Q. Can you tell how long after June 7, 1889, that conversation took place? A. That was about six weeks after. I went to see him right away. Q. That was at Port Royal? A. Yes, sir. Q. The other conversation you had with him, except this conversation at Port Royal, took place out in your field? A. Yes, sir. Q. That was the day the notes were signed? A. Yes, sir. Q. State if the conversation took place immediately before the notes were signed. A. Yes, sir.

By Mr. Lyons: Q. Who was present during this conversation? A. My son Nevin and H. C. Landis. Q. Anybody else? A. No, sir. Q. These notes are witnessed by Annie E. McConahy? A. No, sir; there was no one to sign. Q. Did she see you sign all? A. No, sir. Q. Are these the notes (shown witness)? A. Yes, sir; those are the notes.

By Mr. Neely: Q. Where was Annie E. McConahy at this time? A. I could not say exactly; I think she was visiting Mr. Landis at that time.

Cross-examination. *By B. F. Junkin:* Q. What relation are you to Mr. Landis? A. He is married to my niece. Q. Had you ever gone security before for anything? A. Yes, sir; I had been on a note he had in bank for a small amount. Q. How often had you done that, more

than once? A. No, sir; I think not. Q. Wasn't it known to you at the time he came there that he owed the company? A. No, sir; I had no knowledge of it. Q. Do you deny that he told you that he had settled with the company and owed them this amount of money, and that the object of these notes was to furnish them security for what he owed them; didn't he tell you that he owed them this sum of money that these notes represented? A. No, sir; he said he did not owe the company anything. Q. Don't you remember that he said he had accounts enough to pay the company what he owed them? A. He told me that afterwards when I went to see him. Q. I mean before you signed them? A. No, sir. Q. Did he say he had accounts enough to pay back the notes, and these notes were intended as additional security? A. No, sir. Q. But on the other hand he said he did not owe them anything, and these notes were intended as security for machines to be advanced afterwards? A. Yes, sir. Q. That is what he said? A. Yes, sir.

By Mr. Pennell: Q. Didn't he say to you that he had transferred to the company accounts enough that would pay his indebtedness and wanted these notes for additional security, and when these accounts were paid you were never to be called on to pay these notes? A. No, sir; he did not tell me at the time I signed the notes. He told me that when I went to see him at Port Royal. Q. Didn't he tell you that you would never be called on to pay these notes? A. Yes, sir; he guaranteed me that there would never be any trouble, that they were just collateral security for machines that he would get in the future. Q. Haven't you said to John Shover since these notes were entered up against you, that you signed them because you pitied his wife, that they were in trouble? A. No, sir; I never told Shover anything of that kind. Q. Did you tell anybody anything of that kind? A. No, sir. Q. When was this conversation? A. Which conversation? Q. The first time he brought the notes, or the second time? Q. How many times did you sign notes for him? Q. How many sets of notes did you sign? A. Two, I think. Q. These notes in controversy, are they the first or second set? A. Well, the last set, I guess. Q. Did you have any conversation with Landis when you signed the first set? A. Yes, sir. Q. What did he say to you then? A. The conversation was about the same. Q. Was that conversation all repeated when he came the second time? A. Yes, sir. Q. What was the reason he asked you to sign two sets of notes? A. Well, he said these first notes—there was something not right about them. Q. Did you ask him where the first set was? A. Yes, sir. Q. What did he say? A. He said he hadn't them along, but he

would destroy them. Q. You signed the second set then? A. Yes, sir. Q. Are you sure when you signed that second set that he said anything about his indebtedness? A. Yes, sir. Q. Where were you when you signed the first set? A. I was at the house. Q. Who was there then with you? A. Well, my son was there, too. Q. Anybody else? A. No; I believe not. No person there that heard the conversation but him, I guess. Q. Was there anybody else in the house? A. Yes, sir.

Nevin Aughey, called on the part of the defendant, testified as follows: I am a son of Lyman Aughey; I am fifteen years old; I know H. C. Landis. Q. State whether you remember of his coming to your place in the summer of 1889? A. Yes, sir. Q. Do you remember what time it was? A. It was June 17, 1889. Q. Where were you at that time, and who were with you? A. I was with my father out in the field repairing some fence. Q. Then state if Landis came to you and your father? A. Yes, sir; he came there with four notes and ink and pen. Q. Do you remember the amount of those notes, about how much they were for? A. They were for two hundred and twenty dollars and some cents. Q. What did he say to your father? A. He asked him to go on the notes. Q. Do you remember why he said he wanted him to go on the notes? A. That the company wanted him to go on the notes. Q. What, if anything, did he say the company would do? A. That they would send him six machines on each note as soon as the notes were signed and returned to the company. Q. What did your father say then? A. He did not want to sign the notes; he refused. Q. What, if anything, did Landis say? A. He still insisted on signing the notes. Q. Do you remember any questions that your father asked him as to whether he, Landis, owed the company anything? A. He asked him if he owed the company anything, and he said he did not at the time. Q. What did he say he wanted these notes for? A. Collateral security for the machines. Q. For machines that had been delivered or were to be delivered? A. That were to be delivered. Q. What did your father do; state whether he signed the notes? A. Yes, sir; he signed the notes. Q. How many notes did he sign, if you remember? A. Four.

By Mr. Lyons: Q. Did you see the notes? A. Yes, sir.

By Mr. Patterson: Q. Could you recognize these as the notes (shown witness)? A. Yes, sir.

By Mr. Neely: Q. Was Annie E. McConahy a witness at the time your father signed these notes? A. No, sir. Q. Was there any one else present at the time except you and your father and Landis? A. No, sir.

Cross-examination. *By Mr. Pennell.* Q.

Where were you when Landis came to your father? A. I was in the field at the fence. Q. Can you tell just now what field you were in? A. In the field not very far from the buildings. Q. What were you doing that day? A. Repairing some fences. Q. Was there anybody else there? A. Nobody but my father and H. C. Landis. Q. What time was it in the day when Landis came there? A. It was before dinner. Q. Do you remember now what else you did that day? A. No, sir. Q. Can you tell what you did that afternoon? A. I don't know. Q. Do you remember anything else you heard that day? A. No, sir. Q. How far from your father were you standing when Landis and your father had this conversation? A. Standing alongside of him. Q. Are you sure that you heard all that was said? A. I heard pretty much all the conversation. Q. Do you remember it? A. I think I remember all of it. Q. How many times have you gone over this conversation? A. I did not go over it very often. Q. Whom did you go over it with, with your father? A. Yes, sir. Q. Did you see the notes that day? A. Yes, sir. Q. Did you see the face of them, that is, that part of them (indicating)? A. Yes, sir; I saw him sign the notes. Q. Did you see them in Landis's hand? A. Yes, sir. Q. Did you know they were notes that day? A. Yes, sir. Q. Do you know a note when you see it? A. Yes, sir. Q. Whose name was on it before your father signed it? A. Mary J. Landis. Q. Did you see it? A. Yes, sir. Q. What day of the week was it when these people were there—Monday, Tuesday, Wednesday or Thursday? A. I don't remember what day it was.

Lyman Aughey, recalled for further examination, testified: Q. What did you understand the agency of Mr. Landis to be—selling machines? A. Yes, sir; he told me he was agent for the company. Q. For the sale of machines? A. Yes, sir; for the Wheeler & Wilson Manufacturing Company.

George L. Hower, a witness on behalf of defendant, testified as follows: Q. Interrogatories to be exhibited by way of cross-interrogatories to and answered by H. C. Landis in his ninth cross-interrogatory. In the fourteenth interrogatory you are asked: State whether or not you had any conversation with J. Howard Neely, Esq., or George L. Hower, Esq., or anybody else in the office of Patterson & Neely, Esqs., in Millintown, Pa., in which you said: These notes were given to secure your future indebtedness to the plaintiff company, or that the company was to advance you six machines on each note? Answer in full. Did you not come into the office of Patterson & Neely in February, 1890, to furnish these counsel with petition to be presented on behalf of your mother to the

Court of Common Pleas of Juniata County, to have her name stricken from the judgments Nos. 58, 59, 60 and 61, of September Term, 1889; and didn't George Hower ask you why you induced your mother to sign these notes, which might ruin her financially, and did you not answer and explain the matter by saying that these notes had been given as collateral security for future machines, which were to be gotten on these notes, that six machines would be received upon each note, and did you not state also to him that you owed the company nothing when the notes were signed, and did you not say to him that the amount of money you had paid the company, the collections the company had made on the outstanding accounts and leases which were assigned or delivered then, and the collections which you had made on the outstanding accounts and leases and property in the hands of the company, had paid the full indebtedness to the company when the notes were given, and did you not make answer to your mother's petition? In answer to that H. C. Landis said: I never made any of these statements to him. I went to the office of Patterson & Neely, and saw Neely. This was after the company had entered suit on these notes. All I told Neely was, that I knew the company had realized something out of the accounts that I had turned over, and that they must give credit on these notes for the amount of money realized by the company in that way. I do not remember whether I filed an answer to my mother's petition. I think I did. Q. Will you state whether you had any conversation with H. C. Landis in regard to this in February, 1890? A. I had a conversation which was just recited there, that is about the substance. Q. State what you asked him at the time. A. I asked him why he induced his mother to sign these notes, and he said, he did it to give him future employment and he was to receive machines on these notes. Says I, there is a mistake somewhere, and then he went to work and explained how it was; that the notes were wrongfully applied or used, and then he went on and showed me his accounts, and the manner in which the company had been satisfied, before he received the notes. He said he owed the company nothing at the time the notes were given; that is what he stated to me. Q. State now whether he said that those were the representations that he made to Mr. Aughey? A. He said he told him the same thing; that he told him the same thing that he told his mother. He said it was in order to give him employment. Q. Did he say anything about being out of employment, at that time, by that company? A. Yes, sir. Q. Do you know whether he was employed by this company afterwards again? A. No, sir; I have forgotten that. Q. Do you know whether he did begin to work for this company again—had he begun to work for

this company at the time he was in there? A. He was in their service at that time. Q. He was in the service of the Wheeler & Wilson Company at the time this petition was presented? A. I can't answer that question. Q. Didn't he say in that conversation, didn't he become angry on account of them not continuing him in their employment? A. Yes, sir; he used some rough language about their mistreating him, about them not sending him the machines they agreed. Q. How many machines did he say that he was to receive on each note? A. Six machines on each note, he said, and I said that would amount to twenty-four machines, and I asked him what he was to pay for these machines, and he did not answer, and I don't know when he went back into the employ of the company.

Cross-examination. *By Mr. Pennell:* Q. What were you doing at Patterson & Neely's office at that time? A. I was a student at law at that time in their office. Q. Deeply interested in the success of the firm? A. No, sir; nothing more than common. I was interested in this case. Q. Do you interest yourself in all cases that come in there? A. No, sir. Q. Do you ask questions? A. No, sir; the reason that I asked this question was because I was very well acquainted with the Landis family, and I thought it was a great wrong. Q. In what part of the office did this conversation take place between you and Landis? A. The first remark I made to Landis, I believe, was in the front office, and the other part of it occurred in the back office. We did a little calculating on his books. He did that to show me how he stood with the company, and if his statement was correct the book seemed to bear out his statements. Q. Did you testify this way before the justice? A. This is the substance of it; it may not be exactly the words, but it is the substance. Q. Is it the language of H. C. Landis? A. I think that I am only using my own language, but it is the substance of the conversation between Mr. Landis and I. I repeat what I understand. Q. Then you are not repeating his language? A. As near as I can get at it, it is the substance of it. I know there was a few words that I have recited that he used particularly, but I don't say that everything was his words. Q. Then you detail this conversation virtually in your own words as you understand it? A. As I understood him; as I understood it and heard it. I am very positive that I did not manufacture it. I know he stated that he had sold something upwards of \$1100 worth of machines and paid them \$300 cash, and gave them over leases and collected some money on it and paid that over. I know that, because I figured on it myself.

Plaintiff requested the Court to charge the jury as follows:—

(1) That the undisputed evidence shows that

the notes in suit were given to secure to the plaintiff a debt which H. C. Landis owed to said plaintiff; and the undisputed evidence shows that the signatures of the defendant to the notes in suit were not obtained by the company itself, but by their debtor, H. C. Landis, to pay the debt of the latter to the plaintiff; and that there is no evidence that the plaintiff company had authorized Landis to make, or had any knowledge of any misrepresentations made by said Landis to the defendant until after proceedings were commenced to open judgments entered thereon. The plaintiffs are not affected by the representations of H. C. Landis to defendant, and the plaintiffs are entitled to recover the balance unpaid on said notes, after allowing the admitted credits. *Answer.* We decline to affirm this point as presented. We are of the opinion that the maxim, *Qui sentit commodum sentire debet et onus*, applies; and that the plaintiffs cannot have the benefit of the security and at the same time repudiate the contract by means of which they obtained it. (*Jones v. Building Association*, 94 Pa. 215, 218.) (Fourth assignment of error.)

(2) There is no evidence in this case that the plaintiff company, or any one for it, said or did anything to induce the defendant to sign these notes, and without this evidence the plaintiff is entitled to recover. *Answer.* We decline to affirm this point as requested. The plaintiff may not have done or authorized any person to do anything to induce the defendant to sign the notes in suit, and yet may not be entitled to recover. (Fifth assignment of error.)

(3) That the plaintiff is entitled to recover on these notes for the reason that there is no proof or evidence of misrepresentation or fraud by the plaintiff company in procuring the defendant's signatures to the notes. H. C. Landis, the alleged agent, was acting for himself in this transaction and not for the plaintiff company, and Lyman Aughey, the defendant, knew this fact. *Answer.* We decline to affirm this point as requested. (Sixth assignment of error.)

(4) The alleged representations, if in truth made by H. C. Landis to the defendant at the time of the execution of the notes, as to their scope and purposes, cannot and will not discharge the defendant, and in the absence of any other testimony to show fraud or misrepresentation on the part of the plaintiff, the verdict of the jury must be for the plaintiff. *Answer.* We decline to affirm this point as requested. (Seventh assignment of error.)

(5) That there is no proof or evidence that H. C. Landis was the agent of the plaintiff company in this transaction, and to prevent the said company from recovering in this suit the defendant should have established by competent testimony that said H. C. Landis was the plaintiff

company's agent in procuring these notes. *Answer.* We decline to affirm this point as applicable to the evidence in the case. (Eighth assignment of error.)

The Court charged the jury, *inter alia*, as follows: Now, we submit this to you to determine whether these notes were given to secure the payment of an alleged indebtedness, and if you find they were so given, then we say the plaintiff is entitled to your verdict. On the other hand, if you find from all the evidence in this case, that these notes were given simply to pay for six machines to be furnished thereafter, and the machines were not so furnished, then your verdict would be generally for the defendant.

Verdict for defendant and judgment thereon. Plaintiff appealed, assigning for error the action of the Court (1) in opening the judgment; and (2) in submitting the cases to the jury; (3) the admission of the testimony as above noted, and (4, 5, 6, 7, and 8) the answers to plaintiff's points.

F. M. M. Pennell and John Marshall Gest (William P. Gest, Louis E. Atkinson, and John Sparhawk, Jr., with them), for appellant.

The burden of proof was upon Aughey to establish the agency of Landis.

Hays v. Lynn, 7 Watts, 524.

Moore v. Patterson, 28 Pa. 505.

Refining Co. v. Bushnell, 88 Id. 89.

Relief Assn. v. Post, 122 Id. 579.

American Underwriter's Assn. v. George, 97 Id. 238.

Landis's own acts and admissions were inadmissible as evidence of his authority.

Hays v. Lynn, *supra*.

Whiting v. Lake, 91 Pa. 349.

Telephone Co. v. Thompson, 112 Id. 118.

Creighton v. Boudinot, 14 WEEKLY NOTES, 556.

Assn. v. Post, 122 Pa. 597.

Aughey was bound under the evidence in this case to inquire into the scope of Landis's authority.

Seiple v. Irwin, 30 Pa. 513.

Bank v. Gayley, 92 Id. 518.

Dripps' Estate, 4 Clark, 87.

Carson v. Cochran, 9 Phila. 21.

Saving Fund v. Bank, 36 Pa. 498.

Mere representations by the principal debtor as to the nature and extent of the obligation incurred by the surety, do not affect the rights of the obligee unless he has notice of the same, and ratifies them or her previously given authority.

Simpson v. Bovard, 74 Pa. 351.

Lane's Appeal, 112 Id. 499.

Johnston v. Patterson, 114 Id. 398.

Rothermal v. Hughes, 134 Id. 510.

Wayne v. Bank, 52 Id. 344.

It follows from the principles of law above stated and the authorities upon the construction of the Act of April 4, 1877 (P. L. 53), that the learned Court should not have opened the judgment in this case and let the defendant into a defence.

There is no evidence, nor the slightest shadow

of evidence, in the petition of Aughey, the defendant, to be let into a defence, or in the depositions taken by the direction of the Court under the rule, to show that the alleged misrepresentations of Landis were made with the knowledge of the plaintiff, or that he had any authority whatever as agent to bind the company in any such manner. A judgment entered by confession under a warrant of attorney should not be opened, nor the evidence submitted to the jury, unless the written instrument be overcome by testimony which, if believed, would cause a Chancellor to decree that the note was void or should be reformed because of forgery, fraud, or mistake; and if the evidence submitted to the Court and contained in the depositions under which the Court was asked to open the judgment would not be admissible upon the trial of the cause, it is error for the Court to open the judgment in order that this irrelevant and inadmissible evidence should be submitted to the jury.

We refer as to the construction of the Act of April 4, 1877, to—

- Earley's Appeal, 90 Pa. 321.
- Sylvius v. Kosek, 117 Id. 67.
- English's Appeal, 119 Id. 534.
- Jenkintown Bank's Appeal, 124 Id. 337.
- Knarr v. Elgren, 19 WEEKLY NOTES, 531.

The cases cited by the appellee are all distinguishable; in them the contract was entirely for the benefit of the person seeking to enforce it, while in the case at bar the notes were given to plaintiff as security for an existing indebtedness.

Alfred J. Patterson (J. Howard Neely and Jeremiah Lyons with him), for appellee.

A principal seeking to enforce a contract made by his agent must take it *cum onere*.

- Mundorff v. Wickersham, 63 Pa. 87.
- Broom's Legal Maxims, 632.
- Hovil v. Pack, 7 East, 164.
- Coleman v. Stark, 1 Oregon, 115.
- Paley's Agency, 172.

The authority of an alleged agent may be established by circumstances. What is sufficient evidence of agency is a question for the jury.

- Valentine v. Packer, 5 Pa. 333.
- Bank v. Mechanics' Bank, 12 Am. Law Reg. 51.

The fact of agency may be shown by the acts of the agent, and their recognition by the principal.

- Woodwell v. Brown, 44 Pa. 121.
- Steamboat Co. v. Brown, 54 Id. 77.
- Theyken v. Howe Machine Co., 109 Id. 95.

Where some evidence of agency has been given the acts and declarations of the agent are admissible. There was evidence of agency in this case.

- Stewartson v. Watts, 8 Watts, 392.

Again, the evidence of Lyman Aughey and Nevin Aughey, and other witnesses of defendant, was clearly admissible as a part of the *res gestæ*.

Res gestæ has been defined as those circum-

stances which are the undesigned incidents of a particular litigated act, and which stand in immediate causal relation to the act.

Whart. Ev., § 259.

Immediateness is tested by closeness, not of time, but of causal relation to the act.

Rinesmith v. Ry. Co., 90 Pa. 262.

Whart. Ev., § 262.

Landis was certainly an agent in some sense, and his representations bound his principal.

Insurance Co. v. Woodworth, 83 Pa. 223.

A man cannot take any benefit under a false and fraudulent representation made by his agent, although he may have been no party to the representation, and may not have distinctly authorized it; no matter how innocent he may be, he cannot reap the benefits of his agent's fraud.

Hein v. Nichols, 1 Salk. 288.

Musser v. Hyde, 2 W. & S. 314.

Bennet v. Judson, 21 N. Y. 238.

Elwell v. Chamberlain, 31 Id. 611.

Southern Express Co. v. Palmer, 48 Ga. 85.

Jones v. National Building Association, 94 Pa. 215.

A party seeking to enforce a contract made by his agent, is bound by his declarations made at the time, although he exceeded his authority.

Caley v. R. R. Co., 80 Pa. 363.

If he would have the benefit of the bargain he must adopt it as his agent made it.

Keough v. Leslie, 92 Pa. 424.

Hughes v. Bank, 110 Id. 428.

Logan Bank v. Townsend, 3 S. W. Rep. 122.

Evans' Agency, 594, 606.

Adams Express Co. v. Schlessinger, 75 Pa. 246.

1 Addison on Contracts, 3 Am. Ed., p. 109.

It is well settled in Pennsylvania that fraud or failure of consideration may be given in evidence, under the plea of payment with leave, etc., in an action on a note or bond.

Baring v. Shippen, 2 Bin. 166.

Stubbs v. King, 14 S. & R. 206.

Evidence is received to prove that a bond was fraudulently obtained or that the consideration has failed.

Carpenter v. Groff, 5 S. & R. 162.

Geiger v. Cook, 3 W. & S. 266.

Honk v. Foley, 2 P. & W. 245.

McCulloch v. McKee, 16 Pa. 289.

In the absence of any evidence to the contrary, an assignment under seal imports a valuable consideration. If, however, there be any evidence, however slight, to impeach the *bona fides* of the transaction, the assignee may be required to give full proof of consideration.

Hancock's Appeal, 34 Pa. 155.

Twitchell v. McMurtrie, 77 Id. 383.

October 5, 1891. GREEN, J. The learned Court below distinctly charged the jury that if the notes in suit were given for a past indebtedness of Landis to the plaintiff, their verdict should be in favor of the plaintiff, but if they found that they were given for machines to be furnished thereafter, and the machines were not delivered,

the verdict should be for the defendant. The jury found for the defendant and thereby determined that the notes were given for machines to be furnished in the future. There was abundant testimony in support of the defendant's contention, and we must, therefore, regard it as an established fact, that the notes were given in consideration that machines should be delivered to Landis by the plaintiff, subsequently to the execution and delivery of the notes in question. It is beyond all question that Landis obtained the signature of the defendant to the notes, and that he delivered the notes so signed to the plaintiffs, who received and kept them, and affirmed their title to them by bringing suit upon them against the defendant. For the purpose of obtaining the notes Landis most certainly acted as the representative of the plaintiffs, and they conclusively accepted the fruits of his act. That they cannot do this without being subject to the conditions upon which he obtained the notes, whether he had authority or not, to make, or agree, to those conditions, is too well settled to admit of any doubt. The whole doctrine was well expressed by SHARSWOOD, J., in the case of *Mundorff v. Wickersham* (63 Pa. 87). "If an agent obtains possession of the property of another, by making a stipulation or condition which he was not authorized to make, the principal must either return the property, or, if he receives it, it must be subject to the condition upon which it was parted with by the former owner. This proposition is founded upon a principle which pervades the law in all its branches: *Qui sentit commodum, sentit debet et onus*. The books are full of striking illustrations of it, and more especially in cases growing out of the relation of principal and agent. Thus, where a party adopts a contract which was entered into without his authority, he must adopt it altogether. He cannot ratify that part which is beneficial to himself and reject the remainder: he must take the benefit to be derived from the transaction *cum onere*." This doctrine is so reasonable and so entirely just and right, in every aspect in which it may be considered, and it has been enforced by the Courts with such frequency and in such a great variety of circumstances, that its legal soundness cannot for a moment be called in question. It is of no avail to raise or discuss the question of the means of proof of the agent's authority. The very essence of the rule is that the agent had no authority to make the representation, condition or stipulation, by means of which he obtained the property or right in action, of which the principal seeks to avail himself. It is not because he had specific authority to bind his principal for the purpose in question that the principal is bound, but notwithstanding the fact that he had no such authority. It is the enjoyment of the fruits of the agent's action

which charges the principal with responsibility for his act. It is useless, therefore, to inquire whether there is the same degree of technical proof of the authority of the agent, in the matter under consideration, as is required in ordinary cases where an affirmative liability is set up against a principal by the act of one who assumes to be his agent. There the question is as to the power of the assumed agent to impose a legal liability upon another person, and in all that class of cases it is entirely proper to hold that the mere declarations of the agent are not sufficient. But in this class of cases the question is entirely different. Here the basis of liability for the act or declaration of the agent is the fact that the principal has accepted the benefits of the agent's act or declaration. Where that basis is made to appear by testimony, the legal consequence is established. Mr. Justice SHARSWOOD, in the case above cited, after enumerating many instances in which the doctrine was enforced, sums up the subject thus: "Many of these cases are put upon an implied authority, but the more reasonable ground, as it seems to me, is, that the party having enjoyed a benefit, must take it *cum onere*." We are of opinion that the learned Court below was entirely right in the treatment of this case.

Judgment affirmed in each of these cases.

W. M. S., Jr.

Jan. '91, 127.

March 31, 1891.

City of Philadelphia v. Ridge Avenue Passenger Railway Company.

Venue—Change of—Act of March 30, 1875—Passenger railways—Ridge Avenue Passenger Railway Company—Duty of, to repair streets with new paving—Municipal corporations—Power of to impose conditions on grant of franchises.

A change of venue is only to be granted under the provisions of the Act of March 30, 1875 (P. L. 35), when the Court or Judge is satisfied of the truth of the facts alleged in the applicant's petition; and in a case where the Court or Judge is not satisfied of the truth of the facts so alleged, a change of venue should not, and cannot be made consistently with the letter and spirit of said Act.

When a charter granted by the State Legislature contains a provision that the company incorporated shall not exercise its corporate privileges without the consent of a certain municipal corporation, the municipal corporation may couple with its consent any conditions or restrictions not imposed by the Act of incorporation, if such conditions or restrictions are accepted by the company, and harmonize with, and are in nowise in conflict with the provisions of the Act of incorporation.

Appeal of the City of Pittsburgh (115 Pa. 4), distinguished.

The duty imposed upon street passenger railway companies to repair or repave streets, is not limited to the space between the rails, but extends to the entire roadway from curb to curb.

Although the duty may devolve upon a street passenger railway company to repair and repave at its own expense the city streets over which its railway passes, yet it is the special province of the municipal corporation to determine when such repairing or repaving is needed, how it shall be done, and whether with the same kind of material as before or with a different and better material.

In 1858 a street passenger railway company was incorporated by a special Act of Assembly to operate a railway on certain streets in the city of Philadelphia. The Act of incorporation contained a proviso that the city councils may "establish such regulations in regard to said railway as may be required for the paving, repaving, etc., of said streets;" a second proviso, that before the company should occupy the streets in the city, the consent of the city councils should be first obtained; and a further proviso, that the company should be subject to a certain ordinance passed by the city councils. This ordinance provided, *inter alia*, that all street railway companies "shall be at the entire cost and expense of maintaining, paving, repairing, and repaving that may be necessary upon any road, street, avenue, or alley occupied by them." Before giving its consent, the councils of the city required the company to execute an agreement binding it "to observe and be subject to all ordinances of said city in reference to passenger railways now in force or hereafter to be passed." In 1881 the city councils passed an ordinance forbidding the paving with cobble or rubble, except between tracks of railways. In 1886, by a resolution of city councils, the commissioner of highways was authorized to require passenger railway companies to repave with Belgian blocks. The railway company was notified to repave with Belgian blocks a part of a certain street over which its track passed, which had been previously paved with cobble-stones. It failed to comply with the notice. The city did the work. In an action by the city against the company to recover the price thereof:

Held (1), that the conditions imposed by the city in giving its consent to the occupancy of the streets by the railway company were valid and binding.

(2) That even if those conditions were not binding, the railway company would nevertheless be liable to the provisions of the above ordinance of 1881.

(3) That the railway company was bound to repave at its own expense the streets over which its railway passed, and this duty was not limited to the space between the rails, but extended to the entire roadway from curb to curb, and

(4) That it was, nevertheless, the special province of the city, and it had the power to determine when such repaving was needed, and how, and with what material it should be done.

In the above case it seems that the fact that the order to repave was made by resolution, and not by ordinance, is immaterial.

Appeal of the Ridge Avenue Passenger Railway Company, defendant, from the judgment of the Common Pleas No. 1, of Philadelphia County, in an action of case wherein the city of Philadelphia was plaintiff.

This was an action brought to recover expenses incurred by the city of Philadelphia in repairing

Ninth Street from Race to Sergeant Street with Belgian blocks, after due notice to make such repaving had been given to the defendant company, and it had failed to comply therewith.

Before the trial the defendant filed a petition, and obtained a rule on the plaintiff to show cause why there should not be a change of venue in accordance with the Act of March 30, 1875 (P. L. 35). The provisions of this Act, and the allegations of the petition are set forth in the opinion of the Supreme Court, *infra*. This application was refused and the rule discharged in an oral opinion by ALLISON, P. J., and the case immediately ordered for trial against the protest of the defendant. (First and second assignments of error.)

On the trial, before ALLISON, P. J., it appeared that the defendant was a corporation formed by the consolidation of the Girard College and the Ridge Avenue and Manayunk Passenger Railway Companies, and the work in question was done at a point on the line of the former Girard College Passenger Railway Company, which was incorporated under the Act of April 15, 1858 (P. L. 300), containing, *inter alia*, the following provisions:—

7. . . . And provided further, That the city councils may from time to time, by ordinance, establish such regulations in regard to said railway as may be required for the paving, repaving, grading, culverting, and the laying of gas and water pipes in and along said streets, and to prevent obstructions thereon; And provided further, That before the said company shall use and occupy the said streets, the consent of the city councils shall be first obtained; and said consent shall be taken and deemed to have been given, if said councils shall not within thirty days after the passage of this Act, by ordinance duly passed, signify their disapproval thereof.

8. That said company, in constructing said road, shall conform to the grades now established, or hereafter to be by law established of the several streets and avenues traversed by said road and keep said streets and avenues in perpetual good repair, at the proper expense of said company; Provided, That said Girard College Passenger Railway Company shall be subject to an ordinance of the city councils, entitled, "An ordinance to regulate passenger railways within the city of Philadelphia," approved the seventh day of July, Anno Domini one thousand eight hundred and fifty-seven.

The ordinance of 1857, to which the company was thus made subject, provided *inter alia*:—

That all railroad companies as aforesaid shall be at the entire cost and expense of maintaining, paving, repairing, and repaving that may be necessary upon any road, street, avenue, or alley occupied by them.

A supplement approved April 1, 1859, repeals "so much as provides that the railroad company shall pave any street that has not heretofore been paved."

The city councils of Philadelphia passed an ordinance, approved May 5, 1858, by which the assent required by the above Act was refused unless the company would give a written obligation

to observe and be subject to all ordinances in relation to passenger railways then in force or thereafter to be passed, in which event the refusal was to be void. The agreement thus required set forth the ordinance and the minutes of the stockholders' meeting authorizing its execution. Omitting these, it reads as follows:—

These presents witness that for and in consideration of the consent, permission, and authority given and granted as aforesaid by the said city, to said company, to occupy certain highways of said city with the railway of said company, as in their charter is more fully and at large set forth; that the said company, by this, their written obligation, subscribed by their president and secretary, duly empowered for that purpose, do covenant and agree with the said city that the said company shall now and at all times hereafter be bound to observe and be subject to all ordinances of said city in reference to passenger railways now in force or hereafter to be passed as aforesaid; and said company hereby say that the true and sole intent and purpose of these presents is to declare that said company is now and shall be at all times hereafter bound to observe and be subject to all and several the ordinances aforesaid.

In testimony whereof, The president and secretary of said company have hereunto set their hands and corporate seal of the said company, this twenty-ninth day of July, Anno Domini 1858, at Philadelphia aforesaid.

The plaintiff offered in evidence such an agreement duly executed by the defendant company. Objected to by defendant. Objection overruled, and evidence admitted. Exception. (Third assignment of error.)

The plaintiff also offered in evidence the ordinances of the city later than the above ordinances, and purporting to regulate passenger railway companies. Objected to by defendant. Objection overruled, and evidence admitted. Exception. (Fourth assignment of error.)

Among the ordinances so offered in evidence was an ordinance approved December 12, 1881, forbidding paving with cobble or rubble except between tracks of railways. Also a resolution of May 6, 1886, "authorizing the chief commissioner of highways to cause cobble-stones to be replaced by Belgian blocks on streets occupied by passenger railroads;" which authorizes that officer to require any company to "repave" with Belgian blocks instead of cobble-stones wherever Belgian blocks are necessary. And also a copy of a notice, dated July 23, 1886, which was given to defendant, referring specifically to this resolution, and requiring it to "repave Ninth Street from Race to Sergeant Street with Belgian blocks."

The plaintiff and defendant each presented numerous requests to the Court to charge the jury, all of which and the answers thereto are set forth in the charge of the Court, which was as follows:—

"This case which we have been engaged in trying yesterday and so far to-day, is to be deter-

mined mainly upon the view of the law which I take of the question as it stands—upon its legal aspects, and you will be very much guided, therefore, by the instructions which I am required to give you as to what I think is the proper legal principle governing and controlling the case before us.

"The questions submitted by the points which I have been asked to charge the jury upon, as submitted by the plaintiff, are mainly questions which affect the construction of the Acts of Assembly, the ordinances of councils, and the agreement of the defendant company filed in pursuance of the ordinance of councils, and those are purely and entirely questions of law upon which I shall give you directions in a moment. That applies to the first, second, and third points. As to the fourth point, there is a question of fact raised by that point upon which I will say something to the jury, and so also of the fifth and sixth points.

"Now, the plaintiff has asked me to say to you, gentlemen, 'that the Ridge Avenue Passenger Railway Company is bound by all the charter obligations of the Girard College Passenger Railway Company.' I affirm that proposition, because the Ridge Avenue Passenger Railway and the Girard College Passenger Railway became consolidated under the laws of this Commonwealth, and having consolidated and merged the present corporation became liable to all the obligations of the two corporations—that is, of the first and of the second coming together and merging their corporate existence into the present corporation, which represents the two, stands under precisely the same obligations under which the several companies stood at the time when that merger took place. I therefore affirm that proposition.

"The second is: 'That the Ridge Avenue Passenger Railway Company is subjected by the Act of 15th of April, 1858, chartering the Girard College Passenger Railway Company to the ordinance of July 7, 1857.'

"That ordinance you will probably recall when it was referred to by counsel, and the substance of it was stated, and I affirm that proposition. That was an existing ordinance at the time the Ridge Avenue Passenger Railway Company was chartered, and the company then chartered was made subject to the provisions of the ordinance of 1857.

"The third is: 'That the Ridge Avenue Passenger Railway Company is, by the corporate obligation of the Girard College Passenger Railway Company of July 29, 1858, subjected to all the provisions of the ordinance of July 7, 1857.'

"Those two points merely ask me to say to you that the two corporations which were merged—the Ridge Avenue Passenger Railway Com-

pany and the Girard College Passenger Railway Company—were, each of them, subject to that ordinance of July 7, 1857, and are jointly subject to that ordinance of July 7, 1857, because of the merger of the two companies or corporations into one.” (Fifth assignment of error.)

“The fourth point is: ‘That if the jury believe that the pavement on Ninth Street, above Race Street, was out of repair in 1886, and the company defendant failed to comply with notice to repair, the city had a right to make the repairs at the cost of the defendant.’

“I affirm that proposition, that if the jury believe that in 1886 it was necessary to repair the pavement upon Ninth Street, above Race Street, and the company defendant failed to comply with notice to repair, to repave, and it was necessary to repair the pavement on Ninth Street above Race, and the company defendant failed to comply with the notice, the city had a right to make the repairs at the cost of the defendant.” (Sixth assignment of error.)

“‘That if the jury believe that in 1886 it was necessary to repair the pavement on Ninth Street above Race Street, and the company defendant failed to comply with notice to repave it with the kind of pavement suited to the traffic on the street, the city had a right to lay such a pavement at the cost of the defendant.’

“I affirm that proposition.” (Seventh assignment of error.)

“‘If the jury believe that granite-block pavement is the pavement with which all large cities in this country and abroad are paving their main streets and streets on which the traffic is heavy; that such pavement is, considering the first cost and the item of repairs, as cheap if not cheaper than cobble-stone pavement, and is the kind of pavement suited to the neighborhood and traffic of Ninth and Race streets, and with which the city is, as fast as its finances will permit, resurfacing its main streets, then the city had the right to repave and repair Ninth Street north from Race Street with granite blocks, and the defendant company is liable for the just and proper cost thereof.’

“I affirm that proposition, striking out all that follows in the first line the word ‘is;’ that is, the words ‘the pavement with which all large cities in this country and abroad are paving their main streets and streets on which the traffic is heavy.’ I do not think that is a question which the jury have anything to do with, except it may be a fact to be taken into account by the jury in passing upon the question as to whether the Belgian-block pavement was the proper pavement to be laid down on this part of Ninth Street. I make this point read as follows: ‘If the jury believe that granite-block pavement is, considering the first cost and the item of repairs, as cheap

if not cheaper than cobble-stone pavement, and it is the kind of pavement suited to the neighborhood and traffic of Ninth and Race streets, and with which the city is, as fast as its finances will permit, resurfacing its main streets, then the city had the right to repave north on Ninth Street with granite blocks, and the defendant company is liable for the just and proper cost thereof.’ I affirm that proposition with that portion of it stricken out. (Eighth assignment of error.)

“Upon the defendant’s points I am asked to say to you:—

“(1) No authority to pave Ninth Street with Belgian blocks has been shown, and your verdict must be for defendants.”

“I decline to affirm that proposition as submitted.” (Tenth assignment of error.)

“(2) No authority to repave Ninth Street from curb to curb with Belgian blocks has been shown, and your verdict must be for the defendants.”

“I decline to affirm that point, because if the company were obliged to pave at all, or repave at all, or keep in repair at all, the street, it is the pavement between curb and curb and not simply between tracks.” (Eleventh assignment of error.)

“(3) There is a lack of evidence of any power conferred by the city of Philadelphia to repave Ninth Street with Belgian blocks at the expense of the defendants, or at the expense of any other party, and your verdict must be for the defendants.”

“I decline to affirm that proposition, because the question of paving or repaving with any particular kind of pavement is a question that is under the control of the city of Philadelphia as supervisors of the highway. I do not at all agree with the general proposition that counsel for the plaintiff pressed upon me so erroneously, that the whole power or the whole obligation, so far as paving is concerned, is cast upon the defendants, notwithstanding the fact that the defendants as a railway corporation accepted the grant of the privilege which was the condition of their filing the agreement with the city of Philadelphia, that they would pave, repave, and repair the streets of the city, notwithstanding that there is still a general oversight and general care and general obligation resting upon the city of Philadelphia as supervisor of the highway; those highways are still under their general supervision and control, and that remaining and resting upon them; the power to determine what kind of a pavement shall be laid down upon particular portions of the streets of the city remains with the corporate authorities of the city of Philadelphia; and I decline, therefore, to affirm that proposition. If they decided that Belgian block was the proper pavement to be put down, they had the right so to decide.” (Thirteenth assignment of error.)

"The fourth point is: '(4) If you find that the bill of paving sued for is for tearing up a cobblestone pavement existing on Ninth Street at the time the railway was laid down, and for repaving said street from curb to curb with Belgian blocks, your verdict must be for defendants.'

"I decline to affirm that proposition for the reason which I have just given, that this power is a general power of supervision and control over the highways of the city which still remains in the corporate authorities of Philadelphia, and that it was for them to direct what character of pavement should be laid down at the time the Belgian block on Ninth Street, which is the subject of controversy and dispute here, was laid down." (Fourteenth assignment of error.)

"The fifth point is: '(5) There is no authority in the city of Philadelphia to compel the defendants to pay the cost of paving the whole cartway of Ninth Street at the place in question with Belgian blocks.'

"I decline to affirm that, because if they had the right to decide what kind of pavement should be put down, as I have said to you they had that right, then they have the right, under my view of the law, to direct that it should be paved with that kind of pavement, or such other kind of pavement as they may have thought to be best and most suitable for this particular locality from curb to curb. As I said a moment ago, if there is an obligation on the part of the railway company to pave or repave and put the streets in repair under direction of city councils, that means the whole cartway of the street, and not the mere portion of it which is within the track of a railway laid upon the street itself, that that is not the cartway of the street, and that is not the part of the street which is to be paved; that is only a portion of that part of the street called a highway which is required to be paved for the passage of general travel over the cartway of the city." (Fifteenth assignment of error.)

" '(6) The city councils had no authority to make their approval to the laying of defendants' railway conditioned upon their entering into a written obligation to observe and be subject to all ordinances of the city in relation to passenger railways then in force or thereafter to be passed. The agreement thus compelled to be signed by the defendants did not bind them so far as exceeded the authority of the city to impose conditions.'

"I decline to affirm that proposition because I think the city had the right to impose that condition upon this corporation before the corporation could enter upon the streets and lay their track upon them. The Act of Assembly made the consent of the city to the exercise of that power by the defendants a prerequisite to the right to use the streets of the city for the purposes

of constructing upon them—the defined streets in the Act—a city passenger railway, and if the city had the right to refuse or to consent, it had the right to say upon what terms it would consent, and upon what terms it would refuse. Perhaps if the question were raised by the city with a view to preventing the exercise of this power under the Act, that it had imposed impossible conditions on the railway company, that might be held to be an exercise of authority not warranted by the law; but the condition which is here imposed, and which is the one to which this point was directed, I hold was not an impossible condition nor an unreasonable condition, and therefore I decline to affirm this proposition." (Sixteenth and seventeenth assignments of error.)

" '(7) If you find that the existing cobblestone pavement on Ninth Street was capable of being repaired with the same stones, in the proper manner, and that to repair the same it was not necessary to repave with Belgian blocks, your verdict must be for defendants.'

" '(8) Your verdict must be for defendants.'

"I decline to affirm this proposition, because if the city councils are, as I understand they are, vested with the power of determining what kind of pavement should be laid down, either as an original pavement or as a pavement to be substituted for the one which is to be repaved, which is to be taken up and put down, that that power was properly exercised by the city of Philadelphia when they directed that this portion of the highway of the city should be repaved with Belgian block, the discretion being given to them. Now, in the exercise of this power, they must exercise it within reason, they must exercise it with a proper consideration of the rights of the company as well as with a proper consideration of what they owe to the public, to endeavor to secure proper highways in the city of Philadelphia, and as I am asked to state to you this point, the city has no right to direct. The general proposition as thus submitted I decline to affirm." (Eighteenth and nineteenth assignments of error.)

"So that you will find the question of fact which you have to consider is presented under the fourth, fifth, and sixth points of the plaintiff, which I will read to you again; and which I have affirmed:—

" '(4) That if the jury believe that the pavement on Ninth Street above Race Street was out of repair in 1886, and the company defendant failed to comply with notice to repair, the city had a right to make the repairs at the cost of the defendant.'

"Now, the jury will have to pass upon the question as to whether the pavement on Ninth Street was out of repair, and out of repair in such a way that it was a proper thing for the

city of Philadelphia to direct the company defendant to repair it, and if they failed to repair it then the question is presented as to whether the city had the right to make the repairs at the cost of the defendant. If you find that the pavement on Ninth Street above Race Street was out of repair in 1886, and that the defendant company did not comply with the notice served upon them by the city, and that they failed to make the repairs under that notice, then the city had the right to make the repairs at the cost of the defendant. I affirm the proposition, leaving the question to you as to whether Ninth Street above Race Street was out of repair, and in such condition as to justify the city in calling upon the defendants to put it in proper repair and condition, that if you find they failed to put it in proper repair after that notice was given the city had the right to make the repairs at the cost of the defendant.

"Now, the fifth point, to which I want more particularly to call your attention as we go along, is:—

"That if the jury believe that in 1886 it was necessary to repair the pavement on Ninth Street above Race Street, and the company defendant failed to comply with notice to repave it with the kind of pavement suited to the traffic on the street, the city had a right to lay such a pavement at the cost of the defendant."

"I see you do not specify the kind of pavement?"

"*Mr. Beiler.* You will find it by looking at my copy.

"THE COURT. There is no such modification here at all. This ought to be so modified 'that if the jury believe that in 1886 it was necessary to repair the pavement on Ninth Street above Race, and that the company defendant failed to comply with notice to repave it with the kind of pavement suitable to the traffic on the street, the city had a right to lay such a pavement at the cost of the defendant.'"

"I affirm that proposition. That leaves to you the question that if the jury believe that in 1886 it was necessary to repave the pavement on Ninth Street above Race Street, and that the company defendant failed to comply with the notice to repave, the city had the right to lay such pavement.

"(6.) If the jury believe that granite-block pavement is, considering the first cost and the item of repairs, as cheap if not cheaper than cobble-stone pavement, and is the kind of pavement suited to the neighborhood and traffic of Ninth and Race streets, and with which the city is, as fast as its finances will permit, resurfacing its main streets, then the city had the right to repave and repair Ninth Street north from Race Street

with granite blocks, and the defendant company is liable for the just and proper cost thereof."

"[Now, that submits to you, gentlemen, the question as to whether, considering the first cost of the Belgian-block pavement, that it is as cheap if not cheaper than cobble-stone pavement. If you believe that fact, in the first place, and that is put in this way for the purpose of presenting to the jury the question as to whether this requirement on the part of the city was a reasonable or unreasonable requirement. The city has not the arbitrary authority to do just exactly what it may please in regard to the orders which it may give to these companies to repair or to repave. Their orders must be reasonable and must be just, and such as, under the circumstances of the case, they ought to have given for the doing of that particular kind of work. Therefore, it is presented as a question in this point that if you believe it was as cheap as cobble-stone, or cheaper than a cobble-stone pavement, the inference which you will be asked to draw from it is that that was no unreasonable obligation imposed upon the company; that is, if they could lay down the Belgian-block pavement, taking the whole question in regard to the laying down and keeping it in repair, that it was as cheap or cheaper than cobble-stone, that then it was no hardship to require them to lay down the Belgian-block pavement instead of the cobble-stone. That question of fact is submitted to the jury, and if you find also that it is the kind of pavement suited to the neighborhood and traffic of Ninth and Race streets, and with which the city is, as fast as its finances will permit, resurfacing its main streets—I think that had better be stricken out, because it is asserting a fact, and I will strike out that clause, because it is assuming something as to which you have offered no evidence, but you assume it that it is really doing that very thing—'then the city had the right to repave and repair Ninth Street, north from Race Street, with granite blocks, and the defendant company is liable for the just and proper cost thereof.' With this modification I affirm that proposition."] (Ninth assignment of error.)

Verdict for the plaintiff for \$1026.50 and judgment thereon. Whereupon the defendant took this appeal assigning for error, the refusal of the Court to grant the change of venue requested; the ordering of the case immediately to trial; the admission of evidence, the answers to points, and the charge of the Court, as above set forth.

J. Howard Gendell and *John G. Johnson* (with them, *David W. Sellers*), for appellant.

The change of venue asked for should have been granted because—

(1) To refuse it was to go contrary to the

general principles governing changes of venue as set forth in—

3 Blackstone's Commentaries, 363, 383.
Southampton Br. Co. v. Local Board, 8 Ell. & Bl.,
92 E. C. L. R., 803.

(2) To refuse it was to go contrary to the Legislature of Pennsylvania upon the subject, and to the decisions construing these Acts.

Act of April 14, 1834, P. L. 396.
Act of April 28, 1870, Id. 1292.
Act of March 30, 1875, Id. 35.
Constitution of Pennsylvania, Art. III., § 23.
Vankirk v. R. R. Co., 76 Pa. 66.
Williamsport and Elmira R. R. Co. v. Cummins,
8 Watts, 450.
Hughes v. R. R. Co., 30 Pa. 517.
Williamsport v. Commonwealth, 90 Id. 498.
In re James W. N. Newlin, 123 Id. 541.

The effort of the city is to pave at appellant's expense, with Belgian blocks, a street heretofore paved with cobble-stones, and which could have been repaired with like material. This was forbidden by the Act of April 11, 1868 (P. L. 849). It has been held that the city cannot require property-owners to set a new and different curb in place of an old one.

Wistar v. Phila., 80 Pa. 505.
Phila. v. Wistar, 92 Id. 404.
Wistar v. Phila., 111 Id. 604.

Since the old pavement could have been repaired, a new pavement was not required, and the city's requirements were unreasonable and therefore invalid.

Pittsburgh's Appeal, 115 Pa. 4.
Commissioners v. Gas Co., 12 Id. 318.
City v. Empire Pass Ry. Co., 7 Phila. 321.

The agreement of July 29, 1858, did not impose any new duties upon the appellant company, and if it did it was invalid.

Pittsburgh's Appeal, 115 Pa. 4.
Faust v. Pass. Ry. Co., 3 Phila. 164.

The power to order a new pavement must be exercised by ordinance and not by resolution.

Abraham M. Beidler, assistant city solicitor, and *Charles F. Warwick*, city solicitor, for appellee.

The use of Belgian blocks was not experimental. The city had used them since 1874, and all other large cities used them. It has the right to change the character of its pavements.

City to use v. Evans, 27 WEEKLY NOTES, 240.

The trial Judge was evidently not "satisfied of the truth of the facts alleged," and therefore properly refused the change of venue. The appellant was bound by the agreement of July 29, 1858, because it was its voluntary act.

Pittsburgh's Appeal, 115 Pa. 4.
Pass. Ry. Co. v. Birmingham, 51 Id. 41.
Pass. Ry. Co. v. Pittsburgh, 80 Id. 72.

The duty to repave extends to the whole of the roadway. There has never been any doubt that

the passenger railway companies are bound to repair the entire roadway from curb to curb.

Pass. Ry. Co. v. Phila., 2 WEEKLY NOTES, 639.
Pass. Ry. Co. v. City, 13 Id. 457.
Campbell v. Ry. Co., 27 Id. 274.

Ridge Avenue Pass. Ry. Co. v. Phila., 124 Pa. 219.

The Act of April 11, 1868, was not a repeal of the Act of April 15, 1858. If intended to be so, it fails because its title does not express that object. The Wistar cases have no application here, because the city is not invoking any power of taxation, or acting arbitrarily.

October 5, 1891. *STERRETT, J.* This suit was brought against appellant to enforce payment of the cost of repaving Ninth Street, from Race to Sergeant Street, in the city of Philadelphia, with interest thereon. The city authorities, having determined that it was necessary to repave that portion of Ninth Street, and claiming that appellant company, under its charter and contract obligations, was bound to do the work at its own expense, notified it to do so. The company denied its obligation and refused to repave. The city then advertised for bids, awarded the contract to the lowest bidder, and the work was done at the cost of and was paid by the city. There was no question as to the amount of the claim. The sole contention was in regard to appellant's liability; and that depended on the questions of law and fact involved. They were determined in favor of the city, and a verdict in her favor for \$1026.50 was rendered. From the judgment, entered on that verdict, this appeal was taken.

After the cause was at issue, but before it was called for trial, the defendant company presented a petition, signed and affirmed to by its president, setting forth:—

"That this action is for the cost of repaving certain streets of the city of Philadelphia with an alleged improved pavement, and not only involved a very large sum directly in controversy in this case, but will be a precedent, and possibly an adjudication and estoppel, for similar claims in the near future against this company, amounting to many hundreds of thousands of dollars; and, in addition thereto, will greatly affect similar litigation, and claims against other railway companies in this city, amounting, in the aggregate, to millions of dollars.

"And your petitioner further shows, that the plaintiff is a municipality in this county, and is coterminous with the county, and that public attention has been attracted, to an unusual extent, to the claim which is the subject-matter of the suit; that a large number of the inhabitants of this county have an interest in the question involved adverse to petitioner; that there are issues of fact as well as of law to be tried, and

that local prejudice exists and a fair trial cannot be had in this county.

"Wherefore your petitioner prays for a change of venue herein."

That application was refused, and the trial proceeded before the learned President of Common Pleas No. 1.

The refusal to grant the application for a change of venue is the subject of complaint in the first and second specifications.

In section 23, of Article III., our Constitution declares: "The power to change the venue in civil and criminal cases shall be vested in the Courts, to be exercised in such manner as shall be provided by law."

The Act of March 30, 1875, passed to carry that provision into effect, provides:—

"Sect. 1. That changes of venue shall be made in any civil cause in law or equity depending in any of the Courts of this Commonwealth in the following cases, to wit:—

"1. Whenever the Judge, who, by law, is required to try or hear the same, shall be personally interested in the event of such cause, or in the question to be determined thereby.

"2. Whenever the title under which the parties, or either of them, claim in any such cause, shall have been derived from or through such Judge, and he shall be liable thereunder, or whenever he shall hold under the same title with either of the parties in the said cause.

"3. Whenever any near relative of such Judge shall be a party to any such cause, or interested in the event thereof.

"4. Whenever the county in which such cause is pending, or any municipality therein, or the officials of any such county or municipality, are parties thereto, and it shall appear by the oath of the party desiring such change of venue that local prejudice exists, and that a fair trial cannot be had in such county.

"5. Whenever a large number of the inhabitants of the county in which such cause is pending have an interest in the question involved therein adverse to the applicant, and it shall appear, by the oath of such applicant, that he believes that he cannot have a fair and impartial trial.

"Sect. 2. The applicant for any such change of venue may apply to the Court in term time, or to any law Judge thereof in vacation, by petition, setting forth the cause of the application, which shall be accompanied by his affidavit of the truth of the facts alleged therein, and that the said application is not made for the purpose of delay, and praying a change of venue; and after reasonable notice thereof having been given to the opposite party or his attorney, the said Court or Judge shall, if satisfied of the truth of the facts alleged, award a change of venue of the

said cause to some county where the causes complained of do not exist."

The first three paragraphs, above quoted, are inapplicable to this case. The reasons assigned in the petition are not within the purview of either. They are solely within that of the fourth and fifth paragraphs, one of which provides for change of venue when it shall appear "that local prejudice exists and that a fair trial cannot be had," and the other when "it shall appear by the oath of such applicant that he believes he cannot have a fair and impartial trial." To whom must these matters appear? Certainly not to any one save the Court or Judge who passes upon the application. It was never intended that the mere statement of facts coming within the purview of either of these two paragraphs should of itself entitle the petitioner to a change of venue. The Act requires more than the mere making of the affidavit. It means that the statements set forth shall be true; that their truth shall appear to the Court or Judge who hears the application; and further, that by reason thereof a fair and impartial trial cannot be had.

In the second section of the Act, after stating to whom the application shall be made, what it shall set forth, etc., it is provided, that "the said Court or Judge shall, if satisfied of the truth of the facts alleged, award a change of venue," etc. It is very evident from this that it is not enough that the applicant be convinced of the truth of what he alleges. The Court or Judge must be satisfied of their truth. If all others concerned are fully satisfied of their truth, and the Court or Judge is not, the change of venue should not and cannot, consistently with the letter as well as the spirit of the Act, be made. Nobody can for a moment doubt that the learned President of the Court below was not satisfied. If he had been, he would have granted the application.

We are quite clear that there is nothing in the record that would justify us in sustaining either the first or second specifications.

The third, sixteenth, and seventeenth specifications of error may be considered together. The first of these is to the admission in evidence of the agreement of the Girard College Passenger Railway, executed July 29, 1858. The others are to the answers of the Court to defendants' sixth point, which point is as follows:—

"The city councils had no authority to make their approval to the laying of defendants' railway conditioned upon their entering into a written obligation to observe and be subject to all the ordinances of the city, in relation to passenger railways, then in force or thereafter to be passed. The agreement thus compelled to be signed by the defendants did not bind them, so far as it exceeded the authority of the city to impose conditions."

The agreement referred to was rightly admitted in connection with the agreement of merger between that company, the Ridge Avenue Passenger Railway Company, and the Ridge Avenue and Manayunk Passenger Railway Company, which were consolidated in January, 1872, and thereafter known as the Ridge Avenue Passenger Railway Company, appellant, the ordinance of July 7, 1857, referred to in the charter of said Girard College Passenger Railway Company, and other evidence.

In refusing to affirm defendants' sixth point, above quoted, the learned Judge correctly said: "The city had a right to impose that condition upon the corporation before it could enter upon the streets and lay its track upon them. The Act of Assembly made the consent of the city to the exercise of that power by the company a prerequisite to the right to use the streets of the city for the purpose of constructing upon them (the streets defined in the Act) a city passenger railway; and if the city had a right to refuse or consent, it had a right to say upon what terms it would consent and upon what terms it would refuse. Perhaps, if the question were raised by the city with the view of preventing the exercise of this power under the Act, that it had imposed impossible conditions on the railway company, that might be held to be an exercise of authority not warranted by law; but the condition which is here imposed, and which is the one to which this point is directed, I hold was not an impossible condition nor an unreasonable condition, and therefore I decline to affirm this proposition."

The agreement binding the company to "observe and be subject to all ordinances of said city in reference to passenger railways now in force or hereafter passed," was the voluntary act of the company. It was executed and filed pursuant to the unanimous direction of the stockholders, and has stood unchallenged from 1858 until this contention arose. But, as we shall see presently, that agreement has little if any effect on the company so far as the matter involved in this contention is concerned. It is a mistake to suppose that if that agreement can be repudiated the company is at liberty to ignore the provisions of the ordinance of December 12, 1881, forbidding the paving with cobble or rubble except between tracks of railways, etc.

The contention of the defendants as to the invalidity of the agreement under consideration is not sustained by anything that was decided in Pittsburgh's Appeal (115 Pa. 4). As will appear by an examination of that case, its facts are wholly unlike those of the present case. Among other things, councils in that case undertook, as a condition of their assent, to deprive gas companies of the right of appeal expressly given

them by the Act under which they were incorporated. That was attempted by making councils themselves a Court of last resort and exacting a bond in large amount binding them to submit to that self-constituted tribunal. The *animus* of this and other conditions, clearly violative of the corporate rights of the companies and *ultra vires*, was so apparent that the companies affected thereby refused to submit. They declined to recognize any such usurpation of authority, and entered into no agreement. Referring to the unreasonableness and unlawful character of the conditions imposed in that case, we held that councils had no right to couple their assent with any condition or restriction not imposed by the Act unless the gas company agreed to accept the same and be bound thereby; and even then the conditions or restrictions so accepted by the company must harmonize and in nowise conflict with the provisions of the Act incorporating such companies.

The case before us is very different. As we shall presently see, the terms of the agreement are not in conflict with the provisions of defendant company's charter. They are neither unlawful nor unreasonable. A meeting of the stockholders was called for the purpose of considering the ordinance. They agreed to accept its provisions, and authorized their officers to execute the agreement. It was accordingly executed and filed.

A question similar to that under consideration was ruled in *P. and B. Pass. R. W. Co. v. Birmingham* (51 Pa. 41), and *Same v. Pittsburgh*, (80 Pa. 72). The Pittsburgh and Birmingham Pass. R. W. Co. was authorized to construct and operate a railway along Carson Street, in the boroughs of Birmingham and South Pittsburgh, both of which were afterwards consolidated with the city of Pittsburgh. The 8th section of the company's charter provided: "That the said railway company shall not be permitted to use or occupy any of the streets of the said city of Pittsburgh or streets of said boroughs for the purposes of their railway, until the consent of the councils of said city and boroughs is first thereto had by ordinance duly passed." The consent of both boroughs was given upon certain terms expressed in ordinances passed by them respectively. That of Birmingham was given in the following words: "Said railway company, in addition to other requirements of the charter, shall keep Carson Street in perpetual good order and repair from curb to curb, its whole length, from the time of the acceptance of this ordinance." That of South Pittsburgh was as follows: "And provided also that said railway company shall keep said Carson Street in a good and sufficient state of repair from curb to curb, to the satisfaction of the committee on streets, . . . and also keep

said Carson Street in a reasonable sanitary condition."

The company having refused to remove from Carson Street the dirt that accumulated by reason of its ordinary use as a thoroughfare, the Court, in an action brought by the borough to recover the cost of cleaning the street, held that "the duties of defendants below arise, not only from the Act of Assembly, but also from their contract with the plaintiffs, the borough authorities, without whose consent they could not have used and occupied Carson Street" (51 Pa. 42).

Subsequently, after consolidation of the boroughs with the city of Pittsburgh, a mass of debris, stones, and gravel were thrown upon Carson Street by an unusual rainfall. The city was requested by the company to remove the obstruction, clean the street, etc., and having refused to do so, it was done by the company, and suit was brought against the city to collect the cost thereof. This Court held that there could be no recovery. Referring to the Act of incorporation and ordinance giving consent of the borough, Mr. Justice MERCUR said: "The manifest intention of the statute and of the ordinance was to transfer to the company the exclusive duty of keeping in repair all that portion of the street which lies between the curbs. Hence, in the words of the former, the company was to keep the street 'in perpetual good repair,' and in those of the latter, 'in a good and sufficient state of repair.' Neither contains any intimation that the municipality was to repair under any contingency. But to make it more clear that the company assumed the whole duty of keeping the street in repair, the ordinance required it to be so kept 'to the satisfaction of the committee on streets.' This practically gave to the municipality the power of deciding on the goodness and the sufficiency of the repairs made by the company. Still further, the ordinance required the company to keep the street 'in a reasonable sanitary condition'" (80 Pa. 75).

By reference to the second proviso to 7th section of the Act of April 15, 1858, incorporating the Girard College Passenger Railway Co., authorizing it to occupy Ninth Street, etc., it will be seen, "that the city councils may from time to time, by ordinance, establish such regulations in regard to said railway as may be required for the paving, repaving, grading, culverting, and the laying of gas and water pipes in and along said streets, and to prevent obstructions thereon."

We are unable to see that there is anything *ultra vires* in the ordinance granting consent, or that there is anything in the company's agreement accepting the same and consenting to be bound thereby, that in any manner conflicts with the provisions of its charter.

As heretofore stated, the defendant company was formed by merger of three passenger railway companies, and assumed the name of "Ridge Avenue Passenger Railway Co." By that merger the duties and obligations of the respective companies devolved on the new one. The street, for the repaving of which this suit was brought, was occupied by the Girard College Passenger Railway Co., chartered by the Act of April 15, 1858. By section 8 of that Act the company was, in express terms, declared "subject to an ordinance of city councils, entitled, 'An ordinance to regulate passenger railways in the city of Philadelphia,' approved the seventh day of July, A. D. 1857." That ordinance provided, *inter alia*, as follows:—

"Sect. 1. . . . That all passenger railroad companies within the city of Philadelphia, shall be subject to the restrictions, limitations, terms, and conditions hereinafter provided; and any such company, before entering upon any road, street, avenue, or alley within the limits of the said city shall be understood and deemed to be subject thereto, upon the conditions hereinafter prescribed.

"Sect. 2. That it shall be the duty of said companies, or any of them, to conform to the surveys, regulations, and gradients as they are now or may be hereafter established by law. They shall submit all proposed plans, courses, styles of rails, and the manner of laying the same to the board of surveys and regulations, for their approval and sanction; . . . to lay flag-stones or crossings, along the line of the paved streets upon which the rails are laid, at intervals not exceeding two hundred and fifty feet;" etc.

"Sect. 3. That all railroad companies as aforesaid, shall be at the entire cost and expense of maintaining, paving, repairing, and repaving that may be necessary upon any road, street, avenue, or alley occupied by them. That for the convenience of the public, it shall also be the duty of the said companies to clear the streets or other public highways that they may occupy of snow or any other obstruction placed thereon by such companies when the same impedes the travel upon said highways," etc.

"Sect. 4. That it shall be the duty of any company as aforesaid, when requested to do so by the chief commissioner of highways, to remove any obstruction, mend, or repair their road, pave or repave their highways, as herein before provided; and should they refuse or neglect to do so for ten days from the date of such notice, then, and in such case, councils may forbid the running of any car or cars upon the said road until the same is fully complied with; and the city reserves the right in all such cases to repair or repave such streets, and the expense thereof shall be a judg-

ment upon the road, stock and effects of such company, recoverable as such judgments are now recoverable by the city of Philadelphia."

The remaining five sections of the ordinance provide in detail for other matters which have no special bearing on this contention, except to show, what is already quite apparent, that the permission given to occupy streets, etc., is in subordination to the general authority and power of the municipal authorities over the streets, etc.

The ordinance thus referred to in the Act of Assembly is in effect read into and made part of the company's charter. It is as much a part of the law of its being as any part of the Act of Assembly itself; and by the merger and consolidation aforesaid, it in fact became an integral part of defendant company's charter. The third section declares in plain and unequivocal language that the company shall be at the entire cost and expense of maintaining, paving, repairing, and repaving that may be necessary upon any road, street, lane, or alley occupied by it. Considered in connection with other provisions of the company's charter, the words here employed are not susceptible of any other than their ordinary meaning.

It has never been seriously doubted, nor can it be, that the duty to repair, or to repave, when either is adjudged necessary, extends to the entire roadway from curb to curb. In *Philadelphia & Gray's Ferry Passenger Railway Co. v. The City* (2 WEEKLY NOTES, 639), a similar question was mooted; and in a very able opinion by the learned President of Common Pleas No. 4, it was held that the railway company was bound to keep in repair the entire roadway of the street it occupied; not only the space between the rails, but the entire roadway from curb to curb. To the same effect are *Passenger Railway Co. v. City* (13 WEEKLY NOTES, 487); *Campbell v. Railway Co.* (27 Id. 274; 40 Leg. Intel. 154); *Ridge Avenue Passenger Railway Co. v. Philadelphia* (124 Pa. 219); *P. & B. Passenger Railway Co. v. Birmingham*, and *Same v. Pittsburgh* (*supra*).

By whom is the necessity for repairing, or repaving, etc., to be determined? Certainly not by the company itself, but by the municipal authorities. As a general rule, it is their special province to determine when repaving is needed, and how it shall be done, whether with the same kind of material as before, or with a different and better material. It was never intended to transfer the duty of determining these matters, or either of them, from the municipal authorities to any one else. The proposition that because cobble-stone was the kind of pavement ordinarily in use when defendant company was chartered, it is in no event bound to repave with any other and more expensive kind of material, etc., is wholly unten-

able. It cannot be entertained for a moment. It was never contemplated that the railway company would continue to exist and perform its corporate functions in a cobble-stone age. It was called into being with the view of progress. The duties specified in its charter were imposed with reference to the changes and improved methods of street paving which experience might sanction, as superior to and more economical than old methods. In other words, the company is bound to keep pace with the progress of the age in which it continues to exercise its corporate functions. The city authorities have just as much right to require it to repave at its own expense with a new, better, and more expensive kind of pavement as they have to cause other streets to be repaved, in like manner, at the public expense.

Six points for charge were submitted by the plaintiff, all of which were rightly answered by the learned Judge. His answers appear of record and require no further comment, except to say that the fifth and sixth points were more favorable to the defendant company than any evidence in the case warranted. The first three presented questions of law, and, for reasons given in the answers thereto, they were properly affirmed. As requested in the fifth and sixth points he instructed the jury:—

First. If the jury believe that in 1886 it was necessary to repave the pavement on Ninth street, above Race, and the company defendant failed to comply with notice to repave it with the kind of pavement suited to the traffic on the street, the city had a right to lay such a pavement at the cost of defendant.

Second. If the jury believe that granite block pavement is, considering the first cost and the item of repairs, as cheap, if not cheaper, than cobble-stone pavement, and is the kind of pavement suited to the neighborhood and traffic of Ninth and Race streets, and with which the city is, as fast as its finances will permit, resurfacing its main streets, then the city had the right to repave and repair Ninth Street, north from Race Street, with granite blocks, and the defendant company is liable for the just and proper cost thereof. These instructions were more favorable to the defendant company than it was entitled to. The verdict, as has been stated, was in favor of the city. By necessary implication, the jury must have found, as the basis of their verdict, the facts of which the plaintiff's fourth to fifth points inclusive are predicated. The facts thus established by the finding of the jury, in connection with the charter obligation, and duty of the railway company, as correctly explained by the Court, entitled the plaintiff to recover.

The eight points for charge submitted by de-

defendant were rightly refused, for reasons given by the learned Judge in his answers. It follows that neither of the specifications of error is sustained.

Judgment affirmed.

C. K. Z.

Jan. '91, 298.

May 25, 1891.

Mifflin Bridge Company v. County of Juniata.

Eminent domain—Taking of toll-bridge for public use—Measure of damages—Evidence.

Where a bridge is taken by a county for public use under the Act of May 8, 1876 (P. L. 131), the measure of damages is the value of the property to the owners, not to the county taking it; and such value is to be ascertained not only by the cost of the structure, but also by the value of its franchises.

The cost or value of the structure, the net amount of tolls, and the market value of the capital stock, are all elements to be considered in ascertaining the value of the bridge and the corporate franchises.

The county must pay for the bridge at its actual value at the time of taking. The true question is the value of the bridge, not what it cost nor the contract price, for the contractor may have taken it at too low a figure, or the owner may have paid too much.

When the bridge company had given in evidence to show the value of the capital stock or franchises, the receipts from tolls, it is clearly competent for the defendant, the county, to put in evidence the return of the company to the auditor general to show the value placed by the company upon its own stock, a valuation made upon the oath of its officers. The return is not conclusive upon the question of value, but it is competent and important evidence.

It is not relevant to show what the county could have erected a new bridge for on the site of the old bridge or at some other point.

If the liability of the bridge to destruction by flood or ice lessens its value, this is to be considered to the extent that it decreases the value of the property.

Appeal of the County of Juniata, defendant, from the judgment of the Common Pleas of Mifflin County, in the matter of the assessment of damages for taking the bridge of "the president, managers, and company, for erecting a bridge over the Juniata River, at or near the village of Mifflin, in the county of Mifflin" (now Juniata), in which proceeding the bridge company was plaintiff and the county defendant.

This case came into the Common Pleas of Juniata County on an appeal from the award of viewers appointed by the Court of Quarter Sessions. The case was afterward removed from the Common Pleas of Juniata to the Common Pleas of Mifflin County, upon a petition for a change of venue.

On the trial, before BUCHER, P. J., of the Twentieth Judicial District, plaintiff's counsel asked L. G. Brown, a witness, who was the contractor for this bridge, and who estimated for at least a hundred bridges in a year, "From your knowledge of that bridge, Mr. Brown, what would be the value of the superstructure in the market?" To this question defendant made the following objection: "We do not object to his testifying as to what the contract price was and what its actual cost was, but we do object to his testifying to any imaginary value that he may put upon it." Objection overruled and evidence admitted. Exception. (First assignment of error.)

Defendant on cross-examination asked the same witness, "What did it cost the company?" Objection to as irrelevant and immaterial. Objection sustained and evidence rejected. Exception. (Second assignment of error.)

Defendant also offered to ask the witness "What was the contract price of the King Bridge Company with the plaintiffs for the erection and construction of this bridge, and what did the plaintiffs pay the King Bridge Company for it?" Objection to as immaterial. Objection sustained and offer rejected. Exception. (Third assignment of error.)

On cross-examination, defendant asked the witness who had superintended the repairs to the bridge after the flood, "What did it cost?" Objection to. Objection sustained, offer rejected. Exception. (Fourth assignment of error.)

Defendant offered to prove by the same witness the entire cost of the masonry and stone work to repair the damages done by the flood of 1889, and upon which the present bridge is erected. Objection to because the cost is not an indication of what it is worth. Objection sustained, offer rejected. Exception. (Fifth assignment of error.)

Defendant offered in evidence certified copies of the returns of the value of the capital stock, made by the Bridge Company to the auditor-general, from the year 1881 to the time of trial, for the purpose of showing the company's valuation placed upon its own stock. Objection to. Objection sustained, offer rejected. Exception. (Sixth assignment of error.)

Defendant also offered in evidence the report for the year 1889, to be followed by proof that at the time this return was made the contracts for the repairs had been made, and their cost ascertained; so that the company knew what the value of the stock was—for the purpose of showing that the stock was no more valuable at the time the bridge was taken, on February 6, 1890, and to show its actual real value at the time it was taken. Objection to. Objection sustained. Evidence rejected. Exception. (Seventh assignment of error.)

Defendant further offered to show for what price a new bridge could be erected at this point, in all respects equal to the one erected by plaintiff and taken by the county, at the point at which that bridge stands, between Mifflin and Patterson—for the purpose of showing the value of the bridge taken by the county of Juniata. Objected to. Objection sustained, and evidence rejected. Exception. (Eighth assignment of error.)

The following point was submitted by defendant :—

(1) That in estimating the value of property, the jury are to take into consideration the liability to destruction of the property by flood and ice. *Answer. Affirmed.* If the jury find that the property was liable to destruction from flood and ice, this may be considered to the extent that this liability decreased the value of the property. (Eleventh assignment of error.)

The facts of the case are sufficiently set forth in the following extract from the charge to the jury :—

“This controversy arises in this way: The Legislature of Pennsylvania, as early as the 5th day of March, 1828, granted to a company at Mifflintown, the county seat of Juniata County, the right to construct and maintain a bridge over the Juniata River at that point, with the right to exact payment of the tolls fixed by the charter. This charter was amended by subsequent legislation, and again amended, subject to the general corporation laws of this State. This Bridge Company, by virtue of this right granted to them by the Commonwealth, saw fit to erect and maintain a bridge over the river at this point, and it was operated from the time of its construction down until the 6th day of February, 1890, barring some occasions when it had been injured or destroyed by floods for a short period of time.

“On the 6th day of February, 1890, whilst the Bridge Company were in the possession of a bridge which was new, the authorities of the county, believing that this right to exact tolls was an embargo upon the trade and traffic of the county, saw fit to exercise the right which the Legislature had granted it, to seize and appropriate this property of the Bridge Company to its own use. They did so seize and occupy it.

“The Legislature wisely provides that when the county takes the property of a corporation or of individuals for its own use that the damages are to be paid; that these damages are to be assessed not by a jury of the county in which the property is located, for you see if that were the case you would have the jurors sitting in judgment and fixing the amount of money to be paid, and they would be deeply interested in the result; therefore the law wisely ordains that when

property is taken by a county that the trial shall be removed to another tribunal, where an impartial jury may render full and substantial justice to the parties litigant without being moved by any pecuniary consideration which may affect their own pockets. This county having taken the bridge, the company was entitled to damages, and under the Constitution of the Commonwealth that damage was to be fixed by a jury. The Common Pleas of Juniata County, therefore, certified the case to this county for trial. So, gentlemen of the jury, you have the fact, undisputed and undenied, that this defendant, the county of Juniata, did, on the 6th day of February, 1890, take and occupy the property belonging to this bridge company. The Constitution of the Commonwealth wisely declares that whilst the county of Juniata had the right to exercise the right of taking the property of the plaintiffs and appropriate it to its own use, whether the plaintiffs were willing or not, it must make compensation to the plaintiffs for the property that they were deprived of by the county, so that, after all, the sole question for this jury to determine is, What would be a just compensation to these plaintiffs for the injury and damage that has been done to them by reason of the seizure and appropriation of its property by the county of Juniata? Thus, you see, the question narrows itself down to a very small compass. Now, gentlemen of the jury, much has been said to you about this corporation exacting illegal tolls; there is not a particle of evidence of that fact in the record. We have no evidence on that subject whatever, and therefore you are to disregard it entirely in reaching a conclusion. You are to try the case by the law and the evidence, and by that alone. If this corporation did exact illegal tolls, these tolls do not belong to the county of Juniata, but would belong to the people who illegally paid them, and thus that can have no influence in affecting your verdict one way or the other.

“The measure of damages in this case, like every other question of this character, is full compensation for the injury sustained; that is the measure of the damages. This defendant had the right to take the property of the plaintiffs against their will, bounded by the limitation that when it did so it would pay the full value of the property thus appropriated. Now the Supreme Court has said, in a similar case, that in estimating the damages for property of this character the property and franchises of a bridge company are represented by its stock, and the market value of the stock may be said to represent the market value of the property taken as nearly as it can be ascertained. But, gentlemen of the jury, in the case on hand we have no evidence of the market value of this stock. This

stock was not listed on the stock exchanges of the commercial centres of the country, where it was sold daily, nor have we any evidence that it passed readily from hand to hand by sale and transfer in the borough of Mifflintown, where the bridge was located. [It seems that this stock was held by a comparative few, and there was no real market for it—not because it had no value, but because there were no purchasers or no sellers; so, in the absence of evidence of the market value of the stock, the jury must get at the damages as best they can.] I therefore charge you that in estimating the damages in this particular question you are to take into consideration the value of the physical structure at the time that this county of Juniata appropriated it to its own use, and this value must be arrived at by taking into consideration the length and width of the structure, the number of piers that supported the superstructure, the value of the masonry, the value of the fill and abutments, as well as the superstructure, and to that you are to add the value of the franchise.

“Now this franchise is an impalpable, invisible thing that the jury cannot lay their hands on or see with their eyes; nevertheless it may be a very valuable thing and worth really more than the physical structure in the particular case. I am not saying that this is the case here; but whatever their rights to take tolls were, which constitutes the franchise here, that is an element of damage to be computed by the jury and that is to be added to the physical structure at the time of the appropriation of this bridge by the county. [Now the value of a bridge structure, as well as the value of the franchise, depends to a very great extent upon the locality in which it is located. Let me illustrate: A company goes down into the Narrows, between this borough and the borough of Mifflintown—down in the centre, about nine miles from the face of man; at either end of the Narrows they erect a structure that would withstand flood and ice and expend \$50,000 for it. If the county would come and seize that it would not be so valuable, being located in a sparsely settled country where there were no passengers to cross it and no traffic to go over it, as it would be in the borough of Mifflintown, the county town of Juniata; so, in determining the value of it, you will have to consider the fact that it spans the river at the county town of Juniata, and take into consideration the nature of country around it, the number of the population, and the amount of travel that would naturally go over it, with the revenues that the traffic would bring to the coffers of the plaintiff company.”]

Verdict for plaintiffs for \$52,708.50, and judgment thereon; whereupon defendant took this appeal assigning for error the admission and

refusal of the foregoing offers of testimony, the answer to the above point, and the portions of the charge included between brackets.

Alfred J. Patterson and David W. Woods, for appellant.

B. F. Junkin and Andrew Reed, for appellees.

October 5, 1891. *PAXSON, C. J.* It was held in *Montgomery County v. Bridge Company* (110 Pa. 54), that where a bridge is taken by a county for public use under the Act of May 8, 1876 (P. L. 131), the measure of damages is the value of the property to the owners, not to the county taking it, and that such value is to be ascertained not only by the cost of the structure but also by the value of its franchises. The value of its franchises depends largely upon its earning capacity. A bridge, as was observed in the case cited, is a peculiar kind of property, and seldom has a market value. The value of its capital stock may, and generally does, indicate with some accuracy, the value of its franchises. Hence, in an action against a county for taking a bridge, the cost or value of the structure, the amount of net tolls, and the market value of its capital stock, are all elements to be considered in ascertaining the value of the bridge and its corporate franchises. No one of these elements, standing alone, would in all cases, furnish a test; considered together, they will seldom fail to lead to a satisfactory result.

The first three assignments may be considered together. The witness, L. G. Brown, was asked as to the value of the bridge, by which I understand to be meant the superstructure only. This was objected to on the ground that Brown, having contracted for the erection of the bridge, should have been asked as to the contract price. We do not think this objection well taken. The true question was the value of the bridge, not what it cost. The contractor may have taken it at too low a figure, or the owner may have paid too much; the county is entitled to pay for it at its actual value at the time of taking.

The fourth and fifth assignments allege that the Court below erred in rejecting evidence in reference to the cost of certain repairs to the bridge. The evidence was clearly irrelevant and properly rejected.

The sixth assignment is more serious. The defendant offered a certified copy of the returns made by the bridge company of the value of its capital stock to the auditor-general under oath, from the year 1881 up to the present time. This was offered for the purpose of showing the value of the capital stock as made for the company under oath by its officers.

The capital stock represents the property and franchises of the corporation, and as before observed is an element to ascertain the damages.

The plaintiff had given in evidence to show the value of the capital stock or franchises, the receipts from tolls for 1884, 5, 6, 7, 8, 9. It was clearly competent, therefore, for the defendant to show the value placed by the company upon its own stock; a valuation made upon the oath of its officers. It is no answer to this to say that the return was made by the officers and not by the stockholders. The officers were the duly constituted agents or representatives of the latter; and their act was the act of the corporation itself. The return was made in pursuance of the Act of Assembly, and was the official act of the corporation. Hence, we need not discuss the cases cited as to the power of an agent to bind his principal by his declarations. They are not relevant. While this return does not conclude the bridge company upon the question of value, it is nevertheless competent evidence for the consideration of the jury, and is moreover important. The difference between the verdict and the valuation placed upon its property by the company, under the oath of its officers, is so great as to justify the suggestion that the verdict was too large, or the company has undervalued its property to escape taxation.

What has been said covers the seventh assignment. The eighth assignment is not sustained. It was not relevant to show what the county could have erected a new bridge for, at this or some other point. The county might have erected a new bridge, but it preferred to take the bridge of the plaintiff, and must pay for it at its value to the latter. The remaining assignments refer to the charge of the Court, and are not sustained. The learned Judge said in answer to the defendant's first point: "If the jury finds that the property was liable to destruction from flood or ice, this may be considered to the extent that this liability decreased the value of the property." This was an affirmation of the point, but the defendant complains that it was not strong enough and that the learned Judge should have instructed the jury that they *must* consider the matters referred to, instead of that they *may* do so. This is somewhat of a refinement. The jury could not fail to have understood that if the liability to destruction from flood and ice lessened the value of the property, their verdict should be reduced to that extent.

The judgment is reversed, and a venire facias de novo awarded.

H. S. P. & N.

Jan. '91, 102.

February 11, 1891.

Clayton v. McCay.

Co-heirs—Tenants in common—Liability to account.

When one of several co-heirs is in possession of the premises, he is liable to account to his co-tenants for the use of their share of the land. Such liability to account is an incident of the possession, and is independent of any agreement between the parties.

If the co-heir has obtained possession by an agreement between himself and his co-tenants, he is bound to restore possession as fully as he has received it by virtue of that agreement; and the possession of his tenants, continued after the agreement comes to an end, is his possession. He cannot subject his co-tenants to the risk, delay, and expense of litigation in turning such tenants out.

The amount fixed by such an agreement as the rental value of the premises, may be justly assumed as the standard of value for the whole period of exclusive occupancy, when there is no evidence of a change of value.

Appeal of Sarah J. Clayton and Thomas J. Clayton, her husband, and George L. McCay, plaintiffs, from the decree of the Common Pleas of Delaware County, sustaining exceptions filed to the report of the Master upon a supplemental bill filed for an account for certain rents in an action of partition wherein Sarah J. Clayton and Thomas J. Clayton her husband, George L. McCay, and William McCay, were plaintiffs, and John B. McCay, Jr., and Emma McCay, were defendants.

The facts of the case were as follows: John B. McCay died on February 23, 1885, seised of certain lands, and leaving five children, the parties to this suit. After his death a paper purporting to be his last will and testament was presented for probate, by which he left to his daughter Sarah certain bank stock and annuities payable by Emma and John out of the lands devised to them. To William he left a tract of land called "The Mill Farm;" to John, a farm then in possession of his son William; to George "The Bethel Farm," and to Emma "The Homestead Farm," where he was living at the time of his death, with his two children, John and Emma. *Caveats* were filed, and an issue *devisavit vel non* was granted, which was tried April 20, 1887, and resulted in a verdict against the will, and on June 6, 1887, the Court made a formal decree reversing the register who had admitted the will to probate, and declaring the said decedent intestate. On April 1, 1885, while the contest over the will was pending, the several children and heirs of John B. McCay entered into an agreement which, after reciting the facts, and stating that the agreement was made, "in order to subserve the best interest of the heirs," and to

make some arrangement with reference to the occupancy of the real estate pending the controversy over the said alleged will, provided :—

Fourth. The several devisees under the said alleged will who would be entitled to the control and possession of the real estate devised thereby, if the said will had been admitted to probate, shall enter into possession of their respective parts, except William, being now in possession of the land devised to John, and about eight acres of that devised to himself, shall remain in possession thereof, pending litigation upon said alleged will and John shall have possession of the remainder of the part devised to William during the same period. Each accounting to the other, in case the will is sustained, for the rent of the respective parts according to the annexed schedule of rents, so as to give each the proper rental value of the land devised to him. The rent due by John to William being set off against that much of the rent due by William to John, and, in case the will is not sustained, then each shall account to the parties legally entitled to the rent at the same rate, provided that William shall have the privilege of manuring the eight acres with manure from the land devised to John, and John shall have the privilege of removing from the premises of William occupied by John any hay or grass he may cut on the land devised to William to compensate him for the manure so taken by William.

Fifth. In case the alleged will shall not be proven and sustained as the last will and testament of the said decedent, and said real estate shall become distributable under the intestate laws, or under the provisions of any other paper which may be established as a will of said decedent, whereby a different scheme of distribution may become necessary, then, in either of such cases, the several children who are to have the possession of the lands under this agreement shall account for, and pay over and be charged with rents for their respective portion as follows :—

SCHEDULE OF RENTS.

William shall pay for the land devised to John the annual rent of \$516, and for the eight acres devised to himself, the annual rent of \$32.

John shall pay for the land devised to William, the annual rent of \$312.

George shall pay for the land devised to him, the annual rent of \$186, and

Emma shall pay for the land devised to her, the annual rent of \$700. In every case to be computed from the 1st day of April, 1885.

In all cases the occupants of each tract of land under the provisions hereof, shall pay the taxes payable thereon during the term.

Under this agreement full and absolute possession was taken by the parties of the land allotted to each.

On May 11, 1887, the plaintiffs in this case began an action of ejectment against the defendants to recover their undivided interests as heirs-at-law of the decedent in the two farms, occupied by the decedent, with the defendants, at the time of his death, and of which the defendants, at the time of the commencement of the ejectment, had possession under the above agreement. A verdict was found, in this action of ejectment, for the plaintiffs, and the judgment was confirmed

by the Supreme Court. (See *McCay v. Clayton*, 21 WEEKLY NOTES, 98.)

On May 12, 1887, one day after the ejectment suit was begun, the plaintiffs also filed a bill for partition of the lands in question making the same two heirs defendants. John T. Reynolds, Esq., was appointed Master to make partition, and subsequently he reported that he had sold the whole property, which report was duly confirmed, a deed made pursuant thereto, and possession delivered by the Master on April 1, 1889, to the purchaser.

On April 5, 1889, the bill, under which this contention arises, was filed, as supplemental to the original bill for partition, for the purpose of obtaining an account of the rents, issues, and profits of the lands in the possession of the defendants.

The defendants contended before the Master (John T. Reynolds, Esq.) that under the agreement of April 1, 1885, they had the right to terminate their liability for rent at the end of the year, during which the controversy over the will ceased, and litigation was ended; that the will was set aside June 6, 1887, and the ejectment suit terminated March 6, 1888; and that, therefore, all contests about the will were finally ended prior to April 1, 1888. On the other hand, the plaintiffs claimed that the defendants were liable to account up to April 1, 1889, at which time the purchaser of the properties went into possession, and the possession of the several heirs under the agreement of April 1, 1885, terminated.

The Master held that the agreement ended when "the controversy over said alleged will ended," viz., with the verdict of April 20, 1887; that it then ceased absolutely, and with it the mutual rights and obligations of the parties thereto, unless by common consent they chose to continue in possession of the said lands for a further period. If they did thus remain in possession, there would then be raised by implication an agreement between the said parties, indefinite as to time, but in terms and conditions the same as the original compact, and conferring and imposing respectively on the said parties the same rights and obligations. He found as a fact that on December 24, 1887, the defendants, John B. McCay and Emma McCay, gave notice in writing to all the other heirs, that they were not satisfied to continue on farms occupied by them for another year, under existing terms as to rent, and unless a satisfactory arrangement could be made they would vacate the property on the first of April following, which they designated in said notice as "the end of our present terms." He also found that about the same time the leases made by the defendants to subtenants upon said farms were renewed for another year. He there-

fore found that the defendants did retain possession of their respective holdings until April 1, 1889, their actions showing that they had entered upon a subsequent, implied agreement on the same terms as the written, which could not be terminated except by a partition, or the mutual consent of all the parties concerned.

A decree to that effect was reported by the Master, which was set aside by the Court, WADDELL, P. J., of Chester County, filing the following opinion:—

"The exceptions filed to the Master's report and pressed upon the argument, relate solely to the liability of the defendants, for the rent of their respective properties, from April 1, 1888, to April 1, 1889.

"This liability depends, as the Master properly says, upon the construction of a certain agreement, entered into by both the plaintiffs and defendants, on the first day of April, 1885. He holds that it was a leasing of the premises by the plaintiffs to the defendants, and by reason of the terms of this lease, and the law applicable thereto, they are liable for the rent in question. [We doubt, however, whether the position of landlord and tenant existed, and, therefore, whether the rules applicable to such a relationship apply."] (Third assignment of error.) "The defendants were either the devisees of John B. McCay, or his heirs-at-law, and in either event they owned, and were entitled to the possession of the land referred to in the agreement. They agreed among themselves to pay for its occupancy, 'pending the controversy over his alleged will;' not as tenants, but 'in order to subvert the best interest of the heirs.' [When this controversy ended, they were no longer liable to pay the rent. They made no agreement to pay after that event happened."] (Fourth assignment of error.) "When did it happen? The Master says the controversy ended with the verdict on the issue, to wit, April 20, 1887. This may admit of some question, but whether it ended on that day or on the 6th day of March, 1888, when the remittitur from the Supreme Court was filed, is immaterial in this view of the case, since the defendants admit their liability, up to March 31, 1888; and such a liability may be properly inferred from the terms of their agreement.

"[It is an agreement to pay a stipulated annual rent, and the year is to be computed from the first day of April, 1885. Hence, we infer, if the controversy over the will should end at any time between April and April, the occupier would be liable to pay the rent for the current year, up to the following 1st day of April. When the controversy terminated, and the 1st day of April after such termination arrived, his agreement to pay rent ended. If, therefore, the controversy over the will ceased upon either of

the days heretofore named, the agreement to pay rent would only be binding up to the following 1st day of April. That would be April 1, 1888."] (Fifth assignment of error.)

"[Was there any agreement on the part of these defendants, by implication or otherwise, to continue their liability beyond that date? We do not find it in the evidence. They may have prevented their co-tenants from obtaining entire possession of certain portions of the property, by having rented them, but this renting only affected their own interest.

"In our opinion, such an act did not amount to an extension or renewal of their agreement to pay rent for a longer period of time than the April following the end of the controversy over the will."] (Sixth assignment of error.)

"If we are to be bound by this view of the agreement, their liability for rent would end with April 1, 1888.

"But if the parties are to be considered as standing in the relation of landlord and tenant to each other, then what is the liability of these defendants? They are to pay an annual rent and it was to be computed from a fixed period, but the duration of their tenancy was for an indefinite period of time. It depended upon a contingency. Such a lease is regarded as a lease from year to year. (Lesley v. Randolph, 4 R. 123; Thomas v. Wright, 9 S. & R. 87; Jones v. Kroll, 116 Pa. 85.) If their tenancy ran from April to April, then the termination of the controversy over the will merely indicated the year within which this tenancy would cease. If this is so, the current year for which rent was payable always terminated on the 31st day of March of each year, whether the contingency happened or not. The tenant might quit, however, at the end of any current year, provided the contingency upon which his tenancy depended, happened during that year. He was not required to give notice of his intention to quit. (Cook v. Neilson, 10 Pa. 41; Brown v. Brightly, 14 WEEKLY NOTES, 497.) Here the tenancy depended upon the conclusion of the controversy over the will. The Master finds that this terminated on the 20th day of April, 1887. If he is in error as to this date, it certainly ended some time before April 1, 1888. The contingency upon which the tenancy depended had, therefore, happened between April 1, 1887, and April 1, 1888, and, if we are right, the tenant was entitled to terminate the tenancy at the end of that current year. This ended on the 31st day of March, 1888, and on that day the tenants left the premises.

"It was a surrender at the end of the term, and not a surrender during the term. If notice of their intention to leave was necessary it was given on the 24th day of December, 1887.

"[If, as tenants of the plaintiffs, they had sub-

let any portion of the premises, it was a letting in excess of their own estates, and was void as to those whose estates it infringed upon." (Seventh assignment of error.)

["The Master holds that the agreement between these parties ended when the controversy over the will ended, to wit, on April 20, 1887; that their mutual rights and obligations then ceased, unless by common consent they chose to continue in possession of the lands for a further period; and if they did thus remain in possession, there would be raised by implication an agreement between them, indefinite as to time, but in terms and conditions the same as the original compact, and conferring and imposing upon the respective parties the same rights and obligations. We must differ with the learned Master in this view of the case."] (Eighth assignment of error.)

["If the agreement of April 1, 1885, is to be regarded simply as a contract, then whenever their rights and obligations under it ceased, and were determined by its own terms and provisions, there can be no new contract raised by implication. The relative rights and obligations of the parties were at an end."] (Ninth assignment of error.)

"If, however, it is to be regarded as a lease, and these defendants occupied the position of tenants, then their rights and obligations as such tenants must depend upon the character of their tenancy. If this was a tenancy for years, and they held over after its termination, they became either trespassers or tenants from year to year, as their landlords might elect, subject to all such covenants contained in the original lease as applied to their situation. (*Laguerrenne v. Dougherty*, 35 Pa. 45; *Phillips v. Monges*, 4 Whart. 226; *Hemphill v. Flynn*, 2 Pa. 144.)

"If the landlord saw fit to regard them as tenants, then they impliedly agreed to pay the same rent, and at the same point of time, as they agreed to pay for the first year. Their tenancy commenced with each year, as fixed by the original agreement. (*Diller v. Roberts*, 13 S. & R. 63; *Wood on Landlord and Tenant*, 62.) If the lease created a tenancy for years, and fixed the limit of the year, then the same limit as to the year continued if the tenants held over. The duration of the lease would be as definite as the amount of rent. If, then, the lease is to be regarded as a lease from year to year, and it required the year to be computed from April 1, 1885, it would end March 31 of the following year, and so on, from year to year, until it terminated, and the liability of the tenant for rent would cease at that point of time in one of these years.

"In whatever aspect we view the question, therefore, we are constrained to differ from the Master in his conclusions. [We do not see how

these defendants can be held liable beyond the first day of April, 1888. We understand the Master has charged them each with the annual rent due from April 1, 1888, to April 1, 1889. In this particular we think he has erred, and we must remit his report for correction, and request him to make distribution in accordance with the views herein expressed."] (Second assignment of error.)

Whereupon the plaintiffs took this appeal, assigning for error, *inter alia*, the portions of the opinion given above in brackets, and that the Court did not direct that the costs of the supplemental bill should be paid by the defendants, John B. McCay, Jr., and Emma McCay.

V. Gilpin Robinson and Isaac Johnson, for appellants.

Even apart from the agreement, the defendants, being in possession, were liable to account to their co-heirs.

Statute of Anne, Rob. Digest, 48, and note.

4 Kent's Com. 365, and note

Lorimer v. Lorimer, 1 Madd. Ch. Pr. 249.

Jackson & Gross, Landlord and Tenant, 15.

Paxson v. Gamewell, 82 Va. 706 (1 S. E. Rep. 92).

Clements v. Cates, 49 Ark. 242 (4 S. W. Rep. 776).

Toltz v. West, 1 Western Rep. 856.

The facts of this case are sufficient to bring it under the strict construction of the Statute of Anne.

Sailer v. Sailer, 3 Central Rep. 687.

Kitts v. Church, 3 N. E. Rep. 116.

Roley v. Barrett, 8 West. Rep. 691.

Almy v. Demels, 4 N. Eng. Rep. 915; S. C. 15 R.

1. 318; 10 Atl. Rep. 654.

John M. Broomall (Henry C. Howard with him), for appellees.

October 5, 1891. **STERRETT, J.** The main question presented for decision by this record is whether or not these appellees are liable to account for the rental value, during the year ending April 1, 1889, of the lands which had been assigned them under the agreement of April 1, 1885. They admit that they obtained possession of those lands, and so held them until April 1st, 1888, by virtue of that agreement; and the finding of the Master, that their possession continued until April 1, 1889, must, in the absence of manifest error, be assumed to be the fact. The admission of appellees that their tenants continued in possession of part of the premises, in itself justifies the finding. The possession of these tenants was their possession; they could not subject these appellants to the risk, delay, and expense of litigation in turning the tenants out. In contemplation of the agreement, and in good faith, they were bound to restore possession as fully as they had received it by virtue of that agreement. Having obtained exclusive possession by virtue of the agreement, they must account for the

whole period of that possession. Had they taken possession without the consent of these appellants, they must now have accounted. When the will was set aside, they became tenants in common, and liability to account, for the use of their cotenants' share of the land so used, became an incident. It is therefore immaterial whether their exclusive possession was with or without the consent of these appellants; they were equally liable to account. The rental value of the premises having been ascertained by the agreement between the parties, and there being no evidence of change since, that may be justly assumed as the standard of value for the whole period of exclusive occupancy.

We are not convinced that there was any error in not directing that the costs of the supplemental bill should be paid by the defendants, John B. McCay, Jr., and Emma McCay.

Decree reversed, and ordered that the costs of this appeal be paid by the appellees; and it is further adjudged and decreed that distribution be made in accordance with the schedule recommended by the Master in his original report.

S. H. T.

Jan., '91, 318, 319, 304.

March 30, 1891.

In re Change of Grade of Plan 166.

In re Allen's Lane.

Roads, streets, and highways—City of Philadelphia—Changes of grade upon city plans—Damages—When they accrue—How recoverable—Quarter Sessions and Common Pleas—Respective jurisdiction of—Consolidation Act of Feb. 2, 1854, § 27 (P. L. 37); Acts of April 21, 1855, §§ 4 and 7 (P. L. 264); May 13, 1856, § 17 (P. L. 571); April 21, 1858, § 6 (P. L. 386); April 1, 1864, (P. L. 206); June 6, 1871 (P. L. 1353); Dec. 27, 1871, § 3 (P. L. 1872, 1390)—History of legislation providing for damages arising from changes of grade in the city of Philadelphia, reviewed.

Section 27 of the Consolidation Act of Feb. 2, 1854 (P. L. 37), provided for the constitution of a board of surveyors for such purposes relating to surveys, the planning of the city, the construction of sewers, and grading of highways, as councils should declare by ordinances; provided that surveys and regulations already made, or directed by law to be made, of any portion of the county of Philadelphia, should not be affected by this section, but should remain unaltered, "unless said alterations shall be ordered by a resolution of councils, and approved by the Court of Quarter Sessions, upon public notice; . . . and provided further, that in any alteration that may be made of the regulations of any portion of the city, in conformity

with the provisions of this section, whereby damage may ensue to private property, compensation shall be made for such damage, to be ascertained and paid by law, as in case of damage for opening streets."

Held, that the proviso for damages applies only to changes of grade regulations which were then already legally established, and is not a continuing part of the system of road damages.

In re Ridge Avenue (99 Pa. 469; S. C. 12 WEEKLY NOTES, 133), followed. *City v. Wright* (100 Pa. 235), and *Campbell v. City* (108 Id. 300), distinguished.

Damages for the opening of streets are not given until the actual operation upon the ground, though under the language of the Constitution the cause of action for some purposes—as, *e. g.*, for consequential damages from the exercise of eminent domain—is complete as soon as the part of the work which will do the injury is begun.

The placing of a street upon the public plan is so far an interference with the rights of property that no buildings may thereafter be erected within the lines, and those so erected must be removed at the expense of the owner, and without damages being paid therefor when the street is opened; yet no right of action accrues until the actual opening.

For damages by the establishment of a grade, in the first instance there was no remedy in any Court, and if a remedy now exists by virtue of the Constitution, it must be asserted by an action in the Common Pleas.

Until the Legislature shall provide another remedy, the constitutional protection will have to be invoked by an action on the case, except that where there is a statutory remedy in the Quarter Sessions, as in the case of opening a street, the jurisdiction of the Court having once attached, it will determine the whole cause, including the damages from change of grade.

In these cases the grade of the streets involved was established in 1878, and the change upon the plan for which damages were sought to be recovered was made in 1885:

Held, that the cases did not come within the provisions of the Act of Feb. 2, 1854.

Appeals of the City of Philadelphia and Clarence H. Clark from the judgment of the Quarter Sessions of Philadelphia County, sustaining a certain exception and dismissing others, filed by said city to the report of viewers appointed to assess damages in the matter of the change of grade upon Plan 166, between Forty-second and Forty-sixth streets and Woodland and Baltimore avenues in the said city.

The petition of C. H. Clark, an owner of property within the above limits, set forth that the grades of the streets on Plan 166, which covered the tract above mentioned, had been duly confirmed upon the plans of survey of that portion of said city prior to the year 1884; that subsequent to such confirmation the plan of survey relating to said grades was revised and changed, and a new plan, materially altering said previously established grades, to the injury of petitioner, was prepared; which plan, by virtue of a city ordinance of June 23, 1884, and of the vote

of the board of surveys of November 2, 1885, was finally adjusted and confirmed. He therefore prayed for the appointment of a jury to assess his damages, etc.

A jury having been appointed, the city took a rule to dismiss the petition for want of jurisdiction, which rule was discharged.

The jury reported, *inter alia* :—

"The jury have found that on the second day of November, 1885, a revision of that portion of Plan 166 between Forty-second and Forty-sixth streets and Woodland and Baltimore avenues was confirmed by the board of surveyors in pursuance of authority duly given them by an ordinance of councils, approved June 23, 1884. Prior to that revision the plan in force for the locality stated was one which had been confirmed February 4, 1878. This former plan was known by the same number. The effect of said revision was to elevate many of the street levels within the area above defined. In some places these elevations, at points bordering upon the property of Mr. Clark, were as great as nine feet. From this height they varied down to zero. The said plan, confirmed November 2, 1885, did not change the grades of Forty-second Street, Baltimore Avenue, Forty-sixth Street, or Woodland Avenue.

"Forty-third Street, from Baltimore Avenue to Woodland Avenue, was dedicated as a street by deed of Clarence H. Clark, dated December 17, 1877. Up to the second day of November, 1885, no work had been done toward the construction of this street.

"Forty-fourth Street, within the area in question, has never been opened or dedicated, nor has Hanline Street, which runs from Chester Avenue to Kingsessing Avenue.

"Forty-fifth Street, from Baltimore Avenue to Woodland Avenue, was opened by virtue of a proceeding in the Court of Quarter Sessions, which was confirmed June 25, 1887. It appeared from the record of the said proceeding that counsel for Clarence H. Clark had appeared before the jury, and had stated that he 'did not claim any damages for the property taken by the opening of said street.' The construction of said street commenced about August 1, 1888, and finished February 8, 1889.

"Chester Avenue, within the limits in question, was opened by deed of dedication dated January 30, 1883, made by Clarence H. Clark *et ux.*, and from Forty-fifth to Forty-sixth streets by deed of dedication dated February 9, 1883, by J. L. Crew *et al.* The said street was graded prior to the revision of 1885, so as to conform to the plan of 1878, but there was no curbing or paving done at that time.

"No part of Kingsessing Avenue, between Forty-third and Forty-fifth streets, has been opened or dedicated to this time.

"Regent Street is not plotted upon the city plan, but is merely a private street. The construction of said street was begun subsequently to the confirmation of November 2, 1885. The jury find that no work upon the property of Mr. Clark was done prior to November 2, 1885, toward making the same conform to the grades of 1878, except the partial grading of the sidewalks on Chester Avenue. Indeed it appeared, and the jury now find, that no expenditure whatsoever was at any time incurred by Mr. Clark with regard to any of his property because of which he makes claim, in reliance upon the grades contained in the plan of February 4, 1878, excepting that some thousand of cubic yards of dirt had been dumped into some of the holes. . . .

"Taking into consideration all advantages and disadvantages resulting to the property of Clarence H. Clark because of the changes of grade made November 2, 1885, and considering every street shown upon the city plan within that area, without regard to whether the same was constructed, or merely opened, or but plotted upon the plan of the city, the jury estimate the difference between the value of the said properties, according to the plan of 1878, which was in effect prior to the confirmation of 1885, and the value of the said property according to the grades established as aforesaid November 2, 1885, in the sum of twelve thousand dollars, and they therefore award this sum to the said petitioner, subject to the opinion of the Court on the matters hereinafter stated.

"Prior to February 4, 1878, the survey plan covering the locality in question, was one confirmed by the Court of Quarter Sessions, on March 28, 1860. All of the properties for which Mr. Clark claimed damages for the change of grade, except one property, as to which the amount of change of grade affected at the revision of November 2, 1885, was too slight to be of importance, were purchased by him about the middle of the year 1876, when the said plan of 1860 was in effect. The heights upon the plan of 1860 are much greater than those upon the plan of 1878, being approximately at the elevations of the plan of 1885, although somewhat lower than the latter. Upon the plan of 1860 many declivities are shown upon the streets much steeper than those appearing on the plan of 1885.

"Comparing the value of Mr. Clark's property, according to the plan of 1860, with its value according to the plan of 1885, the jury would say that the latter plan is not less favorable to his property than was that of 1860."

The city filed the following exceptions, *inter alia* :—

(1) The jury erred in awarding damages for the change of grades of merely plotted streets, not constructed or opened, to wit: Forty-fourth

Street, Forty-fifth Street, and Kingsessing Avenue.

(4) The jury erred in awarding damages for the change of grades effected November 2, 1885, when it appeared that said change only restored the grade substantially equivalent to that prevailing when claimant purchased.

(5) The jury erred in awarding damages for a change of grade to a property-owner who had not thereby suffered depreciation of improvements erected in reliance upon the former grade.

Upon the hearing of the exceptions, counsel agreed "that claimant has sustained no damage or injury by the confirmation of the grades of 1885, if the said grades be compared exclusively with those upon the plan of 1860, and the plan of 1878 be disregarded."

The Court without filing an opinion dismissed all of the city's exceptions but the fourth, which was sustained; the award of the jury was set aside, and the petition dismissed.

Whereupon C. H. Clark, the petitioner, appealed, as did the city of Philadelphia, the latter assigning for error the discharge of the rule to dismiss the petition for want of jurisdiction, and the dismissing of its first and fifth exceptions.

IN RE ALLEN'S LANE.

The petition of certain property-owners on the line of Allen's Lane between Germantown Avenue and Cresheim Road was filed, setting forth that the department of surveys did on August 5, 1889, confirm a revision of the lines and grades of said Allen's Lane, between the points named, made under authority of the ordinance of January 19, 1885, by which revision the grade of Allen's Lane in front of petitioners' property has been raised, which caused great loss and damage thereto. The petition prayed for the appointment of a jury, etc.

The jury filed a report, in which they awarded damages to the petitioners.

The city filed an exception, *inter alia*, as follows:—

(4) The Court is without jurisdiction, as the Act of 1854, under which these proceedings were instituted, was repealed by the Act of June 1, 1885, and the remedy of said claimants is by an action of trespass, and not by a petition for a road jury.

The exceptions were dismissed, and the report confirmed; whereupon the city appealed, assigning the dismissal of its fourth exception for error.

All of these appeals were argued together.

E. Spencer Miller, assistant city solicitor (Charles F. Warwick, city solicitor with him), for the city of Philadelphia, appellant.

John G. Johnson and Joseph S. Clark (John G. Lamb with them), for C. H. Clark, appellant, and others, appellees.

IN RE PLAN 166 (JANUARY '91, 318, 319).

October 5, 1891. MITCHELL, J. The ruling question in these appeals is the applicability of the proviso of sect. 27 of the Consolidation Act, 2 February, 1854 (P. L. 37), which gives a right to damages for change of grade regulations. To determine this question properly we must consider the condition of circumstances and the law existing at the passage of the Act. The city of Philadelphia, as laid out and chartered by Penn., had undergone no change of corporate boundaries for more than a century and a half. As population had grown, adjoining districts and boroughs had been incorporated from time to time, with separate municipal and *quasi* municipal governments until in 1854 the county included the city proper, ten incorporated districts, six boroughs, and thirteen townships. (See Address on the Road Laws of Pennsylvania, read before the Law Association of Philadelphia, by Abr. M. Beitler, Esq., 1891.) The northern and southern boundaries of the city, Vine and Cedar streets, so far as continuity of building, density of population and community of interests were concerned, had become not only arbitrary, but imaginary lines of distinction. The evils and inconveniences of this state of things in the conflicts of authority, the impeding of police action, the variation of taxes and multiplication of tax officers, etc., are pictured by Eli K. Price in his History of the City's Consolidation, chap. 4. Among these evils, not the least was the necessity for a uniform system of streets, street grades, sewers, etc., for a population already approximating half a million, located on a site whose general level was so little above tide-water as to make the problem of drainage one of difficulty as well as importance. The population had not only expanded from the old city into the adjoining districts of Southwark, Moyamensing, the Northern Liberties, and Spring Garden, but had also grown from detached centres such as Germantown, Roxborough, Frankford, and Hestonville. Each of these had its own system of roads and drainage developed on its own peculiar requirements, without reference to the others. The central city and the outlying villages were approaching each other, and it was apparent that provision must be made for the day when they should come into continuous and actual contact. With this necessity in view, sect. 27 of the Consolidation Act provided for the appointment by councils of a competent number of skillful surveyors and regulators who should constitute a board of surveyors for such purposes relating to surveys, the planning of the city, the construction of sewers, and grading of highways as councils should declare by ordinances; provided that surveys and regulations already made

or directed by law to be made, of any portion of the county of Philadelphia should not be affected by this section, but should remain unaltered, "unless said alterations shall be ordered by a resolution of councils and approved by the Court of Quarter Sessions upon public notice; . . . and provided further that in any alteration that may be made of the regulations of any portion of the city in conformity with the provisions of this section whereby damage may ensue to private property, compensation shall be made for such damage, to be ascertained and paid by law as in case of damage for opening streets." The precise question now before us is whether this last proviso for damages applies only to changes of grades which were then already legally established, or was a general and continuing provision for all future changes even in grades established thereafter.

We are of opinion that the former was the true intent and scope of the Act. Such, in the first place, is the natural and obvious meaning of the words used, "any alteration that may be made of the regulations of any portion of the city," that is, of the *existing regulations*, previously established by law, and specifically preserved and made unalterable except in the mode expressly provided in the section itself. There are no words to indicate a reference to possible changes of grades which were themselves to be established in the future, upon what was intended to be a uniform and permanent system.

Again, the actual condition of things in the various localities favors this view. As already noted, the outlying sections had developed from different starting points and their systems were in some cases widely divergent. Frankford was flat, and its system both of street lines and grades was largely governed by the Delaware River. Germantown grew along the line of a main street much higher and capable of draining from the ridge on one side or the other, either into the Delaware or the Schuylkill. Roxborough was higher still and necessarily got its outlet in the Schuylkill. The lines of property had been adjusted and built upon in each locality in reliance upon its own roads and grades, and these were to be preserved as far as consistent with a uniform general plan, contemplated and authorized by the Act. For such changes as the general plan for the general good made necessary, compensation was to be made, but such changes were manifestly considered to be exceptional. The rule was to preserve the local plans and grades already established. In regard to future establishment of grades, however, the case was different. That was to be under the direction and control of the central body, the board of surveyors, which the Act created. No present injury would ensue to any one from such grades;

no owner of property had been misled by them, or made improvements in reliance on them. They did not come within the reasons for present compensation, and it is not natural to presume that they were intended to be included in the provision for it.

If, now, we turn from the actual circumstances of the different localities to the condition of the law at that date, we are led to the same conclusion as to the intent of the statute. Compensation is to be made for damage to private property by any alteration of the *regulations*, and such compensation is "to be ascertained and paid by law, as in case of damage for opening streets." Primarily and principally, of course, this latter provision refers to the mode of ascertaining and paying the damages, but it is also important as showing the legislative intent to assimilate the case of damage by a change of grade to damage by opening a street. In doing so, however, the Act makes one very striking variance of rule in the two cases. Damages for opening are not given until the actual operation on the ground. This is the general rule of law, that the cause of action arises only when the injury is complete. Such is the general rule when property is taken for streets. (*Whitaker v. Phoenixville*, 28 WEEKLY NOTES, 30; *Volkmar Street*, 124 Pa. 320; *Brower v. Philadelphia*, 28 WEEKLY NOTES, 87.) Though under the language of the Constitution the cause of action for some purposes, as, e. g., for consequential damages from the exercise of eminent domain, is complete as soon as the part of the work which will do the injury is begun. (*O'Brien v. R. R. Co.*, 119 Pa. 184.) The placing of a street upon the public plan is so far an interference with the rights of property that no buildings may thereafter be erected within the lines, and those so erected must be removed at the expense of the owner, and without damages being paid therefor when the street is opened. (Act 27 Dec. 1871, § 3, P. L. 1872, p. 1390; *Volkmar Street*, 124 Pa. 320.) Yet no right of action accrues until the actual opening. But the 27th section we are considering gives the action in express terms for change of regulation, or, as it is commonly called, the paper change, without reference to the actual change on the ground. The reason for such an anomaly, if applied to future grades, would be difficult to comprehend. An owner having a mere plotted or paper street laid out at a certain grade through his land would have an immediate action for a change in the grade regulation, which appeared to be to his disadvantage, though nothing should be done on the land, and the grade might immediately be restored to its former regulation and the change never be carried out on the land at all, while he would have no action for the restriction on his right to use

his land for building until the actual opening of the street, and if it was never opened, but vacated on the plan, his right of action (at least as the law then stood) would never arise at all. This is not a fanciful or improbable illustration, for in 1854 considerable tracts of open country, in cornfields and truck farms, lay between the built-up centre and some of the outlying towns, but both the latter were growing towards each other, and the period was approaching when grade regulations would become necessary over all the intervening territory. As to all such regulations, the case put for illustration was likely to arise constantly and in the near future. But if we confine the operation of the section to changes of plans already established, then the intent becomes clear, and the principal difficulties disappear at once. The detached centres of population and improvement had, as already noted, developed on their own systems, which had not extended beyond their own immediate localities, but within their limits had been conformed to, and private rights had been fixed, and public expenditures made in reliance upon them for a long course of years. Germantown, for example, was nearly as old as the city of Philadelphia itself. As to such localities, a change of grade regulation might well be considered as such an unsettling of the existing order of things as to be equivalent to the actual change on the ground, which was presumably to follow in the immediate future, and therefore for such change compensation was provided, as if for an actual change, upon the principles and in the mode of compensation for the opening of a street. Such a view is one that would readily present itself to a law-maker familiar with the circumstances and the law of that day, and there is nothing in the language of the Act to show that it was intended to have any wider scope.

But further, there is another view of the state of the law, at the date of the statute, which leads to the same result. The idea of compensation for consequential damage resulting from change of grade was a novelty. There was no general provision, constitutional or statutory, for such compensation, and elsewhere it did not exist. Even in so hard a case as *O'Connor v. Pittsburgh* (18 Pa. 187), Chief Justice GIBSON said the Court had had the cause re-argued in order to discover, if possible, some way to relieve the plaintiff, but had discovered none. It is said by the present Chief Justice, in *Re Ridge Avenue* (99 Pa. 469, 478), that it is at least probable that the 27th section was introduced into the Consolidation Act in view of the decision in *O'Connor v. Pittsburgh*, as it was considered "a great hardship that when an owner had improved his property in accordance with a grade fixed by the city to have it injured by a subsequent change of

grade, and no remedy for such injury. The 27th section of the Act of 1854 was intended to give such remedy; but as none existed before the passage of the Act, we must limit it to such cases as come within its terms." It will be observed that *O'Connor v. Pittsburgh* was a case of property improved upon the faith of an established grade, and a subsequent change actually made on the land. As already suggested in a preceding paragraph, the local centres whose lines and grades were liable to be changed under section 27 had been developed in reliance upon their own long-established systems, and the change which was imminent, even though it might be only of the grade regulations, might well be considered as such an unsettling of vested conditions as to be morally equivalent to an actual change on the ground, and to be entitled to compensation as such. The circumstances were exceptional and they were given an exceptional remedy. It is more natural to suppose that such remedy was to be confined to the existing exceptional conditions than that it should suddenly be interjected as a permanent anomaly in the system of road damages of which the new remedy for change of grade was made a part. New rules and changes of law in respect to that system have never sprung full-fledged into existence, but have been developed gradually, step by step, as experience suggested. The course of local taxation for local benefits was recently reviewed briefly in *Re Howard Street* (28 WEEKLY NOTES, 159), and a like review of the course of subsequent legislation upon the present subject tends to confirm the construction contended for in regard to the 27th section. In the very next year a supplement to the Act of 1854 was passed reorganizing the board of surveyors, changing their mode of election and tenure of office, and modifying their powers. The Act of 21 April, 1855, sect. 4 (P. L. 264), directed councils to cause to be completed a survey and plans of the city plot not already surveyed, and gave the board of surveyors, under direction of councils, authority to alter the lines and regulate the grades of any street laid out upon the public plan, but not opened. It was held that this was *pro tanto* a repeal of the power over grades given by section 27 of the Act of 1854, and restricted such power to unopened streets. (*Paynter v. Young*, 4 Phila. 153.) This Act specifically provided that no ground should be taken for public use without compensation, but made no provision for compensation for change of grade, and the reason seems clear. Changes of grade of unopened streets were mere paper changes for the future, and were not in any way equivalent to actual changes on the ground of previously established grades, for which alone the Act of 1854 had intended to provide com-

pensation. And in 1871 (Act 6 June, P. L. 1353), the power of the board over the plans and regulations of all streets, opened as well as unopened, was restored, but no provision was made for compensation for damage by change of grade. The exceptional circumstances which required the exceptional remedy of 1854 were no longer thought to exist, and this, although the subject of consequential damages from public works was in the public mind and the right was secured by a constitutional mandate only two years later.

Again, by the Act of 21 April, 1855, sect. 7 (P. L. 266), councils were authorized to order any street on the public plan to be opened, and 'to institute an inquiry as to persons benefited . . . and to withhold appropriation for the opening of the same until the persons found to be benefited shall have contributed . . . towards the damages.' By the further supplement to the Consolidation Act, passed 13 May, 1856, sect. 17 (P. L. 571), this power of councils to refuse to appropriate for the opening of a street until the owners benefited should contribute "the whole or any part thereof, as councils may have determined to be just," was enlarged to cover all cases, whether "commenced in councils or in the ordinary course before the Court." By the further supplement of 21 April, 1858, sect. 6 (P. L. 386), the juries "to assess damages for opening, widening, or vacating roads or streets in said city" were directed to assess and apportion the same among and against owners benefited, and the chief commissioner of highways was not to carry out the opening, etc., until such parties paid or secured the damages. Finally, by the Act of 1 April, 1864 (P. L. 206), the juries were directed to assess the properties benefited, and the city was authorized to file and collect claims as in other cases of municipal assessments. In this progressive development of the theory of "benefits" from the germ of withholding appropriations in the Act of 1855 to the full-fledged compulsory assessments under the Act of 1864, the subject of benefits from change of grade does not once appear. It was in *pari materia* with the opening, widening, and vacation of streets. Injury or benefit could result as well from one cause as the others, and it is difficult to suppose that if damages for injury were intended or supposed to be recoverable the legislative doctrine of benefits should not also have been applied.

Whether, therefore, we regard the language of the section itself, the actual condition of the localities expected to be affected, the state of the law at the time, or the course of legislation since, we are led equally to the view that the section was intended for the special and immediate changes of then existing grades, resulting from

the Act, and not as a continuing part of the system of road damages.

It remains to examine the decisions. It is somewhat singular that the precise point does not appear to have been authoritatively settled either in this or the other Courts. It was, however, distinctly passed upon in *Re Ridge Avenue* (99 Pa. 469). The surface of the Ridge Turnpike had been fixed by the Turnpike Company under its charter prior to 1854. After the turnpike had become a city street the grade was revised under an ordinance of 1871, and the change was actually made on the ground in 1873. In 1878 property owners commenced proceedings in the Quarter Sessions for damages for the change of grade. The case was argued and decided chiefly on the Statute of Limitations, but the present Chief Justice, in delivering the opinion, also rested the judgment on the ground that the case was not within the 27th section of the Act of 1854, saying, "It is too plain for argument that this section refers only to a change of a grade previously established by the city of Philadelphia, or by one of the municipalities referred to, prior to consolidation. It speaks of nothing else, and gives a remedy for nothing else." The precise point has not since been considered. In *City v. Wright* (100 Pa. 235), the facts were such that it might have been raised and to that extent the case appears to sanction the view that the section applies to changes of grade established after 1854. But the question was not raised; the case was argued and decided on the Statute of Limitations, and it is clear that it was not intended to run counter in any way to the decision in *Ridge Avenue*, as the opinion is by the same Judge, and is distinctly rested on that case. The same thing may be said of *Campbell v. City* (108 Pa. 300). There was a change of plan in April, 1875; an action on the case under the Constitution in December, 1881; a plea to the jurisdiction and a plea of the Statute of Limitations, and a demurrer to the latter, on which the Court below entered judgment for defendant, which this Court affirmed. The question of the continuing force of the Act of 1854 was not raised or discussed. It appears in the case that if the cause of action be regarded as arising from the change of regulation, the action was too late, and if, on the other hand, from the actual change, the plaintiff was not then the owner of the land. In either view, therefore, the judgment for defendant was right, and this is probably all that was intended by the brief *per curiam* opinion, though it does contain the expression that the "Quarter Sessions has exclusive jurisdiction in the assessment of damages for the establishment of a grade of streets on a confirmed plan, and for a change of regulation thereof." But for damages by the establishment

of a grade in the first instance there was no remedy in any Court (*Green v. Reading*, 9 Watts, 382), and if a remedy now exists, by virtue of the Constitution, it is now settled that it must be asserted by an action in the Common Pleas. (*Chester Co. v. Brower*, 117 Pa. 654.) The language of the opinion in *Campbell v. City* must, therefore, be confined to the point actually under consideration, and that was a demurrer to a plea of the Statute of Limitations. *In re Grape Street* (103 Pa. 121) is also cited in favor of the continuing effect of the section under consideration. The change of grade was made in 1875, and the real question in the case was whether the special limitation of one year for proceedings under the road law of 1836 had been abrogated by section 21 of article 3 of the Constitution. It does not appear in the report when the first grade was established, but the record, which I have examined, shows that Grape Street was opened as a public road in Manayunk in 1836, and that several revisions of the plan were made by the borough prior to 1854. Whether these involved the establishment of a grade for Grape Street was disputed and the jury presented majority and minority reports on it, but as the Court below, after considering both reports, referred them back to the jury to find the damages, it is clear that the case was regarded as a change of a borough grade established before 1854, and, therefore, within the express provisions of the 27th section, no matter which construction of that section we adopt. The case, therefore, throws no light on the present question. The latest case on the subject—*Schuler v. Phila.* (22 WEEKLY NOTES, 161)—was an action on the case in the Common Pleas, having a count for damages by change of grade regulation, and also a count directly under the Constitution for damages by the actual change on the ground. The referee, a learned lawyer, exceptionally well versed in the intricacies of legislation relating to Philadelphia, held that the cause of action was complete under section 27 on the change of regulation, and that the Constitution had not created any new or additional right, but had merely given the previously existing right a constitutional sanction, and, therefore, that the jurisdiction was still in the Quarter Sessions. The judgment was affirmed on the referee's opinion, but as it appears that the grade which was changed had been established by the borough of Germantown in 1850, before consolidation, the case, like Grape Street, was within the express terms of section 27, under either construction, and gives us no assistance in the present inquiry.

These are all the cases that bear even collaterally on the precise question before us, and though there is some uncertainty in the language employed from time to time, yet there is

nothing to overcome the view expressed in *Re Ridge Avenue*, the only case in which the question has been directly discussed, and as that view is in entire accord with the construction of the section to which the detailed examination above given leads us, we have no hesitation in adopting it, even at this late day, as the true construction of the intent and scope of the Act. We do this with the more satisfaction as we thereby avoid an anomalous exception in the system of road damages and preserve the uniformity of the general rule, without injustice to any one. The city is not exposed to the danger of speculative damages for a change that may never be made in fact, while the property-owner will still be compensated, but for an actual change when it is made on the land. Until the Legislature shall provide another remedy, the constitutional protection will have to be invoked by an action on the case,* except that where there is a statutory remedy in the Quarter Sessions, as in the case of opening a street, the jurisdiction of the Court having once attached, it will determine the whole cause, including the damages from changes of grade. (*Pusey v. Allegheny*, 98 Pa. 522.)

The grade of the streets involved in these cases was established in 1878, and the change upon the plan which is the foundation of the proceedings was made in 1885. The cases were therefore not within the Act of 1854.

Judgment affirmed.

H. C. O.

[See following cases.]

Jan. '91, 223, 224.

April 9, 1891.

In re K Street.

In re L Street.

Appeals of the City of Philadelphia from the decree of the Quarter Sessions of Philadelphia County, dismissing exceptions filed by said city to the reports of road juries assessing damages in the matter of the change of grade of K Street, from Venango Street to Old Front Street, and of L Street from Kensington Avenue or Venango Street to Erie Avenue.

The same questions were raised in these cases as in the case of *In re Change of Grade of Plan 116*, ante, p. 406.

James Alcorn, assistant city solicitor (*Charles F. Warwick*, city solicitor, with him), for appellants.

Edwin O. Michener (*Thomas R. Elcock* with him), for appellees.

* This case was argued and decided before the passage of the Act of May 16, 1891 (P. L. 75), and the opinion, though filed subsequently, does not intend to refer to the effect of that Act.

IN RE ALLEN'S LANE (Jan., '91, 304).

IN RE K AND L STREETS (Jan., '91, 223, 224.)

October 5, 1891. MITCHELL, J. In these cases the grades, for the change of which damages were recovered, were established after 1854. The cases, therefore, as held in *In re Plan 166*, opinion filed herewith [reported *ante*, p. 406], are not within the Consolidation Act, and the remedy for damages by the actual change on the land is in another Court.

Judgments reversed, and petitions dismissed for want of jurisdiction. H. C. O.

[See next case.]

Jan. '91, 246, 247.

April 10, 1891.

**Ogden v. City of Philadelphia.
Ellis v. The Same.**

Highways—Establishment of grades in Philadelphia—Change of grades—Damages to property affected thereby—When right of action accrues—Limitations—Sec. 8 of Art. XVI. of the Constitution—Consolidation Act of Feb. 2, 1854, § 27.

The right of action given by section 8 of Article XVI. of the Constitution to the owners of property for compensation for property injured, as well as for property taken, by municipal and other corporations, does not accrue in the case of change of grade of streets until the actual establishment of the grade on the land.

The cause of action in such cases arises only when the injury is complete, the exception to the rule being cases which arise under section 27 of the Consolidation Act of Feb. 2, 1854.

Where proceedings were originally begun in the Quarter Sessions, which had no jurisdiction, and an appeal was taken to the Common Pleas, under an agreement to waive the question of jurisdiction, the Supreme Court will not be astute to inquire into regularity of the proceedings, the parties being in the proper Court under a proceeding *de novo*.

The grade of N. Street was fixed by the Quarter Sessions in 1871. In 1887 an ordinance of councils was passed authorizing the actual cutting of the street to correspond with the grade of 1871. A suit for damages was brought in 1890:

Held, that there was no right of action for the change of grade of 1871, and the Statute of Limitations did not begin to run until the work was actually done.

Appeals of Richard T. Ogden and Margaret H. Ellis from the judgments of the Common Pleas No 1, of Philadelphia County, in actions of trespass in which appellants were plaintiffs and the city of Philadelphia defendant.

A petition was filed in the Quarter Sessions by M. H. Ellis, an owner of property on North Street, for the appointment of a jury to assess

damages sustained by the owners of property on North Street, caused by a change of grade. A jury was appointed which reported the damages of M. H. Ellis to be \$750, and those of Richard T. Ogden \$800.

The city appealed from the award, whereupon plaintiffs and defendant filed an agreement that the appeal should be considered at issue and tried without pleadings, but subsequently a statement in trespass was filed, and a plea of not guilty entered.

Upon the trial, on Oct. 27, 1890, plaintiffs proved their title, and the amount of damage.

It appeared that on May 15, 1871, the Quarter Sessions confirmed a plan which fixed the grade of North Street. There had been no established grade before that time. On January 26, 1887, an ordinance was passed by councils authorizing the actual cutting of the street to correspond with the grade established in 1871, which was done.

The city moved for a nonsuit on the ground of the Statute of Limitations, which was granted. A motion to take off the nonsuit having been dismissed, plaintiffs both appealed, assigning error as follows:—

(1) The Court erred in refusing to take off the nonsuit entered in the above case.

(2) The Court erred in deciding that the action was barred by the Statute of Limitations.

(3) The Court erred in deciding that the right of action did not accrue upon the physical change of grade which occurred in 1887.

(4) The Court erred in deciding that the Statute of Limitations commenced to run from 1871, the date of the establishment of the first and only grade of North Street.

Both appeals were argued together.

Joseph S. Goodbread and E. Clinton Rhoads, for appellants.

(1) A statutory limitation presupposes a right of action and can run only from the time such a right accrues.

Leasure v. Mahoning Township, 8 Watts, 551.

In re Volkmar Street, 124 Pa. 320.

Kellar v. Rhoads, 39 Id. 513.

Montgomery's Estate, 3 Brewst. 309.

(2) No right of action whatever accrued to the property-owners along North Street, by virtue of the plan of 1871.

The case of *O'Connor v. Pittsburgh* (18 Pa. 187), determined that where the grade of the street was changed and an injury resulted to an abutting lot owner, no damages could be recovered, because no land had been actually taken, and, as the law then stood, no damages could be recovered for property injured or destroyed.

This severe rule continued to be the law till 1874, when the new Constitution, in article 16, section 8, gave a right of action for property taken, injured, or destroyed.

Before the new Constitution, there was but one exception to this doctrine of *O'Connor v. Pittsburgh*, and that was contained in the following clause of the Consolidation Act (Act 2 Feb. 1854, Sec. 27):—

And provided further, That in any alteration that may be made in the regulation of any portion of the city, in conformity with the provisions of this section, whereby damages may ensue to private property, compensation shall be made for such damage, to be ascertained and paid by law, as in the case of damages for opening streets.

It is clear, then, that in any change of grade occurring before the new Constitution, unless the abutting land-owner could bring himself within the provisions of this clause of the Consolidation Act, he was utterly without right or remedy.

City v. Wright, 100 Pa. 235.

In re Ridge Avenue, 99 Id. 475.

New Brighton v. U. P. Church, 96 Pa. 331.

The plotting of a street, and the actual opening, are two very different forms of exercise of municipal power. To plot a street is not to open it; to plot a change of grade is not to change the grade.

In re Volkmar Street, 124 Pa. 320.

In re Chestnut Street, 118 Id. 593.

Borough of Easton v. Rinek, 116 Id. 1.

Borough of Easton v. Walters, 18 WEEKLY NOTES, 117.

In re Twenty-eighth Street, 102 Pa. 149.

(3) The right which we seek to enforce is one given us by art. 16, sec. 8, of the new Constitution, which provides that "municipal and other corporations . . . shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, and improvements."

A change of grade is clearly within this article.

Chester Co. v. Brower, 117 Pa. 654.

(4) Our right accrued when our property was injured by the municipality, namely, in 1887.

Brower v. Philadelphia, 28 WEEKLY NOTES, 87.

North Chester v. Eckfelt, 1 Mon. 732.

Craft v. Borough of Chester, 2 Pa. C. C. Rep. 568.

Kershaw v. City of Phila., 27 WEEKLY NOTES, 341.

In re Grape Street, 103 Pa. 121.

(5) The cases cited upon the trial by the city solicitor were all instances, where, by virtue of two grade regulations, the parties did have rights of action, from which a limitation did run; or, on the other hand, cases where by virtue of the physical change of grade before 1874, all rights had become fixed before the enactment of the new Constitution.

James Alcorn, assistant city solicitor (*Charles F. Warwick*, city solicitor, and *Howard A. Davis*, assistant city solicitor, with him), for appellee.

We admit the soundness of appellants' first and second propositions, but dispute the third and fourth.

The appellant was not the owner in 1871, when the grade was confirmed on the public plans. At that time there was no remedy for damages inflicted by a first establishment of grade. If there had been the then owner of appellant's lot would have been the party entitled to recover damages. The Constitution, art. 16, section 8, was not retroactive, and had no effect upon the rights and remedies of parties as they existed prior to 1874.

In re Ridge Avenue, 99 Pa. 469.

City v. Wright, 100 Id. 235.

The appellant purchased the property after the injury had been done. The grade was confirmed in 1871, and she purchased in 1877. At the time she bought the property was subject to that grade regulation, and her purchase was made subject to the probability of the street being graded in conformity therewith, but there was no claim for a first establishment.

If the Constitution did give a remedy, then it vested in the injured party immediately upon the adoption of the Constitution, and the action was barred in 1880, long before this claim was made, and the right to recover did not belong to this appellant, but to the owner of the property in 1874.

The fourth proposition of the appellant assumes that the action did not accrue until the physical change in 1887. If this position be sustained then we will have confusion in such proceedings. It is undoubtedly established that where there is a change from an existing confirmed grade, that the right of action accrues upon the confirmation of the second grade, and not upon its physical establishment, and this was so prior to 1874, and was the only case of change of grade in which there was a remedy for the injury.

Campbell v. City, 108 Pa. 300.

In re Ridge Avenue, *supra*.

City v. Wright, *supra*.

O'Connor v. Pittsburgh, 18 Pa. 187.

Where the first establishment of grade was confirmed prior to 1874, which is the case of the appellant, it is contended by her that the right of action given by the Constitution would not accrue until the physical change was made. Then, where the first grade was confirmed after 1874, following the precedents, the Constitution gives a right of action to accrue upon the confirmation of the grade. This would make three different classes of cases, in which the commencement of the right of action would vary. The proper construction would be that the right of action accrues upon the confirmation of the grade, whether it be the first grade or a change from an existing confirmed grade. This would make uniformity in the proceedings, and the action would accrue or commence when the injury was done. If the damage occurs upon the confirmation of the grade, then the right of action would commence. If the damage does occur upon the confirmation of the grade, as was decided by

Judge THAYER in Fifth and Sixth Streets (4 WEEKLY NOTES, 443), followed in *City v. Wright*, *supra*, then the physical construction of the street to the grade does not create or cause any new damage or injury.

As there exists doubt as to the law, the appellee has presented to this Court, in a recent case, a view contrary to the above as to the time when the damage is done by a change of grade, but as the opinion of the Court below in this case appears to adopt the position herein taken, in the absence of any ruling of this Court, the above argument is submitted. The injury to the appellant's property, if any, was done in 1871, when the grade was confirmed.

It certainly was not the intention of the Act of 1878 to give damages for injuries sustained prior to the Constitution of 1874. Before this time no remedy existed whereby a recovery could be had for such injuries, and we cannot assume from the rather careless language of the Act that its retroactive power should go back of the Constitution on which it is based.

Folkinson v. Borough of Easton, 116 Pa. 523.

If this be the law under the Borough Act, which contains the phrase "have changed or may hereafter change," it certainly must be the construction to be placed upon the Constitution as it applies to the city of Philadelphia, where there is no foundation for the claim of the appellant outside of the Constitution.

Retroactive laws, as to remedy, may be passed.

Leasure v. Mahoning Township, 8 Watts, 551.

But there are none upon which the appellant bases her claim.

The Constitution is not retroactive except as to the liability of corporations then existing, for injuries done after its adoption.

County v. Gibson, 90 Pa. 397.

Ahl v. Rhoads, 84 Id. 319.

Price v. Commonwealth, 104 Id. 150.

R. R. Co. v. Duncan, 111 Id. 352.

The cases of—

New Brighton v. U. P. Church, 96 Pa. 331.

Borough of Easton v. Rinek, 116 Id. 1.

Borough of Easton v. Walters, 18 WEEKLY NOTES, 117.

were decided under the Borough Act of May 24, 1878, and do not apply to the present case. This Act does not apply to Philadelphia.

October 5, 1891. MITCHELL, J. In the absence of any opinion by the Court below we are left to gather the grounds of the nonsuit from the facts and the arguments of counsel. The facts, which do not appear to be disputed are that the first grade for North Street was established on the city plan in 1871, but nothing was done on the ground until 1887. For the establishment of the grade of 1871, there was no right of action. (*O'Connor v. Pittsburgh*, 18 Pa. 187; *City v. Wright*, 100 Id. 235.) Therefore the Statute of Limitations could not begin to run from that

date. But the Constitution of 1873, Art. XVI., sect. 8, gave a right to the owners to have compensation for property injured as well as for property taken by municipal and other corporations in the construction or enlargement of their works. The right of action which this section gives, is clearly for the actual establishment of the grade on the land. The general rule is that the cause of action arises when the injury is complete and this has been uniformly applied to the taking of property for public use from the case of *Navigation Co. v. Thoburn* (7 S. & R. 411) down to the present day (*Volkmar St.*, 124 Pa. 320; *Whitaker v. Phoenixville*, 28 WEEKLY NOTES, 30, and *Brower v. Philadelphia*, Id. 87). The cases which were governed by a different rule were exceptions such as those arising under sect. 27 of the Consolidation Act of February 2, 1854, which in express terms gave damages for a change of grade regulations. (*In re Plan 166*, opinion filed herewith.) [*Ante*, p. 406.] There is nothing in the constitutional provision which indicates an intent to depart from the general rule under which, in the present case, the cause of action could not arise until the actual cutting down of the ground in 1887.

No point is made that the action should have been brought originally in the Common Pleas. The city instead of raising the question of jurisdiction in the Quarter Sessions appealed to the Common Pleas and there filed of record an agreement that the appeal should be considered at issue and tried without pleadings, and the argument here waives any question of jurisdiction of the Court in which damages were sought to be recovered. The parties therefore being in the proper Court on a proceeding *de novo*, this Court will not be astute to inquire how they got there (*Wilson v. City of Scranton*, 21 Atlantic Rep. 779), and the point is noticed merely to avoid any apparent conflict between this and the other cases in which it is held that the Quarter Sessions has no jurisdiction.

Judgment reversed and procedendo awarded.

H. C. O.

Orphans' Court.

July 3, 1891.

Fest's Estate.

Life-tenant and remainderman—Apportionment of taxes and charges against estate in case of death of former—Doctrine of apportionment to be applied liberally in favor of widow taking a life-estate under her husband's will—And also in favor of the estate of deceased widow.

Upon the audit of the account of the Pennsylvania Company for Insurances on Lives, etc.,

trustees for Cecilia B. Fest, under the will of John Fest, the Auditing Judge (HANNA, P. J.) found as follows:—

"John Fest, whose will created the trust giving rise to the present account, died July 6, 1888. His last will and testament and the several codicils thereto were duly proved, and letters testamentary thereon were granted to the executrix, Cecilia B. Fest his wife. He bequeathed and devised all the rest, residue, and remainder of his estate real and personal to the accountants, the Pennsylvania Company for Insurances on Lives and Granting Annuities, to hold in trust, to manage and pay the income thereof to his wife, Cecilia B. Fest, for and during the term of her natural life. On the settlement of Mrs. Fest's account, as executrix, the said residuary estate was handed over to the accountants as per award in the adjudication by this Court of said account.

"Two properties, to wit, premises No. 1432 North Seventeenth Street, and premises No. 1405 North Fifteenth Street, Philadelphia, constitute the realty of the trust. In addition to the water rents and taxes of these properties, the accountants, as a matter of convenience to Mrs. Fest, paid the charges of like character on a property on Marshall Street, belonging to her individually and charged the same against the trust income belonging to Mrs. Fest. Taxes, water-rents, and State tax on investments for 1891 were paid by the accountants respectively February 21, February 7, and June 9, and are charged against income. The net balance of income, after deduction of these charges, is \$1440.34, the apportionment of which, to March 17, 1891, the date of Mrs. Fest's death, shows \$1122.93 due Mrs. Fest from this source, and award of that sum is hereby made her estate. The effect of the early payment of the taxes, water-rents, and State tax is to throw the entire burden of their amount for the whole year on the life-tenant, who enjoyed the income for only about one-fifth of that period. This is inequitable; Mrs. Fest died March 17, 1891; she was the testator's widow, and the first uses of the trust estate being for her sole benefit, she is an object of favor, from which there is no sound reason that her estate should be excluded.

"The subject has received very recent consideration in the settlement in this Court of the Estate of Margaret Brumaker, deceased, the Auditing Judge (PENROSE, J.) observing that 'the modern doctrine in regard to apportionment in such cases (*i. e.*, between tenants for life and the owners in remainder) is much more liberal now than it formerly was' (Wilson's Appeal, 12 Outerb. 347); 'and that in favor of the widow of a testator, apportionment will be allowed as in the case of rents, annuities, etc.,

when ordinarily it would be refused. (Gheen v. Osborn, 17 S. & R. 173; Sweigert v. Frey, 8 Id. 299; Blight v. Blight, 1 Smith, 420.) It is not easy to see why upon the same equitable principle, as between the estate of a widow, tenant for life, and those entitled in remainder under the will of her husband, charges upon the estate should not be shared in like manner. The doctrine of apportionment is applied with the utmost liberality in favor of a widow taking an estate for life under the will of her husband.' A proper regard for the first object, not so much of the testator's bounty as of his duty, common fairness, and reasons which will easily suggest themselves, founded on public policy, require that, as between the estate of the widow of a testator, tenant for life, and remainderman, charges like those in this case shall be apportioned. The circumstance that these charges are due on the first day of the year for which they are assessed, and that in the case of taxes their lien operates from that date, is merely technical, so far as relates to this question. Though due, they are not presently payable; though they may be paid, if the owner be so minded, they are not presently enforceable as claims. The owner may justly wait till he has received that benefit on which the demand is founded, and if he does not receive the benefit for the whole term, there is simple justice in requiring those who succeed him in it to contribute to the cost of the advantages enjoyed by them for the remainder of the term. In the present case the charges for the current year as paid are:—

Water rents . . .	\$39 00
Taxes . . .	443 86
State tax . . .	153 00

\$635 86

From which are to be deducted taxes and water rent of the Marshall Street property, payable individually by Mrs. Fest, amounting as shown to . . .

88 87

Leaving for apportionment . . . \$546 99 of which \$113.90 is chargeable against Mrs. Fest's income, and \$433.09 is payable by the remaindermen, and award of said last named amount, to wit, four hundred and thirty-three dollars and nine cents is hereby made to the estate of Mrs. Cecilia B. Fest."

John G. Johnson, for accountant.

William W. Montgomery, for estate of Edwy Fest, deceased.

George Peirce, for estate of Cecilia B. Fest, deceased, and other parties in interest.

W. C. S.

WEEKLY NOTES OF CASES.

VOL. XXVIII.] FRIDAY, OCT. 30, 1891. [No. 28.]

Supreme Court.

Jan. '91, 199.

April 3, 1891.

West Philadelphia National Bank
v. Field.

Promissory note—Suit upon lost note—When secondary evidence of its contents admitted—Receiving of forged note not a payment of genuine note—Liability of indorsers of the first note in such case—Nonsuit—When treated as demurrer to evidence.

Suit was brought against F. to recover the sum of \$5000, the amount of a note drawn by him to the order of J. and H. and indorsed by them to plaintiff. The note was not produced at the trial, but it was proved that it was made by F. for the accommodation of J. and H., indorsed by them, presented to plaintiff, a bank, by J., discounted by it, and the proceeds paid to J. At maturity the note was taken up by J., who gave in place of it another note drawn by L. to the order of J. and H. and indorsed by them; this note was also taken up at maturity, and another note, purporting to be drawn by L. to the order of J. and H. and indorsed by them, given in its place. The notes purporting to be drawn by L. subsequently proved to be forgeries. The first and second notes thus came into the possession of J., who having been accused of committing other forgeries fled the country, and up to the time of trial his whereabouts were unknown to plaintiff, and no part of the above-mentioned notes had ever been paid:

Held, that sufficient ground was laid to excuse the non-production of the note in suit, and to justify the admission of secondary evidence of its contents.

There was also evidence that F. had admitted to the president and cashier of the plaintiff that the original note and the signature were "all right."

Held, that the testimony was ample to have warranted the jury in finding that the signature of the maker of the note in suit was genuine, and that possession of it was fraudulently obtained by J., and that it was error to enter a nonsuit.

A peremptory nonsuit is in the nature of a demurrer to the plaintiff's evidence. If there is any evidence, beyond a mere *scintilla*, which alone would justify an inference of the disputed facts on which the right to recover depends, it must be submitted to the jury.

Upon a motion to nonsuit, the defendant is considered as admitting every fact which the evidence tends to prove, including such inferences of fact as a jury may lawfully draw from it.

Where a note in suit is lost, the defendant is entitled to protection against the possibility of its turning up in the hands of an innocent holder for value, and the Court may restrain execution until indemnity is given.

A failure to give such indemnity is not in bar of the action, but is a prerequisite merely to the execution to enforce payment of the judgment.

The receiving of a note whose indorsement is forged will not amount to a payment of a genuine note, or extinguish the right of action against the indorsers of the first note, if the first note bears their genuine signatures.

Appeal of the West Philadelphia National Bank, plaintiff, from the judgment of the Common Pleas No. 4, of Philadelphia County, in an action of assumpsit brought against John Field to recover the amount of a certain promissory note for \$5000, drawn by defendant to the order of John and James Hunter, and indorsed by them to plaintiff.

The facts are fully set forth in the opinion of the Supreme Court.

Upon the conclusion of plaintiff's testimony, the Court entered a compulsory nonsuit, which the Court in banc subsequently refused to take off, and entered judgment for defendant.

Plaintiff then appealed, assigning the entry of the nonsuit for error.

John G. Johnson, for appellant, cited—

Fales v. Russell, 16 Pick. 315.

Bell v. Young, 1 Grant, 175.

Bisbing v. Graham, 14 Pa. 16.

Bigler v. Keller, 8 WEEKLY NOTES, 323.

Mount v. Scholes, 120 Ill. 394.

Clift v. Moses, 112 N. Y. 426.

Ritter v. Singmaster, 73 Pa. 400.

Richard P. White (Samuel B. Huey and George H. Earle, Jr., with him), for appellee, cited—

Crowe v. Clay, 9 Ex. 604.

Byles on Bills, 381, note.

Lord v. Water Company, 135 Pa. 122.

October 5, 1891. *STERRETT, J.* In the language of plaintiff's amended statement of claim, this suit was brought against the defendant, John Field, "to recover the sum of \$5000, being the amount of a certain promissory note drawn by the defendant to the order of John and James Hunter, dated June 25, 1886, and payable four months after date at Fifty-fifth and Paschal streets, and indorsed by said John and James Hunter to the plaintiff."

As an excuse for non-possession of said note and inability to file a copy of it, the plaintiff added the following averment, viz:—

"The said note is not now in the possession of the plaintiff, because at its maturity James Hunter, as agent for and on behalf of the defendant and of John and James Hunter, offered to plaintiff in payment thereof a note for \$5200, purporting to be drawn by James Long to the order of, and indorsed by, John and James Hunter. Believing the signature of James Long to said note, the plaintiff accepted said note in

payment, and delivered to James Hunter, as agent for defendant, the said promissory note of defendant. Plaintiff afterwards discovered, and now avers, that the signature purporting to be that of James Long to the note so offered and received in payment was a forgery, and consequently the said note was void, and the plaintiff has not received from said defendant, or from any other person, payment of the whole or any part of the aforesaid promissory note of defendant."

On the trial, evidence was introduced by the plaintiff tending to prove, *inter alia*, the following facts:—

(a) That the note in suit was made by defendant for the accommodation of the payees, indorsed in their names, presented to plaintiff by James Hunter, discounted by it, and the proceeds paid to said James Hunter.

(b) When the note in suit matured it was taken up by James Hunter, who, in lieu of it, gave plaintiff a note for \$5200 at four months from October 28, 1886, purporting to be made by James Long to the order of, and indorsed by, John and James Hunter; and when that note matured, it was in like manner taken up by James Hunter, who, in lieu of it, gave another note for \$5200, at four months from March 2, 1887, purporting to be made by said Long to the order of, and indorsed by, said John and James Hunter.

(c) The notes aforesaid, purporting to be made by James Long, were forgeries, but at the time they were respectively taken by plaintiff it believed they were genuine.

(d) The note in suit and the first-mentioned Long note passed, in the manner and under the circumstances above stated, from the plaintiff into the possession of James Hunter, who, having been accused of having committed other forgeries, at or about the same dates, fled the country, and up to and at the time of trial his whereabouts were unknown to the plaintiff; and no part of either of the above-mentioned notes has ever been paid.

We think sufficient ground was laid to excuse the non-production of the note in suit, and justify the admission of secondary evidence of its contents, etc.

The evidence tending to prove that defendant made the note, consisted of his own admissions made to the president and cashier of the plaintiff on several occasions.

The latter testified, in substance, that ten days or two weeks before the note matured defendant came into the bank, handed him notice which had been addressed to place of payment, etc., and asked to see the note. It was handed to him. After looking at it and turning it over he said, "That is all right." A few days afterwards, defendant and Mr. Lucas called in relation to forming a syndicate to buy up the indebtedness of

John and James Hunter, etc. During the conversation, as they were about leaving, "I asked Mr. Field the question: I said, by the way, Mr. Field, that note that you came here and inspected, was the signature of that forged or good? Mr. Field replied that that signature was all right and that the note was all right."

Doctor Hughes, president of the bank, testified that a week or two after James Hunter fled, Mr. Lucas and defendant "came to the bank wanting us to join in a plan to pay the debts of Mr. Hunter; and, before going out, Mr. Park asked him if that note of his was all right—genuine. He replied that it was, after some hesitation."

In short, the testimony was ample to have warranted the jury in finding that the signature of the maker of the note in suit was genuine, and also that possession of it was fraudulently obtained by James Hunter in the manner above stated; but the learned Judge, being of opinion that the evidence was insufficient to justify a verdict in favor of plaintiff, ordered a judgment of nonsuit, and afterwards refused to take it off. In that we think there was error.

It is well settled that a peremptory nonsuit is in the nature of a demurrer to the plaintiff's evidence. If there is any evidence (beyond a mere scintilla) which alone would justify an inference of the disputed facts, on which his right to recover depends, it must be submitted to the jury. (*Hill v. Trust Co.*, 108 Pn. 1; *Abraham v. Mitchell*, 112 Id. 230.) Upon a motion to nonsuit, the defendant is considered as admitting every fact which the evidence tends to prove, including such inferences of fact as a jury may lawfully draw from it. (*Miller v. Bealer*, 100 Pa. 585; *MrGrann v. Railroad Co.*, 111 Id. 171; *Jones v. Blind*, 116 Id. 190.)

Conceding what under the evidence can scarcely be doubted, that James Hunter procured the discounting of a genuine note, and, when it matured, deceitfully and fraudulently paid, or rather pretended to pay it with a forged note, and when that matured undertook to pay it also with a similar forged note, and then fled the country, the fair inference would be that the evidence of his criminality would not be left within plaintiff's reach; but it is only necessary to say in regard to this and other questions of fact, that the evidence was quite sufficient to require its submission to the jury.

As an innocent party to the transaction, the defendant is, of course, entitled to protection against the possibility of the note turning up in the hands of an innocent holder for value; but, as was held in *Bisbing v. Graham* (14 Pa. 16), the Court has ample power to restrain execution until such indemnity is given. In that case it was said: "That the defendant is entitled to indemnity before he can be compelled to pay, I

have no doubt, for it may be that the note was indorsed in blank by Graham, and is now in the hands of a holder for value. . . . The maker ought not to encounter any risk, as he is in no default. The inconvenience, if any, is one to which the holder has exposed himself, arising, perhaps, from his own carelessness. . . . In this all the authorities to which I refer generally agree. But the question recurs, Is the failure to indemnify in bar of the action, or is it a prerequisite merely to the execution to enforce payment of the judgment? In the absence of all direct authority, in this State at least, I incline to the latter view of the case. However the law may be as to suit brought to recover on a lost note (and I see no reason why there should be any difference), we are of opinion that when the note is lost after commencement of the action, it is no objection to the rendition of judgment. Justice may be effectually administered by restraining the plaintiff from issuing his execution without proper indemnity be given. This is an equitable power vested in the Courts, which will take care to do equity, having a proper regard to the circumstances of each case." To the same effect is *Bigler v. Keller* (8 WEEKLY NOTES, 323).

It is unnecessary to discuss so plain a proposition as that the plaintiff bank did not lose its right to recover on the note in suit, because it was surrendered in exchange for a forged note. If authority for that be needed, it will be found in *Ritter v. Singmaster* (73 Pa. 400); *Mount v. Scholes* (120 Ill. 394); *Clift v. Moses* (112 N. Y. 426). In the first cited case it was held that the trial Judge correctly instructed the jury that "the receiving of notes whose indorsements were forged will not amount to a payment of a genuine note, or extinguish the right of action against the defendants as indorsers upon the first note, if the first note, drawn by Burkhalter and indorsed by defendants, bears their genuine signatures."

Further elaboration is unnecessary. For reasons suggested, we think the learned Court erred in not taking off the judgment of nonsuit.

Judgment reversed, and procedendo awarded.

H. C. O.

Jan. '90, 201. Feb. 20, 1890; Feb. 16, 1891.
Ulrich v. Reinoehl et al.

Life insurance—Insurance by creditor on life of debtor—Proportion of debt to insurance—Wagering contract—What is not—Expectancy of life an element.

A creditor may lawfully take out a policy on the life of his debtor in an amount to cover the debt with

interest, and the cost of such insurance, with interest thereon, during the period of the expectancy of life according to the Carlisle Tables.

Grant's Adm'r v. Kline (115 Pa. 618); *Cooper v. Shaeffer* (20 WEEKLY NOTES, 123), distinguished.

In a suit by the executor of the insured against the creditor, who has received the amount of the policy, to recover an alleged excess over the debt and cost of insurance, testimony as to the debtor's expectancy of life according to the Carlisle Tables, and of the cost of maintaining the insurance during that period, is admissible.

In a proper case, where the facts are not in dispute, and the disproportion between the debt and the insurance is so great as to make the insurance a palpable wager, it is the duty of the Court to pronounce upon it as matter of law; but where evidence of the age of the insured and his probable expectancy of life and the cost of maintaining the policy is received, and shows a state of facts that materially alters the disproportion that might otherwise seem to exist, the evidence must be submitted to the jury; and where the testimony shows that the insured's expectancy is twenty-six years, and that after seventeen years the policy would be carried at a loss, a verdict in favor of the creditors holding the policy is abundantly sustained thereby.

Appeal of A. Stanley Ulrich, executor of the last will of Andrew Bleistine, deceased, from the judgment of the Common Pleas of Lebanon County, in an action of assumpsit brought against Adolphus Reinoehl and Charles H. Meily, trading as Reinoehl & Meily, defendants, to recover such part of a sum received by them as proceeds of a life insurance policy on the life of the plaintiff's testator as was in excess of the defendants' debt, expenses, etc.

On the trial, before MCPHERSON, J., it was shown that Bleistine was indebted to the defendants upon a judgment which, with interest and costs, amounted on April 2, 1877, to \$110.02; on that day he procured an insurance on his life in the U. B. Mutual Aid Society for \$3000, and assigned the same to the defendants.

The facts connected with the taking out of the policy were thus testified to by the executor on cross-examination: Q. State whether there was any other consideration not of a pecuniary nature that entered into the contract of assignment. A. To get at the bottom of the facts I will begin where we started: There were three different conversations made to have Reinoehl & Meily accept this insurance. The first was, Mr. Bleistine and myself went out to Reinoehl & Meily and tried to urge them to take this—accept it for this—and they should discharge this thing. Reinoehl & Meily refused. The second was afterwards—Reinoehl & Meily did. Q. Down here? A. There were three different attempts made before this insurance was effected. The first was that Andrew Bleistine and myself went out to Reinoehl & Meily and urged them to accept this insurance for their debt; they refused

it. The second was that Mr. Reinoehl and Meily and Bleistine were together, and he refused again. The third conference was in my office, in the presence of Mrs. Bleistine, his wife, Andrew Bleistine and Mr. Reinoehl. Mr. Reinoehl did not want this insurance; he wanted his money. Bleistine could not pay it, or didn't want to—I do not know which—and Bleistine wanted it. At last Reinoehl wanted to throw off the interest and costs if they would just pay them their debt. The thing they did not want was the trouble of insurance; and Bleistine was a younger man than either of them and they would not likely get any benefit from it; he did not want to have anything to do with it; and Reinoehl wanted to go away, but Mrs. Bleistine caught Mr. Reinoehl by the arm and cried, and begged that her home might be spared, and they should accept this insurance. Bleistine said, "I will give you \$3000, or \$5000, or \$10,000—just what you want." Reinoehl did not want to have anything to do with it, and she held him back, and at last Mr. Reinoehl gave in and accepted it; and at last we went up to the office, and satisfaction was entered on it. Q. Then Mr. Reinoehl and Mr. Meily were to pay all assessments during his lifetime? A. All assessments. Q. It was an absolute assignment of all his rights to the policy? A. It was absolute; no reservations. Q. It was not as collateral at all? A. Nothing.

The anxiety of Bleistine and his wife to bring about this arrangement was shown to proceed from a desire to have the judgment satisfied, so that he might procure a loan with which to pay off some lien-creditors who were pressing him.

The insured died April 20, 1885, and the company paid the whole amount of the policy to the defendants.

The defendants showed, under objection, that by the Carlisle Tables, the insured's expectancy of life at the date of insurance was 26.34 years, and that if he had lived his entire expectancy, the assessments and "annuals" would have amounted to \$2436.32 without interest or \$4336.31 with interest. (First assignment of error.)

The plaintiff requested the Court to charge *inter alia*: The amount allowed and paid as the consideration of the transfer of the insurance, to wit, the sum of \$99.51, with interest thereon from December 7, 1875, to April 2, 1877, and the costs, was grossly inadequate; and the disproportion between that amount and the amount of the insurance, \$3000, is so great as to require the Court to say, as matter of law, that the transaction was a wager, and that in this action Reinoehl & Meily have no right to retain more of the insurance money received by them than the amount of their satisfied judgment with interest and costs, and the premiums and assessments

paid by them, with interest thereon, and therefore the verdict of the jury must be in favor of the plaintiff for the amount received by the defendants, with interest from the date of its receipt, less the amount of the judgment, interest, and costs, and assessments and premiums paid with interest. *Refused.* (Second assignment of error.)

In the general charge the Court said: ["Now the question for the jury is whether, considering all the circumstances of that transaction—the age of the person insured, his condition of health, his habits of life, his expectancy of life, the amount of premium, the probable amount required to be paid by the creditor—whether, considering all those matters, the amount of insurance taken out to protect that debt was so disproportionate as to make the policy a wagering or a speculative policy. If the jury find that it was not—that it was properly proportionate—fairly calculated to protect the debt, and no more, then the verdict must be in favor of the defendants."] If, however, they find under all the circumstances of the case—and we consider it as of that time, and not as of this—that it was a wagering policy, then the plaintiff is entitled to recover the sum which I have already indicated to you, and of which you will no doubt have a calculation. [The fact that this transaction has turned out well for the defendants is not the controversy; for if this man had lived out his expectancy of life, if the calculations which you have heard testified to were accurate, it would have turned out badly; and the mere fact that it turned out well is not controlling, and in my judgment, it is not an element in the case at all. The question is, whether, when the policy was made, it was a wagering contract, or was to fairly protect the debt, and no further."]

Verdict for the defendants.

In discharging a rule for a new trial, MCPHERSON, J., filed an opinion in part as follows:—

"As stated in the charge, there is on the surface much resemblance between this case and *Cooper v. Shaeffer* (20 WEEKLY NOTES, 123), but we thought then, and still think, that there is much real difference also. That case was rested in the Court below—and on this point we can speak with positiveness—solely on the disproportion between the debt and the amount of the policy. Even the age of the insured was not dwelt upon as an element of the problem, and there was not a word of evidence as to the expectancy of life or the probable amount of annual payments to be made. Here, however, these important matters were proved, were urged as a principal ground of defence, and required consideration. In our opinion, they necessarily carried the case to the jury, and abundantly justified the verdict. The defendants insured a

healthy man of forty-two years in the sum of \$3000 to protect a debt of \$100. If he had merely lived out his expectancy and no longer, they would have been obliged to pay for assessments and annual dues \$2436.32, to which if interest be added, the amount of their investment would have been \$4336.31. In return they would have received \$3000, thus suffering a considerable loss. Surely, to call such a transaction speculative is to misuse the word. That it happened to be profitable because the insured died within a few years is manifestly not to the point.

"With much respect, it is suggested that the principle, indicated in *Grant v. Kline* (115 Pa. 625), and *Cooper v. Shaeffer* (*supra*), as the proper rule to determine for what sum a creditor's policy should be taken out, ought to be somewhat expanded before it is positively adopted. As now stated, it would not provide for a case like this, where the policy is taken out in a company which levies annual (monthly?) assessments, and where, therefore, allowance must be made in the creditor's forecast for possible fluctuations; neither would it now provide for the not unfrequent contingency of the insured outliving his expectancy. Under the present form of the indicated rule, the creditor must always lose if the debtor lives beyond his expectancy; and it cannot be accurately applied to assessment insurance, because in this variety of the business the annual payments are not a previously known and certain sum."

Judgment was thereupon entered on the verdict in favor of the defendants; whereupon the plaintiff appealed, assigning as error the admission of testimony and the answer to his point, as above, and the portions of the charge of the Court inclosed within brackets.

The case was argued on February 20, 1890, McCOLLUM, J., being absent. On January 19, 1891, an order was made for a reargument, which was heard by a full bench on February 16, 1891.

Grant Weidman (*A. Stanley Ulrich* with him), for appellant.

The evidence developed every element of speculation in this life insurance, viz:—

(1) Want of relationship.

Gilbert v. Moose, 13 WEEKLY NOTES, 489; 104 Pa. 74.

(2) Disproportion between a debt of \$100 and a policy for \$3000.

Cooper v. Shaeffer, 20 WEEKLY NOTES, 123.

(3) Holding of the policy and payment of all premiums and dues by the defendants.

Scott v. Dickson, 16 WEEKLY NOTES, 181; 108 Pa. 16.

Downey v. Hoffer, 16 WEEKLY NOTES, 184; 110 Pa. 115.

The true rule for the limit of insurance is that a policy taken out by a creditor on the life of his

debtor ought to be limited to the amount of the debt with interest, and the amount of the premiums with interest thereon during the expectancy of the life insured according to the *Carlisle Tables*.

Grant v. Kline, 19 WEEKLY NOTES, 260; 115 Pa. 625.

Dalby v. The Ins. Co., 15 C. B. 365.

Ins. Co. v. Schaefer, 74 U. S. 457.

William M. Derr (*Frank E. Meily* with him), for appellees.

A wagering insurance contract is one where the person for whose benefit an insurance on the life of another is taken has no insurable interest in the continuance of that life at the time the contract is made. The disproportion between the debt of a creditor who insures the life of his debtor and the amount of insurance taken, by itself determines nothing, unless the amount is so disproportionately great that one's eyes cannot be shut to the gross disparity. See illustrations in the opinions in—

Grant v. Kline, *supra*.

Cooper v. Shaeffer, *supra*.

The precise limit of the insurance, which a debtor may lawfully take out, has never been defined in Pennsylvania, but it is submitted that, as probable expectation of life is one of the elements of life insurance, the testimony complained of in the first assignment of error was clearly admissible. Indeed, the lack of such evidence in *Cooper v. Shaeffer* (*supra*) is the distinguishing feature between that case and this.

The question must be decided by the situation and probable intention of the parties at the time the policy was taken out; if the intention of the appellees had been speculation, they would have taken a policy for the largest sum offered, instead of the smallest. Their extreme reluctance to enter into the bargain at all is also to be observed.

It can easily be shown by calculation that the rule suggested in *Grant v. Kline*, and *Cooper v. Shaeffer* (*supra*) would result in loss to the creditor if the debtor lived out his expectancy.

The facts justified the jury in finding in favor of the defendants. It was the province of the jury to determine whether the contract was a wagering one or not.

Shank v. Meily, 26 WEEKLY NOTES, 569.

Fairclaire v. Gabell, 89 Pa. 89.

Kirkpatrick v. Bonsall, 72 Id. 159.

October 5, 1891. *PAXSON, C. J.* This case is not free from difficulty. It has been twice argued, and has received a most careful consideration. It presents the question, to what extent a creditor may lawfully insure the life of his debtor. We have avoided ruling this point before, because it was one of grave importance, and the cases in which it was raised did not necessarily require it, nor did they present all the facts

necessary to enable us to dispose of it satisfactorily. This record raises the whole question squarely. The facts are substantially as follows:—

The defendants are doing a firm-business at Lebanon, Pennsylvania, and held a judgment against one Andrew Bleistine in the Court of Common Pleas of Lebanon County, which, with interest and costs, amounted to \$110.02. The judgment was sufficiently secured on real estate, and the defendants were not pressing their debtor for the money. He was being pressed by other creditors, who held subsequent liens on his property. It was necessary to quiet them for Bleistine to pay off the judgment held by the defendants, or get rid of it in some manner. Not having the money, he applied to the defendants to satisfy it and take a policy on his life instead. The evidence is uncontradicted that the defendants were averse to this, and for a time declined, but finally yielded to Bleistine's entreaties and his wife's tears to save their home. The evidence shows that Bleistine offered them an insurance of \$3000, or \$5000, or \$10,000, or any amount they wanted. The negotiation resulted in the defendants taking a policy of \$3000 on the life of Bleistine in the U. B. Mutual Aid Society. The policy was issued in the name of Bleistine as beneficiary, and afterwards assigned by him to the defendants, who paid the entrance fee and all subsequent assessments. The assignment was absolute, and not as collateral security, and the judgment referred to was satisfied of record. After Bleistine's death, the insurance money was paid by the company to the defendants. Subsequently this suit was brought by the executor of Bleistine to recover from them the amount received over the debt and interest and premiums paid, the plaintiff alleging that the amount of insurance was so disproportioned to the debt as to make it a gambling transaction, within the doctrine of *Gilbert v. Moose* (104 Pa. 74), and the cases following it.

We may safely assume that the debt due by Bleistine to the defendants was *bona fide*; that so far from the latter having procured the former to insure his life for their benefit for speculative purposes, they entered into it with reluctance, at the earnest request of Bleistine and his wife, to relieve them from financial embarrassment and to save their home. This takes out of the case the controlling element which existed in *Gilbert v. Moose*, and that line of cases. Yet if the defendants, even for an honest purpose, have transgressed the law, and made this a gambling transaction, they must suffer the penalty for such violation.

The first and second assignments present the main question in the case. Upon the trial below the defendants proved, under exception, the life

expectancy of Bleistine, and the amount of assessments on this policy, had he lived out his full life expectancy. It appears from this evidence that the insured was forty-two years of age, and that his expectation of life, according to the Carlisle Tables, was twenty-six years; that, had he lived that length of time, the interest on the judgment, with the annual dues and assessments and interest thereon, would have amounted to \$4336.31, being \$1336.31 in excess of the amount of the policy. This evidence was not contradicted. Its admission forms the subject of the first assignment.

In the second assignment, complaint is made that the learned Judge erred in his answer to the plaintiff's sixth point. The point is as follows:—

"The amount allowed and paid as the consideration of the transfer of the insurance, to wit, the sum of \$99.51, with interest thereon from Dec. 7, 1875, to April 2, 1877, and the costs, was grossly inadequate; and the disproportion between that amount and the amount of the insurance—\$3000—is so great as to require the Court to say, as matter of law, that the transaction was a wager, and that in this action *Reinoehl & Meily* have no right to retain more of the insurance money received by them than the amount of their satisfied judgment, with interest and costs, and the premiums and assessments paid by them, with interest thereon, and therefore the verdict of the jury must be in favor of the plaintiff for the amount received by the defendants, with interest from the date of its receipt, less the amount of the judgment, interest, and costs, and assessments and premiums paid, with interest." This point was refused.

Whether the question of excess of insurance is to be disposed of by the Court as a matter of law, or by the jury as a question of fact, it is essential that we should have a fixed rule. We have none now. I felt the importance of this in delivering the opinion of the Court in *Grant's Admrs. v. Kline*, (115 Pa. 618), where I said: "Speaking for myself, it may be that a policy taken out by a creditor on the life of his debtor ought to be limited to the amount of the debt with interest, and the amount of premiums with interest thereon, during the expectancy of life as shown by the Carlisle Tables. This view, however, has never been adopted by this Court in any adjudicated case, nor do we feel compelled to define the disproportion now in view of the particular facts of the case in hand." In the subsequent case of *Cooper v. Shaeffer* (20 WEEKLY NOTES, 123), our brother *STERRETT*, after quoting the above, remarked, "This appears to be a just and practicable rule." No such rule was established, however, in *Cooper v. Shaeffer*. In that case there was an insurance of \$3000 to cover a debt of \$100,

and this Court said, through Mr. Justice STERRETT, "In view of the undisputed facts, the learned Judge of the Common Pleas held that the disproportion between the insurance of \$3000 and the debt of \$100 was so great as to require him to say, as matter of law, that the transaction was a wager, and that the assignees of the policy had no right to retain more of the insurance money received by them than the amount of the debt, plus the premiums paid and interest thereon. In this he was clearly right. The disproportion is so great as to make the insurance a palpable wager, and no Court should hesitate to declare it so as matter of law."

We have no doubt that in a proper case where the facts are not disputed, it is the duty of the Court to pronounce upon the character of the policy. Thus in *Grant's Admrs. v. Kline* (*supra*), it was said: "To take out a policy of \$5000 to secure a debt of \$5 would be such a palpable wager that no Court would hesitate to declare it so as matter of law." It is true this remark was made by way of illustration, and we only refer to it for that purpose now. *Cooper v. Shaeffer* decided nothing but that particular litigation. It laid down no rule for the future beyond its own particular facts, viz: That an insurance of \$3000 for a debt of \$100 unexplained, was a gambling policy. It may be asked why it does not rule this case where the amount of insurance was the same and a difference of a few dollars only in the amount of the debt? The answer is not difficult. *Cooper v. Shaeffer* was decided upon the single ground of the disproportion between the insurance and the debt. There were no facts in evidence by which this disproportion could be explained or shown to be justifiable. This appears by the report of the case as well as from the opinion of Judge McPHERSON who tried that, as well as this case below. In refusing a new trial in the case in hand, that learned and able Judge said in reference to *Cooper v. Shaeffer*: "Even the age of the insured was not dwelt upon as an element of the problem, and there was not a word of evidence as to the expectancy of life or the probable amount of annual payments to be made. Here, however, these important matters were urged as a principal ground of defence, and required consideration. In our opinion, they necessarily carried the case to the jury, and abundantly justified the verdict. The defendants insured a healthy man of forty-two years in the sum of \$3000 to protect a debt of \$100. If he had merely lived out his expectancy and no longer, they would have been obliged to pay for assessments and annual dues \$2436.32, to which if interest be added, the amount of their investment would have been \$4336.31. In return they would have received \$3000, thus suffering a considerable

loss. Surely, to call such a transaction speculative, is to misuse the word. That it happened to be profitable, because the insured died within a few years, is manifestly not to the point." I have quoted this extract at length because I could in no better way emphasize the distinction between *Cooper v. Shaeffer* and the case in hand.

The law very properly lays a mailed hand upon speculative life insurance; of all the forms of gambling, it is one of the most objectionable. The records of our own Court show that it sometimes leads to murder. The holder of a policy upon a life in which he has no interest, either of a social or pecuniary nature, has a strong interest in the death of the assured. This interest grows and strengthens with each payment of premium. He has made a bid upon the life of another person. A man who will engage in such a transaction cannot safely be regarded as a saint. He sees with growing impatience that life prolonged from year to year, and his money slipping away in premiums. A man thus situated soon becomes familiar with the thought of the death of the person who stands between him and what, in his morbid fancy, he may regard as his rights. That crime follows in some instances is a fact of which we have judicial knowledge.

All life insurance is in one sense speculative. Yet within proper restrictions it has been found to be highly beneficent, and not in conflict with public policy. It enables a man in the days of his early struggles to provide for his family in case of his death. It renders it possible for a business man to borrow the capital needed for success. It furnishes the means, and the only means, by which a creditor may sometimes secure a doubtful claim. Yet in all these cases there is the element of speculation, for if the assured dies shortly after the policy is issued, the beneficiary, whether he be a blood relation or a creditor, gets a sum of money greatly disproportioned to the amount paid. But in these cases the law does not regard the speculative element as one of danger. It is true that a son who takes out a policy on the life of his father, or a creditor upon the life of his debtor, may have an interest in the death of the assured, and resort to crime to procure it, but experience shows that such instances are extremely rare, and the temptation no greater than in thousands of other instances in which one person may be benefited pecuniarily by the death of another. But a policy taken out by one who has no interest either as a creditor or a relative in the life of the assured, is always a danger signal.

It is settled law that a creditor has an insurable interest in the life of his debtor, but up to this time there is no decision as to the limit of this right. Our own cases furnish us no settled rule,

and for this reason I do not think it necessary to review them. Each case has been decided upon its own facts. In *Cooper v. Shaeffer*, as before observed, it was said the insurance was too large; in *Grant v. Kline*, on the other hand, we held that the amount of insurance was not disproportioned to the debt. We have now reached a point where it is necessary to lay down some fixed rule by which such cases can be disposed of in the future, otherwise the rulings of the Courts and the verdicts of juries upon such questions will be arbitrary, and where there is nothing in a case but the amount of the insurance and the amount of the debt it is impossible for either a Court or a jury to arrive at a correct result.

Starting out with the conceded proposition that a creditor has an insurable interest in the life of his debtor, and may lawfully take out a policy thereon, it follows logically that he may take out the policy in such a sum as may reasonably secure the debt. It needs no argument to show that if my debtor owes me \$1000, a policy for \$1000 would be inadequate, for if my debtor dies within twenty-four hours after the policy is taken out, I am a loser by the amount of the premium paid, and it would be but a few years before the interest on the debt and the premiums would exceed the debt. Every future payment then would be a loss, with the only alternative of adding to this loss year by year, or abandoning the policy altogether, and sinking the whole amount paid. It seems clear upon reason that the creditor may take out a policy in excess of his debt. But to what excess? The answer to this question obviously depends upon circumstances. An important element in the consideration of this question is the age of the assured. The difference between a policy on the life of a man of twenty-five years of age and one of seventy-five is clear to the dullest understanding. The assured was only forty-two years of age, and his expectancy of life was twenty-six years. The chances were greatly in favor of his living out his expectancy. The Carlisle Tables were prepared with care by competent experts, and are the result of actual experience. I am, therefore, justified in saying that the chances were in favor of the assured living out his expectancy, in which case there would be the loss of interest on the debt for twenty-six years added to the dues and assessments, with interest thereon, for the same period. The evidence shows that in such event the defendants would have been losers by a considerable sum. In fact I infer from the tables furnished that after about seventeen years the defendants would have carried this policy at a loss. The defendants assumed this risk when they took out the policy. They also had the chance of the assured not living out his expectancy. This is a risk which an insurance company as-

sumes upon every policy which it issues. In a particular instance the assured may live many years beyond his expectancy, but this is equalized by the instances where the assured dies before the expiration of his expectancy, so that in the vast volume of business of such corporations the average result is reasonably uniform. But the holder of a single policy can have no average result. He takes the risk with the chances fairly balanced. Had these defendants taken out one hundred policies on the lives of as many debtors, it is more than probable that some of them would have largely exceeded their expectation, while others would not have reached it. In such case there would not have been material gain or loss.

Had the assured lived out his expectancy of life, no question would probably have arisen as to the right of the defendants to retain the whole of the money. It could not then have been successfully assailed as a gambling transaction. I submit that the character of the contract cannot depend upon results, or the accident of death. If not lawful in its inception it could never become so.

In order to ascertain whether an insurance is disproportioned to the debt, regard must be had to the age of the assured, his expectation of life, and the cost of carrying the insurance with interest thereon, as well as upon the amount of the debt. The evidence which forms the subject of the first assignment was not only proper, but essential to an intelligent understanding of the case. It is just what was lacking in *Grant's Admr's v. Kline*, and was one of the reasons why we avoided deciding the broad question in that case. But any one who reads that opinion between the lines can see that the judicial mind must have been influenced to some extent by the suggestion in reference to the Carlisle Tables.

The rule we now announce may not be the best, but we have not been able to find a better, after a most careful and anxious consideration of the question. That it will not produce exact justice in all cases is possible. There will always be cases of individual hardship in the application of all general rules. No general rule can be made to fit each particular case, otherwise it would cease to be a rule. My attention was especially called to this difficulty by the following extract from the opinion of the learned Judge below in refusing a new trial.

"With much respect it is suggested that the principle indicated in *Grant v. Kline* (115 Pa. 625), and *Cooper v. Shaeffer* (*supra*), as the proper rule to determine for what sum a creditor's policy should be taken out, ought to be somewhat expanded before it is positively adopted. As now stated, it would not provide for a case like this,

where the policy is taken out in a company which levies annual (monthly?) assessments, and where, therefore, allowance must be made in the creditor's forecast for possible fluctuations; neither would it now provide for the not infrequent contingency of the insured outliving his expectancy. Under the present form of the indicated rule, the creditor must always lose if the debtor lives beyond his expectancy, and it cannot be accurately applied to assessment insurance, because in this variety of the business the annual payments are not a previously known and certain sum."

We have no difficulty in disposing of the objection that the rule does not provide for the case of the assured living beyond his expectancy and thus entailing a loss upon the creditor. If we go beyond the expectancy, where are we to stop? A man may live to the age of a hundred, and such length of days is of frequent occurrence. To sanction a policy covering such a period, and yet to allow the holder to recover the full amount in case of death within a year, would be a retrograde step in our decisions. Under such a system the creditor would be absolutely secure, with the possibility of an enormous gain in case of an early death. Whereas at present, as I have endeavored to show, the risk of a debtor exceeding his expectancy is equalized by the possibility of his death within it, and in a given number of cases the result produces uniformity. The want of uniformity is not the fault of the rule, but of its application to a single case.

There is more difficulty in the other objection. The policy in question, however, was taken out in a mutual company, where assessments are made from time to time, and there appears to have been no difficulty upon the trial below in ascertaining, with sufficient accuracy, the amount of assessments which the defendants would have been called upon to pay had the assured lived out his expectancy. The precise amount of such assessments cannot, of course, be estimated with the same accuracy as in the case of a company in which the annual premium is a fixed sum. But the assessments, even in a mutual company, can be approximated by the experience of other similar companies with sufficient accuracy to base an insurance upon it. And where a policy has been taken out in good faith by a creditor, the law does not exact impossibilities. A slight mistake, one way or the other, owing to the condition of the company's business, by which assessments are increased or diminished, would not necessarily vitiate a policy. The cost of life insurance, by whatever system adopted, it is believed, does not vary so greatly as to prevent a reasonable approximation thereof.

It may be that few men would take out a life policy to secure a debt of \$100, where there is an

expectancy of life for twenty-six years, and pay an annual assessment or premium in excess of the whole amount of the debt. But we do not pass upon the wisdom of contracts; we only consider their legality. And care must be taken in the enforcement of an admittedly sound rule of public policy not to infringe upon the right of the citizen to contract. In this instance the contract was lawful, and the defendants appear to have entered into it, not so much for their own benefit as for the accommodation of the assured. We are not to measure its legality by its results, but by its surroundings at the time it was made.

We are of opinion that a creditor may lawfully take out a policy on the life of his debtor in an amount to cover the debt with interest, and the cost of such insurance, with interest thereon, during the period of the expectancy of life of the assured, according to the Carlisle Tables.

We find no error in the ruling of the Court below.

Judgment affirmed.

[See next case.]

R. H. N.

Jan. '91, 237.

May 20, 1891.

Shaffer v. Spangler.

Life insurance—Insurance by creditor on life of debtor—Proportion of debt to insurance—Wagering contract—What is and what is not—Assignments of error—When not considered.

A debtor owing \$500 insured his life for \$2000 for the benefit of his creditor, and subsequently suggested that the amount would probably prove insufficient, and that the creditor had better have an additional policy of \$2000, which he was willing to give if the creditor would agree to pay his funeral expenses. This agreement was made and the policy issued. The creditor paid all the expenses incident to the insurance and the debtor's funeral expenses after his death. He also advanced about \$200 after the date of the first policy, and before the issue of the second one. In a suit by the debtor's administratrix to recover from the creditor an alleged excess over his debt and expenses:

Held, (1) That if the first policy was insufficient to cover the indebtedness, the creditor had a right to take out an additional policy, and its validity must be measured by the whole amount of the indebtedness.

(2) That if the funeral expenses were actually paid, they should be included in the indebtedness.

The policies were in different companies, and the creditor was obliged to bring suit against both:

Held, that the amount paid by him as counsel fees was properly charged against the fund.

The proper test of the validity of insurance in such cases is laid down in *Ulrich v. Reineohl* (*ante*, p. 419).

Appeal of Adam Spangler, defendant, from the judgment of the Common Pleas of York County

in an action brought by Margaret Shaffer, administratrix of Francis Shaffer, deceased, to recover the amount of a policy of insurance on the intestate's life held by the defendant and paid by the insurance company to him.

On the trial, it appeared that Shaffer, the decedent, and Spangler, the defendant, were intimate friends, and that Shaffer was a frequent borrower from Spangler, and also was the recipient from him of clothing and provisions for himself and family. Shaffer, on September 24, 1878, was indebted in the sum of \$500, and assigned to Spangler a policy on his life for \$2000, in the Keystone M. B. Association. About fourteen months later, Shaffer suggested to Spangler to take out a second policy, the circumstances being thus narrated by Spangler: Q. What was the arrangement between you and him about it, and at whose instance was it made? A. Why, he came to me, and told me that he thought that the other policy would not pay me for what I had done for him, and he thought I ought to take out another one, and if I would promise to go to the expense of burying him, and see that he was nicely buried, that I should take out another policy, because he did not think these other companies were paying in full, and I would run that risk; and he said he thought I ought to take out another one, and in that way pay it for him. Q. And that is the reason you promised to pay his funeral expenses? A. Yes, sir.

A second policy for \$2000 in the Fidelity Beneficial Society was soon afterwards taken out in Spangler's name. Spangler paid all the expenses of taking out and keeping up these policies until Shaffer's death, on May 15, 1880. After the issue of the first policy and before the issue of the second policy, he advanced from \$150 to \$250 more. The companies both refused to pay the policies, and Spangler was obliged to bring suit against both to recover his money. On the first policy he recovered by the verdict of a jury against the Keystone Mutual Benefit Association the sum of \$650, out of which his counsel retained \$85 attorney fees, and the balance, \$565, came to defendant. His costs of insurance, assessments, etc., were \$72.64. The suit against the Fidelity Beneficial Society was settled before trial was had, by the payment of \$1050 to Spangler's attorneys, out of which one-half of the costs, to wit, \$57, were paid and \$105 retained by counsel for fees, so that Spangler actually received \$888. Funeral expenses, etc., \$67.50, and cost of insurance \$75, were also paid by him out of this insurance.

The plaintiff requested the Court to charge, *inter alia* :—

(3) The counsel fees paid by the defendant for the collection of the moneys on the policies held by him on the life of Frank Shaffer, cannot

be allowed as credits to the defendant in this case, or deducted from the amount received by him, the said defendant, on said policies. *Answer.* This point is affirmed. (First assignment of error.)

By the defendant's fifth point the Court was requested to charge that the sums paid for counsel fees were proper credits. *Refused.* (Second assignment of error.)

The defendant also requested the Court to charge as follows: (7) Under the law and evidence in this case, the verdict of the jury should be for the defendant. *Answer.* This point is affirmed, if the jury believe there was the indebtedness as testified to by the plaintiff, on the second policy of insurance. (Third assignment of error.)

The fourth and fifth assignments were to the admission of testimony which was not quoted in the specifications, and the sixth assignment to the refusal to grant a peremptory nonsuit.

In the general charge the Court said: "There has never been any limit made by law as to what amount a debtor must owe before a life insurance can be taken out upon him for that debt; and, as regards the first claim made in this case, it being the sum of \$500, and on account of the \$100 being given besides, there is no difficulty as regards that; there was an indebtedness of \$500, and that is considered, even by the plaintiff—by the parties interested—as an insurable interest sufficient to sustain this policy, and to sustain the right of the plaintiff to hold the money that he received from the company. But on the second one, according to the defendant's evidence before you, by lending money at different times, or by giving money, and by furnishing articles of apparel at certain times, a debt had been accumulated of some \$150, perhaps more; and about six months after the first policy was taken out for \$2000 in the Keystone Mutual, another insurance was taken out in the Fidelity Beneficial Association in Lancaster. . . ."

Verdict and judgment for plaintiff for \$937.54. Defendant appealed, assigning error, *inter alia*, as above.

N. M. Wanner, for appellant.

Edward Chapin, for appellee.

October 5, 1891. *PAXSON, C. J.* The appellant was the holder of two policies of \$2000 each upon the life of Frank Shaffer. That he was a creditor of Shaffer at the time the first policy was taken out to the amount of \$500 was not disputed; nor was any serious contention raised as to excess of insurance. The second policy was taken out some time after the first, and the defendant alleges that it was done at the request or suggestion of his debtor. He testified: "Why, he (the debtor) came to me, and told me that

be thought that the other policy would not pay me for what I had done for him, and he thought that I ought to take out another one, and, if I would promise to go to the expense of burying him and see that he was nicely buried, that I should take out another policy, because he did not think these other companies were paying in full, and I would run that risk; and he said he thought I ought to take out another one, and in that way pay it for him." There was evidence that the defendant had advanced Shaffer as much as \$150 between the first and second policies, besides furnishing shoes and some other matters to his family; that the whole of these advances amounted to \$200 to \$250; and that after Shaffer's death, the defendant paid his funeral expenses, about \$60 or \$65 more.

This suit was brought by Mrs. Shaffer as administratrix of her husband, to recover the balance received by the defendant on the two policies over and above the debt, interest and costs of the insurance. The Court below held that as to the first policy there could be no recovery, as the debt proved was ample to take it out of the speculative class, and that as to the second policy the jury must also find for the defendant, if they believed there was the indebtedness as testified by the defendant, on the second policy. The jury found for the plaintiff the amount collected upon the second policy. See third assignment. It would not have been error to refuse the defendant's seventh point, embraced in this assignment, for the reason that it prayed for a binding instruction. The question of the existence and amount of the indebtedness upon which both policies were based, could not properly have been withdrawn from the jury. But we think the learned Judge erred in separating the policies, thus making the second policy depend upon the subsequent indebtedness. If in point of fact the first policy was insufficient to cover the debt, the defendant had the right to take out an additional policy for that purpose, and its validity must be measured by the whole amount of existing indebtedness. Thus the question upon another trial will be whether an insurance of \$4000 is disproportioned to the whole indebtedness existing at the time the second policy was issued; and if the defendant agreed that in consideration of the second policy he would pay Shaffer's funeral expenses, and has actually paid them, we see no reason why the amount thereof should not be included in the indebtedness. It is true it was not an existing debt at that time, but it was an obligation assumed for Shaffer's benefit and for that of his family, and, having been fulfilled, should be recognized. Whether the insurance was so disproportioned to the debt as to make it a speculative or gambling transaction, must be determined according to the rule laid down in *Ulrich v. Reineohl*, decided herewith.

As the case must go back for a re-trial, it is proper to say that we think the learned Judge erred in holding that the amount paid by defendant for counsel fees in collecting the money from the insurance companies, could not be deducted from the amount in his hands in case of a recovery by the plaintiff. The money was collected by suit, and a portion only of the amount of the policies paid. The employment of counsel was therefore a necessity. The payment of the money was the result of their efforts, and we think the amount paid them, as fees for such services, is properly deductible from the fund realized. This was a suit for money had and received, and the defendant is not properly chargeable with what never came into his hands. It matters not whether the counsel fees were deducted from the fund before he received it, or whether he paid them out of said fund after it came into his hands. The effect is the same, and the defendant can only be charged with the net proceeds.

This disposes of the first and second assignments. The third has been already sufficiently referred to. The fourth and fifth do not conform to the rules of Court, while the sixth relates to a subject that is not assignable as error. The remaining assignments do not require discussion.

Judgment reversed, and a venire facias de novo awarded.

[See preceding case.]

R. H. N.

Oct. '91, 1.

October 6, 1891.

Shields v. Delo.

Grantor and grantee—Bond—Condition of—Right to remove fixtures at the pleasure of grantor—When merely a personal right.

G. conveyed to D. a tract of land in fee simple for \$5000. D. executed a bond to G. upon the same day for \$4300, to be paid in four annual payments, beginning one year after the death of G., by which bond he agreed to give to G. during his lifetime one-fourth of all grain in the bushel, one-fourth of all hay in the barn, one-fourth of the fruit grown, and one-fourth of the pasturage upon the premises; "also the said G. to have the privilege of operating his oil wells on the premises without let or hindrance from the said D., and the said G. may at any time at his own pleasure remove any buildings and the machinery of the said wells without fraud or further delay: then this obligation to be void," etc. There were nine oil wells in operation upon the premises at this time; and during the lifetime of G. six of the wells were abandoned, and the rigs, fixtures, and machinery disposed of by him. After his death the machinery, tubing, etc., of the three remaining wells were claimed by the executor of G. and by D.:

Held, that the right to the machinery at the wells passed by the deed to D., and it was subject only to the right of removal by G. during his lifetime.

Appeal of D. M. Delo, defendant, from the judgment of the Common Pleas of Clarion

County, in an amicable action and case stated, wherein John C. Shields, executor of George P. Delo, deceased, was plaintiff.

The case stated set forth that George P. Delo died April 12, 1889, having first made his last will, wherein the plaintiff was appointed his executor, to whom letters testamentary were duly issued. On April 25, 1881, the testator and Martha his wife conveyed to the defendant in fee a certain piece of land, together with all and singular the buildings, improvements, ways, water-courses, rights, liberties, privileges, hereditaments, and appurtenances whatsoever thereunto belonging, etc. To this deed was attached a receipt of George P. Delo for the purchase-money, \$5000. Upon the same day, D. M. Delo, defendant, executed and delivered to George P. Delo a bond in the sum of \$4300, of which the condition was:—

The condition of the above obligation is such that if the above bounden D. M. Delo, his heirs, executors, administrators, and assigns, do well and truly pay, or cause to be paid, to the said George P. Delo, his certain attorneys, heirs, executors, administrators, or assigns, the sum of four thousand three hundred dollars, in four equal annual payments, beginning one year after the decease of the said George P. Delo, and in the mean time, during the life of the said George P. Delo, give him the one-fourth of all grain in the bushel, the one-fourth of the hay in the barn, produced on the premises, deeded by the said George P. Delo to the said D. M. Delo, by deed bearing even date herewith; also one-fourth of the fruit produced from the trees growing on the premises, and permit the said George P. Delo the one-fourth of the pasture, if he desires it; also the said George P. Delo to have the privilege of operating his oil wells on the premises, without let or hindrance from the said D. M. Delo, and the said George P. Delo may at any time, at his own pleasure, remove any buildings and the machinery of the said wells without fraud or further delay; then this obligation to be void, or otherwise to remain in full force and virtue.

At the time the said deed and bond were executed there were nine oil wells in operation on the premises conveyed by George P. Delo to the defendant. During the lifetime of George P. Delo six of the wells were abandoned, and the rigs, fixtures, and machinery were disposed of by him. After his death, an appraisement was made by the said John C. Shields, plaintiff, as his executor, in which he included the machinery, tubing, and fixtures attached to the three remaining wells, and appraised the same at \$643. The defendant, D. M. Delo, claimed the said machinery, tubing, fixtures, etc., as his property, after the death of George P. Delo, and refused to allow plaintiff to remove or dispose of the same.

It was agreed by the parties to the action, if the Court should be of the opinion that the plaintiff was entitled to the said property as executor of George P. Delo, deceased, that judgment be

entered in his favor and against the defendant for \$643 and costs. Otherwise, if the Court should be of the opinion that the fixtures and property belonging to said oil wells vested in the defendant on the death of the said George P. Delo or prior thereto, judgment to be entered in favor of the defendant with costs.

The Court entered judgment for the plaintiff upon the case stated, in the sum of \$643; whereupon the defendant appealed, assigning the entry of the judgment for error.

William L. Corbett and *Don C. Corbett*, for appellant.

The deed and bond were part of one and the same transaction, and must be construed together.

Cummings v. Autes, 19 Pa. 287.

The words "buildings, improvements, hereditaments, and appurtenances" in the deed, would include the rigs, machinery, tubing, and fixtures attached to the wells.

Waugh's Executors v. Waugh, 84 Pa. 356.

The right given to G. P. Delo in the bond to remove the buildings and machinery "at his own pleasure" was purely a personal right, to be exercised in his lifetime. It terminated at his death, and afterwards the buildings and machinery remained absolutely the property of the grantee.

White v. Arndt, 1 Wh. 91.

William A. Hindman, for appellee.

The agreement that Geo. P. Delo "may at any time at his own pleasure, remove any buildings and machinery of the said wells" worked a conversion of the property from real to personal; they did not pass with the fee, and could have been sold as his property upon an execution.

8 Am. and Eng. Ency. of Law, 54, 62.

Hind's Estate, 5 Wh. 138.

Lawton v. Lawton, 3 Atk. 13.

Dudley v. Warde, Amb. 113.

Lemon v. Miles, 4 Watts, 330.

Watriss v. Bank, 124 Mass. 575.

Cooper v. Johnson, 143 Id. 108.

Martin v. Roe, 7 E. & B. 237.

October 19, 1891. GREEN, J. The deed from George P. Delo, the plaintiff's testator, to D. M. Delo, the defendant, is an absolute deed in fee simple, and passed to the grantee every possible interest of the grantor in the land, and all its buildings, improvements, and appurtenances. No estate whatever in the premises granted remained in the grantor. Had there been nothing more in the transaction than the deed, it cannot be questioned for a moment that the machinery and fixtures in and about the oil wells which were in operation at the time the deed was made, would have passed with the title. Neither argument nor authority is needed in support of this proposition. There was, however, another paper bearing the same date as the deed and which must be regarded as a part of the transaction. It was a bond executed by D. M. Delo for the payment to

George P. Delo of four thousand three hundred dollars as mentioned in a certain condition annexed. This condition required that the money should be paid in four equal annual sums beginning one year after the death of George P. Delo, and in the meantime during his life, the said D. M. Delo was to give to George P. Delo one-fourth of the hay in the barn produced on the premises, one-fourth of the fruit produced from the trees growing on the premises, and one-fourth of the pasture if he desired it. The condition concludes as follows: "Also, the said George P. Delo to have the privilege of operating his oil wells on the premises without let or hindrance from the said D. M. Delo, and the said George P. Delo may at any time, at his own pleasure, remove any buildings and the machinery of the said wells without any fraud or further delay; then this obligation to be void or otherwise to remain in full force and virtue."

It will be observed that whatever rights George P. Delo held as against D. M. Delo, were under and by virtue of the bond. This was the personal obligation of D. M. Delo. Nothing was reserved or excepted out of the deed. The bond required that D. M. Delo should give the money stipulated, give the proportions of hay, fruit, and pasture specified in the bond, and should also permit George P. Delo to operate the oil wells for his own account, and to remove at his pleasure any buildings and the machinery at the wells. From six of the wells George P. Delo did remove the machinery during his life, and the other three were in operation at his death. The machinery at these wells remained and was essential to their operation. The wells and their machinery were a part of the realty. Unless a right to remove the machinery after the death of George P. Delo was vested in somebody it must continue to remain. No such right was reserved to the executors or administrators of George P. Delo, or to his heirs, or to his assigns. The privilege to remove was purely personal to George P. Delo and died with his person. There is no analogy to the case of fixtures erected on leased premises by a tenant or by the owner of a life estate. George P. Delo never was a tenant either for years or life. He was the owner of the land at the time he operated the wells and up to the time of the grant, and he put in the machinery and fixtures as owner and not as tenant in any sense. That being the case they passed by the grant of the land, and the only right he held after the grant was under the personal obligations of the grantee. That right was limited to the period of his own life simply because it could not be exercised thereafter, and it did not extend to any other persons after his death. Of course no other person than George P. Delo could claim the one-fourth of the hay, fruit, and pasture, either

during his life or after, and nothing can be clearer than that the right died with his person. The right to remove the machinery has no higher or other origin than the right to take the hay, fruits, and pasture. We are clearly of opinion that the right to the machinery at the wells passed with the deed to D. M. Delo, and was subject only to the right of removal by George P. Delo during his life. That right not having been exercised as to the machinery at the three wells which were in operation at the death of George P. Delo, that machinery belongs to D. M. Delo under his deed. There was no severance of the machinery from the freehold during the life of George P. Delo, and hence it cannot be claimed by his executor.

The judgment of the Court below is reversed, and judgment is now entered on the case stated for the defendant, with costs, including costs of this appeal.

H. C. O.

June 12, 1891

Commonwealth ex rel. Ostertag v. Fell et al.

Commonwealth ex rel. Baylie v. Fell et al.

Wholesale liquor licenses—Act of May 24, 1887 (P. L. 194)—Power of Quarter Sessions to refuse wholesale license—Mandamus—Remonstrance against location of wholesale liquor store.

An applicant for a wholesale liquor license, under the Act of May 24, 1887 (P. L. 194), whose license was refused by the Quarter Sessions, applied to the Supreme Court for a writ of mandamus, alleging that he was a citizen of the United States, of temperate habits and of good moral character; that he had complied with all the requisites of the law; that no remonstrance was made against him, and that, under the decisions in the petitions of the Prospect Brewing Co., and Pollard *et al.* (24 WEEKLY NOTES, 177 and 181; 127 Pa. 507 and 523), the Quarter Sessions should be compelled to issue him a license. The Supreme Court refused to issue a mandamus.

In the Supreme Court.

Applications by Joseph Ostertag and James A. Baylie for writs of mandamus against Hon. D. NEWLIN FELL, Hon. ROBERT N. WILLSON, Hon. JAMES GAY GORDON, *et al.*, Judges of the Quarter Sessions of Philadelphia County.

The petition of Joseph Ostertag set forth that he is a citizen of the United States and a resident of the city of Philadelphia, a person of temperate habits and of good moral character; that on February 7, 1891, he applied to the Quarter Sessions for a wholesale liquor license, under the Act of May 24, 1887 (P. L. 194), his application

stating that his residence is No. 2229 Howard Street, and that the place for which he desired a wholesale license is situate at No. 2502 Kensington Avenue; that no remonstrance of any character whatever was filed or presented against the petition or against granting of the license; that on May 15, 1891, a hearing was had upon the petition, and the petitioner was interrogated by the Court as follows: Q. What is your business now? A. Grocery business. Q. Have you ever been in the liquor business? A. No, sir. Q. Have you ever been a bartender. A. No, sir. Q. What is carried on in this place, now? A. The place is vacant at the present time. Q. Nothing is going on? A. No, sir. Q. How long has it been vacant? A. It has been vacant, I suppose, six to eight months. Q. What was carried on there before? A. The butcher business. Q. Who owns the place? A. Hugh Henderson. Q. Did he ever carry on a liquor saloon there? A. No, sir. Q. Have you made arrangements with him for a lease? A. I have. Q. Do you want a wholesale and bottler's license there? A. Yes, sir. Q. What kind of a wholesale business do you expect to carry on there? A. Simply a wholesale business—what the law requires. Q. How do you expect to sell beer? A. In bottles. Q. In the keg? A. If I have orders I will sell in the keg. Q. Will you sell it by the quart, by draught? A. No; no draught at all to be made, in no beer at all. Q. By the keg and by the bottle? A. By the keg and by the bottle. Q. In no other way? A. In no other way. Q. You were never a bartender? A. I never was a bartender. Q. Nor helper? A. Nor helper, or anything else.

The petition further alleged that no information came before the Court except as disclosed in the application filed by the petitioner and in the testimony above recited, and that on May 22, 1891, the Quarter Sessions refused to grant the license prayed for, assigning no reasons for this action.

The petitioner further averred that he has not violated any law of the State, and that he is of right, by virtue of the Act of May 24, 1887, entitled to the license prayed for, having complied with all the requirements of the law, and in the absence of anything upon the record which would warrant a refusal of his application; and prayed for a writ of alternative mandamus, commanding the Judges of the Quarter Sessions to show cause why the prayer of the application should not be granted, and to do fully all that which is required to be done by law and justice in the premises.

The petition of James A. Baylie was similar in most respects to that of Joseph Ostertag, except that it stated that a remonstrance signed by two representatives of the Law and Order Society was filed against his application for a bottler's

license, under the Act of May 24, 1887, as follows:—

We think the said applicant is not a person of good moral character in this, that from the location and surroundings we do not believe that a legitimate bottling business will be carried on.

That the persons signing the remonstrance were not examined at the hearing, the only testimony given being that of the petitioner, as follows:—

By *Lewis D. Vail, Esq.* Q. What business are you in now? A. I have been in the coopering business. Q. How long? A. Going on three years. Q. Were you ever in the liquor business? A. No, sir. Q. Have you ever been a bartender? A. I have been bottling for a man for the last six months. Q. For whom? A. Patrick Conover, at Howard and Huntingdon. Q. Have you been bottling for him, or driving his wagon? A. Both. Q. Has he applied too? A. Yes, sir. Q. What is carried on in this place now, No. 2517 Memphis Street? A. Nothing. Q. It is a private house? A. No, sir; it is a store front. Q. Do you live there? A. Yes, sir. Q. Do you own the house? A. No, sir. Q. Will the owner of the house allow a bottling business there? A. Yes, sir. Q. How do you expect to get your trade? A. By going around in the wagon and soliciting trade. Q. Who owns the place? A. I forget the lady's name. She lives at the corner of Memphis and Cumberland. Q. Have you seen her? A. Yes, sir; I rented the place off of her.

By Judge WILLSON. Q. Do you expect to keep beer on draught? A. No, sir.

The petitioner alleged that the Court of Quarter Sessions has no right to consider any questions concerning an application for a bottler's license, other than citizenship, character, and temperate habits; that the remonstrance filed is not a remonstrance to any one or more of the questions within the province of the Court to consider, but relates entirely to the location of petitioner's place of business; that he is entitled to a fair trial on such points only as are at issue; that the papers filed of record must raise a substantial issue, and that the paper termed a remonstrance does not raise such an issue, and is not such a paper as the Quarter Sessions have a right, at law, to consider.

James M. Beck (F. Pierce Buckley and William F. Harritt with him), for the applicants, submitted, with the applications, a printed brief, in which it was contended—

The petitioners for these writs of alternative mandamus are unquestionably entitled to them, unless the law as clearly stated by PAXSON, C. J., in the petitions of Prospect Brewing Co., and Pollard *et al.* (24 WEEKLY NOTES, 177, 181; 127 Pa. 507, 523), has been overruled. These cases decided.—

(1) The wholesale liquor law of May 24, 1887 (P. L. 194), does not confer upon the Quarter Sessions the discretionary powers conferred by the Retail Act of May 13, 1887 (P. L. 108).

(2) In Philadelphia and Allegheny counties, a citizen of the United States, of temperate habits and good moral character, who presents his application for a wholesale license in due form, and who has complied with the requisites of the law, has a *prima facie* right to a license.

(3) In the absence of anything upon the record to impeach said right, it is the duty of the Court to grant it.

(4) The Court has nothing to do with the question whether a particular wholesale license is necessary for the accommodation of the public, or whether it is desirable to license more than a limited number.

(5) Their only discretion is a qualified and limited discretion, and is confined to the inquiry whether the applicant is a citizen of the United States, of temperate habits, and good moral character.

(6) In the absence of any remonstrance or objection upon the record, it is the duty of the Court to grant a wholesale license, and the objection must be limited to the three disqualifications already alluded to.

(7) Such remonstrance or objection should be in writing, and placed upon the record.

(8) Without any remonstrance or objection, there is no issue before the Court for it to decide, and there cannot be a legal trial. Where there are no disputed questions of fact, there can be no valid finding of fact.

(9) The Court of Quarter Sessions in granting wholesale licenses in the counties named, has not the latitude of inquiry of a "roving commission," nor the arbitrary power of the "Emperor of China."

(10) If, without remonstrance, they refuse to grant an applicant a wholesale license, this Court will issue a mandamus to compel them to perform their plain duty.

In no recorded case has this law ever been modified, abrogated, or overruled as to the counties to which it applied. On the contrary, it has been followed and reaffirmed in *Nordstrom's Petition*; *Commonwealth v. Wilson* (25 WEEKLY NOTES, 148; 127 Pa. 542), and *Knarr's Petition* (Id. 554). *In re Wheelin* (26 WEEKLY NOTES, 72) did not abrogate it, for there a remonstrance was filed alleging that the applicant had not a good moral character, and the applicant refused to appear. The same observation applies to *In re Collum* (Id. 73), where a remonstrance of like effect was filed.

The petitioners applied in due form. They observed all the requisites of the law. They were

citizens of the United States, and there has not been a suggestion or suspicion from any quarter or of any kind that they are not of good moral character and of temperate habits. Against one petitioner the remonstrance simply objected to the location of the place for which a license was required, notwithstanding the Supreme Court had said that "If all the wholesale liquor houses in Pittsburgh were in a single block, it would make no difference and would be no objection to their being licensed." Both applicants appeared for examination, and the testimony brought out no fact, suspicion, or innuendo which reflected in any way on their citizenship, sobriety, moral character or in any other manner howsoever. No witness appeared against them. It followed as a necessary consequence that they were entitled to a license, and that the Court of Quarter Sessions could not, except in the exercise of an authority as arbitrary as the "Emperor of China," refuse them.

October 19, 1891. PER CURIAM. Writs of mandamus refused. A. R. H.

Jan. '90, 414.

January 9, 1891.

Summers v. Bergner and Engel Brewing Company.

Negligence—Contributory negligence—Infant of tender years—When not guilty of contributory negligence—When trespasser—Evidence.

A child four years old cannot be held responsible for contributory negligence.

A child four years of age was knocked down and run over by a team of horses in charge of a driver and injured. There was evidence tending to show that the driver was asleep, that the team was on a descending grade and going rapidly. The child, when discovered, was upon her feet and being turned around between the fore legs of one of the horses, and was thrown down and struck by one of the wheels, receiving injuries from which she never recovered, including the loss of the sight of one eye. The driver testified that the child ran under the horses:

Held, that the driver's negligence and the accident were, under the evidence, closely connected, and the inference that the former caused the latter is the natural result of the testimony.

The Court cannot assume that the child was a trespasser, or that her actions were negligent or rash, merely because the evidence fails to explain how she became involved in the peril in which she was discovered. In the absence of testimony on this point, the reasonable inference is that she was run over while crossing or playing in the street, and when it affirmatively appears that the driver was asleep and the team and wagon were moving down grade at a rapid gait, it is a question for the jury whether the negligence of defendant caused the injuries.

Hestonville Pass. Rwy. Co. v. Connell (88 Pa. 520), distinguished; Lombard & South Sta. Pass. Rwy. Co. v. Steinhart (2 Penny. 358) followed.

Appeal of the Bergner and Engel Brewing Company, defendant, from the judgment of the Common Pleas No. 2, of Philadelphia County, in an action of case brought by May Summers, by her next friend, M. P. Summers, to recover damages for injuries received owing to the alleged negligence of one of defendant's drivers.

On the trial it appeared that on July 28, 1885, a driver of defendant, John Dillenz, was driving a beer wagon, about 10 o'clock in the morning, down Tenth Street, in the city of Philadelphia, and had driven across Washington Avenue. Dr. A. W. Griffith, who was walking up Tenth Street, below Washington Avenue, at the time, heard a scream and looking around saw this driver and wagon coming down Tenth Street, and plaintiff, a child about four years of age, standing up under the horses, or between the fore feet of one of the horses, and being turned around by the horse's legs. The team was in the middle of the street, on the passenger railway track, coming down at a slow trot, or fast walk, on a slight down grade. Dr. Griffith shouted to the driver, whereupon he instantly endeavored to stop the horses and the child was pulled out from the perilous position.

When the child was brought home it was found that she was bruised at the hip, at the stomach, and was bleeding at the left ear. The child was confined to her bed about two weeks, when she was taken to Atlantic City for a few weeks, and after her return went about as usual, but seemed to be nervous. In February, 1889, three years and seven months after this accident, the child was found to have a defect of vision of the right eye, was taken to an oculist, who found the right eye turned partially outward, atrophy of the optic nerve, the optic disc pale, and some evidences of inflammation of the retina, and since then the sight of this eye has entirely gone. The oculist expressed his opinion that this accident could account for the condition of the eye, but his opinion was based upon the facts of the accident as related to him by the parents and grandparent of the child, and those facts were "that she was bruised from head to foot, base of the skull fractured, both eyes contused, profuse bleeding from both ears." The descriptions of the injuries, as testified to by plaintiff's witnesses, were "bruised at the hip, bruised in the stomach, bleeding from the left ear." The oculist was allowed to give his testimony and opinion on these hypothetical facts, before testimony as to the actual injuries of the child was given, on the promise of plaintiff's counsel that the facts would be proved. There was no evidence offered, however, of any

fracture of the skull, or of any contusion of the eyes, or of any bleeding from the right ear.

The driver testified that this child was in company with three or four other children, that they had all crossed the street in front of his horses, and this child appeared to have dropped something, went back to pick it up, and ran right in front of one of his horse's feet. Dr. Griffith, the witness to the accident, said he believed the driver was asleep. That was the only testimony in the case explanatory of the child getting into the position where she was injured.

Counsel for defendant offered in evidence exemplification of the record from the Quarter Sessions in the case of the Commonwealth v. John Dillenz, to show that Dillenz, the driver, was taken into the Quarter Sessions by the next friend of the plaintiff, for the purpose of showing the nature of the charge brought, and that at that time there was no contention on the part of Mr. Summers that the driver was asleep, but that he prosecuted him for assault and battery. Objected to. Objection sustained. Exception. (First assignment of error.)

The Court charged the jury, *inter alia*, as follows:—

"If you find there was negligence in the way the driver was conducting the wagon at this time, and that this negligence resulted in the injuries which the child suffered, your verdict would be for the plaintiff." (Second assignment of error.)

"Now you have heard this testimony and the testimony of the parents of the child, as to when they first noticed this apparent injury to the eye, and my recollection is that they fix it at about a year or about a year and a half. If this permanent injury was the result of the accident, and you find in favor of plaintiff on the question of negligence, it would be your duty to ascertain what was the loss of earning power to the child because of the injury. It is not, as has been suggested to you by the counsel for the plaintiff, what you would be willing to sell your eyes for, or one of your eyes for. That is a bargain which no man in his senses would be willing to make. But it is your duty to carefully and thoughtfully estimate what would be the loss of the earning power because of this injury, and to give a verdict for that, and for that alone, in addition to compensation for the pain and suffering to which I have called your attention." (Third assignment of error.)

Defendant requested the Court to charge, *inter alia*:—

(3) No person in driving through the street is bound to anticipate that a person, either child or adult, may suddenly run in front of, or under his horses and get injured, and if any injury does happen under such circumstances, the driver would not be negligent, and there could be no

recovery against him, or his employer. *Answer.* I decline that point. (Fourth assignment of error.)

(4) If this child ran suddenly right in front of the horses of the defendant, either to pick up something she had dropped, or for any other childish reason, and that act of hers was the real and sole cause of the accident, the plaintiff cannot recover, and the verdict should be for defendant.

Answer. I affirm that point. Ordinarily, if there is negligence on the part of both plaintiff and defendant, which unite in causing the accident, the plaintiff cannot recover, because if there be any contributory negligence, it deprives him of that right. In this case, the child being about four years of age, there can be no contributory negligence.

(5) There being no evidence in the case that the accident was the direct result of any negligence on the part of the defendant's driver, therefore, under all the evidence, the verdict must be for defendant. *Answer.* I decline that point. (Fifth assignment of error.)

Verdict for plaintiff for \$7500. A rule for a new trial was discharged upon plaintiff's filing a remittitur for all over the sum of \$5000. Defendant then appealed, assigning error as above.

John Dolman (James P. Dolman with him), for appellant.

The point of law raised by the second, fourth, and fifth assignments must be argued upon the supposition that the plaintiff's testimony was true, and the driver of defendant's wagon was asleep. This was the only negligence alleged. But the testimony on behalf of the plaintiff left the jury entirely in the dark as to the manner in which the plaintiff came under the feet of the defendant's horses, and the jury should not have been permitted to infer, without evidence, that it was under circumstances which entitled plaintiff to recover.

Hart v. Allen, 2 Watts, 114.

Souter v. Baymore, 7 Pa. 415.

Raby v. Cell, 85 Id. 80.

No one witnessed the accident. No one knows where the child was, or what she was doing at the time. There is not a scrap of evidence to show how she came under the horse's feet. If the accident was caused by the recklessness of the child, and would have happened even if defendant's driver had been awake, his being asleep did not contribute to it. The plaintiff must show the circumstances, and that if defendant had exercised proper care, the accident would not have happened.

Ogden v. R. R. Co., 23 WEEKLY NOTES, 191.

Goshorn v. Smith, 92 Pa. 435.

R. R. Co. v. Morgan 82 Id. 134.

R. R. Co. v. Spearen, 47 Id. 300.

While a child of tender years cannot be guilty of contributory negligence, yet it can, by its own

recklessness, precipitate an injury upon itself, for which the party inflicting it will not be liable. Plaintiff should be held to the strictest and fullest measure of proof that it was the negligence of the defendant which caused the injury.

R. R. Co. v. Spearen, 47 Pa. 300.

Ry. Co. v. Connell, 88 Id. 520.

Bridge Co. v. Jackson, 114 Id. 321.

That a child of tender years is wandering upon the highway without a protector is *prima facie* negligence on the part of its parents.

R. R. Co. v. Hammell, 44 Pa. 375.

The opinion of the experts, being based upon an admittedly erroneous assumption, should have been excluded.

Reber v. Herring, 115 Pa. 599.

The sum of the testimony upon this point was that the defect in plaintiff's eyesight might possibly have been caused by the accident; this was not sufficient.

Cover v. Manaway, 115 Pa. 338.

Hyatt v. Johnston, 91 Id. 196.

Express Co. v. Wile, 64 Id. 201.

Raby v. Cell, 85 Id. 80.

Canal Co. v. Barnes, 31 Id. 193.

R. R. Co. v. Butler, 57 Id. 335.

John G. Johnson (Thomas Diehl with him), for appellee, cited—

Lombard and South Sta. Pass. Rwy. Co. v. Steinhart, 2 Penny. 358.

October 5, 1891. *McCOLLUM, J.* May Summers, a child four years old, by her next friend and father, brought this action against the *Berger and Engel Brewing Company*, to recover damages for injuries she received by being run over on a public street in Philadelphia, by a team and wagon belonging to the defendant company and then engaged in its work and in charge of its employé. It is alleged that the accident was the result of the negligent driving of the team. There was evidence that at the time of the occurrence the driver was asleep, that the team was on a descending grade and going at a rapid gait. The child, when discovered, was upon her feet and being turned around between the forelegs of one of the horses, but before she could be rescued she was thrown down and struck by one wheel of the wagon, and sustained injuries from which she has never recovered, including the loss of the sight of one eye. The negligence and the accident were, under the evidence, closely connected, and to the ordinary observer inseparable. The inference that the former caused the latter is not a strained one, but a reasonable and natural result of the testimony. Aside from the statement of the driver, whose account of the affair was incoherent and confused, there was nothing to indicate that the child ran hastily or impulsively under the horses or the wagon, and certainly there is no presumption that she did so. Besides, a child four years

old cannot be held responsible for contributory negligence. We cannot assume that she was a trespasser, or that her actions were negligent and rash, merely because her evidence fails to explain how she became involved in the peril in which she was discovered. In the absence of testimony on this point the reasonable inference is that she was run over while crossing or playing in the street; and when, as here, it affirmatively appears that the driver was asleep and the heavy team and wagon were moving down grade at a rapid gait, it is a question for the jury whether the negligence of the defendant caused the injuries.

In *Hestonville Passenger Railway Co. v. Connell* (88 Pa. 520), cited by the appellant, it was held that there was no defect in the car, nor neglect in its management, and that the company was not responsible for injuries received by a child from his sudden and unexpected attempt to mount the front platform of the car while the driver, who was also conductor, was on the rear platform and could not have foreseen or guarded against the act; but Mr. Justice GORDON, in delivering the opinion of the Court, said, "It is not a case of mere negligence on the child's part, as if it had been run over whilst crossing or playing in the street; that would raise a question very different from the one in hand."

In *Lombard & South Streets Passenger Railway Company v. Steinhart* (2 Pennypacker, 358), substantially the same questions were raised that we are invited to consider in this case, and they were decided against the company. There is a striking resemblance between the company's sixth point in the case cited and the appellant's third point in the case under consideration. In *Railway Co. v. Steinhart* (*supra*), the plaintiff recovered a verdict in the Court below, and in affirming the judgment this Court said, "The main question, then, was whether the negligence of the railway company caused the injury. While some of the evidence was conflicting, yet there was amply sufficient, if believed, to justify the jury in finding it as a fact. There was evidence that the driver of the car was intoxicated, and driving at a rapid rate of speed, without giving that attention to the observance of any object on the track which his duty required."

There was no exception taken in the Court below to the admission of evidence that the loss of sight was attributable to the accident, nor was the Court requested to withdraw it from the jury. It is now suggested and argued that the testimony on this point was insufficient to justify an inference that the defect of vision was the result of the casualty, and we are requested to convict the Court below of error because there

was not an unsolicited instruction to that effect. It is an unusual request, but as we think the testimony of the experts required the jury to determine whether the loss of sight was one of the disabilities caused by the accident, we dismiss it without further comment.

The record of the suit in the Court of Quarter Sessions, between the Commonwealth and John Dillenz was not relevant to this issue, and was therefore properly excluded. The specifications of error are overruled, and—

The judgment is affirmed.

H. C. O.

Jan. '91, 106.

March 26, 1891.

City of Philadelphia to use v. Pennsylvania Hospital.

Taxes and taxation—Municipal claim for curbing—Whether a tax—Charity—Exemption of property of, from taxation—Whether property of charitable association is exempt from claim for curbing.

The authority vested in a municipal corporation to require property owners to pave and keep in repair the sidewalks in front of their properties, does not rest upon the same basis as the right of local taxation, but imposes a duty on the property owner in the nature of a police regulation.

Wilkinsburg v. Home for Aged Women (131 Pa. 117), followed.

A charitable corporation, whose property is exempt from taxation, is, therefore, not exempt from an assessment by a municipal corporation for the cost of laying a curb along the footway in front of its property.

Appeal of the Contributors to the Pennsylvania Hospital, defendants, from the judgment of the Common Pleas No. 1, of Philadelphia County, in a proceeding upon a claim for paving, wherein the city of Philadelphia to the use of John M. Mack, was plaintiff.

In the Court below the plaintiff issued a writ of scire facias sur municipal claim for curbing in front of a lot of ground on Forty-second Street, between Market Street and Haverford Road, belonging to the defendant.

In the affidavit of defence the defendant set up that it was incorporated under the Act of May 11, 1751 (1 Sm. Laws, 208), entitled "An Act to encourage the establishing of a hospital for the relief of the sick poor of this province, and for the reception of lunatics;" and that under the Acts of March 19, 1845 (P. L. 187), and April 18, 1853 (P. L. of 1854, 834), all its estate, real and personal, was exempt "from the payment of taxes of any kind whatsoever." That all the income, whether derived from invested funds or contributions, was used in the maintenance of the

two hospitals—one at Eighth and Spruce streets, and the other in the late township of Blockley, alongside of which the work, for which this lien was filed, was done.

The Court below made absolute a rule for judgment for want of a sufficient affidavit of defence. Whereupon the defendant took this appeal, assigning as error this action of the Court.

J. Rodman Paul and George W. Biddle (with them *Henry Galbraith Ward*), for appellants.

The case of *Borough of Wilkinsburg v. Home* (131 Pa. 109), was decided on the ground that it was the duty of the lot owners "to keep their footwalks in repair, and if necessary to relay them;" and the duty laid upon the defendant was to abate a nuisance. But in the present case the power to lay the tax was derived from the Act of Feb. 2, 1854, § 40 (P. L. 43), which authorized the assessing of the cost of the work in question against the owners of lots. It has many times been decided that such an assessment is a tax.

Washington Av., 69 Pa. 352.

Pray v. Northern Liberties, 31 Id. 69.

Greensburg v. Young, 53 Id. 280.

Hammitt v. City, 65 Id. 151.

Olive Cemetery v. City, 93 Id. 131.

Wistar v. Phila., 80 Id. 505.

City v. Tryon, 35 Id. 402.

Edwin O. Michener, for appellee.

One essential fact which should be noticed as strengthening the position of the city, is her right to enforce this claim under her police power. If an accident should happen to any one by reason of the bad condition of a footwalk, either from having no pavement or having a pavement out of repair, the city is liable for damages, and if no duty exists on the part of the property-owner, that may be enforced, to keep the property in repair, the city is placed in a very serious position. She must either pave and repair the footwalks at her own expense, or she must suffer in actions for damages because of failure to keep them in order.

The power to collect the cost of paving, curbing, and keeping in repair the footwalks of the city, exists independently of the taxing power.

Wilkinsburg Borough v. Home, 131 Pa. 109.

Cooley on Taxation, 396-398.

In re Goldard, 16 Pickering, 504, 509.

Lowell v. Hadley, 8 Metcalf, 180.

State v. Charleston, 12 Rich. 702.

Washington v. Nashville, 1 Swan (Tenn.), 177.

Whyte v. Nashville, 2 Id. 364.

Mayor v. Maberry, 6 Humph. 368.

The purpose of requiring the property-owner to pave and curb the footwalk is clearly not for revenue, but is simply a regulation under the police power of the municipality, and the cost of it is chargeable against the property.

October 5, 1891. STERRETT, J. In this action of scire facias *pro municipal claim* for curbing, etc., the defendant's affidavit of defence

was adjudged insufficient and judgment was accordingly entered in favor of plaintiff for the amount of his claim. From that judgment this appeal was taken by defendant. The facts are fully presented in the statement of claim and affidavit of defence. There is no question as to the curbing having been properly done, nor as to the cost thereof. The sole question is whether, upon any legal ground, either as a tax or under the police power of the city, the assessment in question can be sustained.

It is contended by defendant that an assessment for curbing is a tax, and inasmuch as its "estate and property, both real and personal, are by law exempt from the payment of tax of any kind whatsoever," the plaintiff's claim cannot be enforced; and in support of the position, *Olive Cemetery Company v. Philadelphia* (93 Pa. 131), and other cases, recognizing the right of local taxation for certain local purposes, are cited. But, it is a mistake to assume that the authority vested in municipal corporations to require property owners to curb, pave, and keep in repair the sidewalks in front of their respective properties, rests upon the same basis as the right of local taxation recognized in the cases referred to. There is a marked distinction between them. In the former a duty is imposed on the property owner in the nature of a police regulation. In the latter no such duty is cast upon him. This distinction was clearly pointed out by the present Chief Justice in *Wilkinsburg v. Home for Aged Women* (131 Pa. 117), which, in principle, is identical with this case. In *Cooley on Taxation*, 398, the learned author says: "The cases of assessments for the construction of walks by the side of the streets, in cities and other populous places, are more distinctly referable to the power of police. These footwalks are not only required, as a rule, to be put and kept in proper condition for use by the adjacent proprietors, but it is quite customary to confer by the municipal charters full authority upon the municipalities, to order the walks of a kind and quality by them prescribed, to be constructed by the owners of adjacent lots at their own expense, within a time limited by the order for the purpose, and that in case of their failure so to construct them, it shall be done by the public authorities, and the cost collected from such owners, or made a lien upon their property. When this is done the duty must be looked upon as being enjoined as a regulation of police, made because of the peculiar interest such owners have in the walks, and because their situation gives them peculiar fitness and ability for performing, with promptness and convenience, the duty of putting them in proper state, and of afterwards keeping them in a condition suitable for use. . . . The Courts distinguish this from taxation on the ground of the peculiar interest which those upon

whom the duty is imposed, have in its performance," etc. Again, on page 396, he says: "The distinction between a demand of money, under the police power, and one made under the power to tax, is not so much one of form as of substance. The proceedings may be the same in the two cases, though the purpose is essentially different. The one is made for regulation and the other for revenue. If, therefore, the purpose is evident in any particular instance, there can be no difficulty in classifying the case and referring it to the proper power." The same distinction was recognized in *re* Goddard (33 Mass. 504, 509).

The ordinance of May 3, 1855, passed in pursuance of the authority vested in councils by the Acts of April 16, 1838, and February 2, 1854, provides that "the footways of all public streets and highways . . . shall be graded, curbed, and paved and kept in repair at the expense of the owners of the ground fronting thereon." The third section of the same ordinance provides that the owner shall have the right to do the work of paving and curbing and keeping in repair said footways, and on his failure to do so, the city shall do it at his expense and may file a lien for the amount.

This requirement is clearly not for the purpose of revenue. It is simply a regulation under the police power of the municipality. On principle, as well as on the authority of our own and other cases, the amount expended by the city in enforcing the regulation is not in any proper sense of the word a tax. It is a liability incurred for neglect to perform a duty imposed by the police power of the city. In so holding we adhere to the principle ruled in *Wilksburg v. Home for Aged Women*, *supra*.

Judgment affirmed.

R. H. N.

Jan. '91, 379.

April 28, 1891.

Gorgas v. Philadelphia, Harrisburg, and Pittsburgh Railroad Co.

Eminent domain — Railroads — Damages — Measure of — Points for charge — Multiplicity of subjects in — Experts — Who are and who are not — View of land by trial jury — Evidence of viewers.

A point for charge containing eleven paragraphs, in each of which is a distinct subject for the consideration of the jury in assessing damages, may well be refused.

Where, by the construction of a railroad across a public highway, a farmer's access to a stream on the highway, where he had theretofore watered his cattle, is rendered inconvenient and difficult, it is no element of damage to his farm, because he has merely been deprived of what did not belong to him.

In a suit for damages for the construction of a railroad it is not error to instruct the jury that if they found there was special advantage to the farm by the establishment of a station near it, that such advantage could be "set off as against the actual disadvantages to the farm."

Where a trial jury by agreement visits the land which is claimed to be damaged in the proceeding before them, the true rule is that in estimating the damages they shall consider the testimony, as given by the witnesses, in connection with the facts as they appeared on the view, and upon the whole case, as thus presented, ascertain the difference between the market value of the property before and immediately after the land was taken.

A witness who testifies that he had no knowledge of the market value of the land in question, but merely knew it by being in the neighborhood and "had heard of some of" the prices, is incompetent as an expert.

One who has acted as a viewer appointed by the Court to view land through which a railroad has been constructed may, on an appeal from the report of the viewers, testify to his observation while acting as viewer.

Appeal of William R. Gorgas, plaintiff, from the judgment of the Common Pleas of Cumberland County in an action of trespass against the Philadelphia, Harrisburg, and Pittsburgh Railroad Company, to recover damages for the taking of and injury to his land by the construction of the defendant's road through it.

The plaintiff originally presented a petition for viewers, who were appointed and awarded him \$2000 damages. He thereupon appealed from the award. On the trial the plaintiff proved the construction of the road and the manner in which it crossed his farm.

The plaintiff called as a witness Jonas Kohler who testified that he was a farmer 59 years of age, and had resided in the county since 1844. He was then asked: Q. Are you acquainted with the market price of lands in Lower Allen Township, and in that vicinity? A. I do not believe I am; I do not believe I am acquainted with those fancy prices. Q. Are you acquainted with what lands sell for generally in that section of the county? A. No, sir, I do not believe I am. Q. Do you know the Gorgas farm? A. I do, sir. Q. How long have you known that? A. I have known it ever since '44. Q. How well have you known it? A. Well, I have known it quite well; I have lived within two and a-half miles, from two and a-half to six miles; we come through there quite frequently. Q. Did you know that farm since the railroad is constructed over it? A. Yes, sir. Q. Has the construction of that railroad over this farm been an advantage or disadvantage to its market value or selling price?

Mr. Wetzel. We object to the question because the witness is incompetent; he has no knowledge, according to his own testimony, of the market value of land in that part of the county.

THE COURT. Q. Have you been upon this farm? A. Yes, sir. Q. Both before and since the construction of the railroad? A. Yes, sir. Q. Have you any knowledge of the market value of land in that neighborhood? A. Well, I have heard of some of those high prices there, and when they talk of selling a farm of 156 acres for \$400 an acre, that kind of knowledge I have not, I am sorry to tell you, but when you come to talk about \$200 or \$250 an acre, that kind of knowledge I have got. Objection sustained. (Sixth assignment of error.)

The defendant called Thomas R. Burgner who testified that he had been one of the viewers appointed by the Court on the plaintiff's original petition, and that he had lived in the section where the farm lay for sixteen years, but for the then past seventeen years had resided about twenty miles away. He was then asked: Q. Are you acquainted with the market value of farms in that neighborhood? A. Not of personal knowledge.

Mr. Wetzel. Q. What knowledge have you of the market value of real estate in Cumberland County? A. General knowledge. Q. Do you know the character of this land, the Gorgas land? A. Yes, sir. The character of it is good limestone land. Q. You were over the farm? A. Yes, sir. Q. As a viewer? A. As a viewer. Q. Appointed by the Court? A. Appointed by the Court.

Mr. Beltzhoover. Objected to, that the witness has said that he has no personal knowledge of the market value of this land, and he cannot testify from any knowledge he acquired from having gone over the road as a viewer, and from what he heard other persons state while a viewer or at any other time.

THE COURT. The defendant may ask the witness whether he is familiar with the property, whether he was on the same as a viewer since the construction of the road, and what, in his opinion, is the amount of damage that has been done to this farm, if any, by reason of the construction of the road. Exception.

Mr. Wetzel. Q. State what, in your opinion, are the damages that have been done to this farm by reason of the construction of this railroad—the damages to the land and everything. A. \$2000. Exception. (Seventh assignment of error.)

Under a rule entered by the defendant, the jury impanelled to try the cause was a "struck jury." By agreement of counsel the jury visited the land.

It was shown that the road passed along the highway, and cut off convenient access for the plaintiff's cattle to water on the line of the highway which he had theretofore used. Evidence was admitted, under objection, as to the amount of damage thus caused.

The plaintiff requested the Court to charge, *inter alia* :—

"(1) The just measure of damages in this case is :—

"First. The value of the land actually taken from the owner, and what will compensate him for that of which he is deprived of the use, and which is thereby rendered valueless to the owner.

"Second. The actual money value of the inconvenience to the plaintiff arising from the division of his farm.

"Third. The value in money of the increased difficulty of access to the thirty-five acres of land which lie on the north side of the railroad, and the danger and inconvenience in working on the same along the railroad, and the crossing and recrossing in all farming operations.

"Fourth. The money value of the increased burden of fencing required on the farm by reason of the location of the road through the farm, including the fences along the sides of the road and the division fences which have to be changed.

"Fifth. The money value of the ordinary dangers from accidental fires to the fences, fields, and farm buildings not resulting from the negligence of the railroad.

"Sixth. The money value of the damages arising from the destruction of the symmetry and shape of the fields through which the road runs.

"Seventh. The value of the damage arising from the inconvenience occasioned by the manner in which the railroad passes through the farm, making sharp, long, and narrow-cornered fields, and necessitating the change of fences and fields.

"Eighth. The damage arising from the interference with the plaintiff's watering place for his cattle and stock.

"Ninth. The damage arising to the plaintiff by the damming of the water back on the fields by the embankments and fills made by the railroad.

"Tenth. The damage which the plaintiff suffers by the interference with the use of his farm for dairy purposes.

"Eleventh. The damage which the plaintiff suffers by the cutting through his orchard, and the taking of his trees, and the rendering of the portion cut off difficult of access.

"From these are to be deducted the amount of any advantages to the farm which may be special to it, and the balance should be the amount of the verdict for the plaintiff."

Answer. "As we understand the destruction of symmetry stated in the sixth paragraph to refer to the manner in which the fields are cut by the railroad, this point is, therefore, affirmed, except as to the eight paragraph. The water referred to is on a public highway and within the boundaries

of the farm of an adjoining owner. When used by the occupants of the Gorgas farm, it had to be reached by passing over this public highway, which has been crossed by the railroad of the defendant. Mr. Gorgas had no right to the water not enjoyed or possessed by the public in general, nor any right of way over the highway not common to the public. The highway has not been destroyed or rendered impassable. The defendant has so constructed its road as not to seriously interfere with public travel over it, at least no such complaint has been made, nor is it contended that the road might have been constructed in a different manner. We do not think, therefore, that it is an item for which the plaintiff can properly claim any damages; because the railroad of the defendant crosses the public road referred to, it is an injury which he suffers in common with the public." (First assignment of error.)

The defendant requested the Court to charge, *inter alia* :—

(3) That in estimating the special advantages accruing to the farm of the plaintiff, if the jury find that the proximity of the station on said railroad, located on the adjoining land just across the public roadway, and the construction of the railroad, defendant, near to and paralleling through the farm a competing railroad line, viz., the C. V. R. R., increases and enhances the market value of said intervening and adjacent lands of the plaintiff, then this may be set off as against the actual disadvantages and damage to the plaintiff. *Answer.* If you find that special advantages have accrued to plaintiff by reason of the construction of the railroad of the defendant as set forth in this point, you can set them off as against the actual disadvantages to his farm. (Second assignment of error.)

(4) That the plaintiff neglects or refuses to avail himself of the special or peculiar advantages which are offered him by the road is of no moment, for the question is not as to the disposition of the owner, Mr. Gorgas, to make use of them, but whether or not the construction of the road has given an increased market value to this tract of land. *Answer.* As an abstract legal proposition this is correct; whether it has any applicability to the present case, under the testimony, we leave for your determination.

In the general charge the Court said: "On the part of defendant it was alleged that special advantages have accrued to the plaintiff by reason of the construction of the railroad; that a station has been located close to his land, and that the construction of the road has resulted in the plaintiff having a part of his land located between two competing railroads, in consequence of which the market value of this portion has been greatly enhanced. . . . The advantages to be considered as a set-off to the disadvantages

are those which are special to the farmer. Any special advantages should be regarded. If the station located near the farm is a special benefit, it should not be overlooked by you." (Third assignment of error.)

"We withdraw from your consideration, gentlemen, all the testimony as to damage caused by reason of the cutting off of the water from the farm of the plaintiff or injury to his dairy accruing by reason thereof. While we have held in answer to the same (plaintiff's first point) that the plaintiff is entitled to damages if he has sustained any to his farm on account of its use for dairy purposes, yet we instruct you that you must not take into consideration in estimating these damages the fact that the railroad cuts the public road between his barn and the spring of Rupp. If there are any damages not included in other estimates, such as difficulty of access to portions of the farm and damage and inconvenience of crossing which are peculiar to the use of the farm for dairy purposes as it was so used, then you may allow them; but if already included in other items you must not allow them." (Fourth assignment of error.)

"In addition, you are what is termed a struck jury. You were taken upon the ground and had the opportunity to view and examine the premises yourselves. This was done in order that you might be aided in coming to a correct conclusion as to the contention between the parties. In ordinary cases the jury is to be governed by the testimony of the witnesses examined in their presence, and while you have been qualified to give a true verdict according to the evidence, that evidence in this case consists of what you have seen on the ground, as well as the testimony of the witnesses who have been examined during the trial before you in Court. What you observed on the view, then, you must remember is a part of the evidence of the case. The statement of the witnesses who have testified must be considered by you, yet you are not bound to be controlled thereby if your own examination of the premises leads you to a different conclusion." (Fifth assignment of error.) "You are to judge of the amount of damages suffered by the plaintiff from the inspection you made of the premises, as well as from the opinions of others who made an examination and gave you their opinions under oath. What you saw on the ground, therefore, and what you have heard from the witness stand should be the basis of your conclusion.

"The law contemplates remuneration to the owner of land for the injury inflicted upon him by the building of a railroad. The land-owner is entitled to this. No other or greater burden is imposed upon the corporation building the road.

"The true measure of damages, if any have been sustained, is the difference between the

market value of the farm, as a whole, before the railroad was located, and its market value after the railroad has been completed and in operation. You are to take into consideration the disadvantages which are actual, which are real, which are susceptible of estimation, but not such as are remote, contingent, and speculative.

"Now, in estimating the damages of the plaintiff, you may properly take into consideration the quantity, quality, and value of the land taken. This should be valued at its market price. If of average quality with that of the remainder of the farm, then a proper estimate would be the price per acre at which the whole was valued. No fanciful price should be put upon the same merely because it is taken without the consent of the owner or out of the heart of his farm. The damages arising for inconvenience of such taking is computed in other items. What is the fair market value of the land taken? That is the measure of value, and the only just one."

Verdict and judgment for the plaintiff for \$2885. Plaintiff appealed, assigning error as above.

F. E. Beltzhoover (Duncan M. Graham with him), for appellant.

J. W. Wetzel, for appellee.

October 5, 1891. *PAXSON, C. J.* The defendant company took about five acres of the plaintiff's land in the construction of its road. The jury appointed by the Court below to assess the damage awarded him the sum of \$2000. From this award he appealed to the Common Pleas, with the result of a verdict in his favor of \$2885. He is still dissatisfied, and has entered an appeal to this Court, alleging a number of errors upon the trial below.

The first point was intended to define the "just measure of damages." It contains eleven paragraphs, in each of which is a distinct subject for the consideration of the jury in assessing the damages. The Court below might well have refused this point, in view of the manner in which it is put. The learned Judge, however, affirmed all of the propositions, except the eighth, in which he was asked to instruct the jury that "the damage arising from the interference with the plaintiff's watering place for his cattle and stock" was an element of damage. It may be that had the access to the water on his own farm been cut off or seriously interfered with, the proposition should have been affirmed. But it was refused upon the ground that the water referred to was on the public highway and within the boundaries of the farm of an adjoining owner. When used by the plaintiff, it had to be reached by passing over this public highway, which has been crossed by the railroad of the defendant company. The plaintiff had no right to

the water, nor of access to it, that was special to himself or his land, or that was not common to the public. The plaintiff was merely deprived of what did not belong to him. We find no error in the answer to this point. (*Patten v. Railway Co.*, 33 Pa. 426.)

Nor do we find error in the answer to the defendant's third point, or in that portion of the charge embraced in the third assignment. The learned Judge correctly told the jury that if they "find that special advantages have accrued to plaintiff by reason of the construction of the railroad of the defendant, as set forth in this point, then you can set them off as against the actual disadvantages to his farm." Whether the matters referred to were special advantages was for the jury. If they were, no reason is apparent why they should not have been set off against the disadvantages. The case was argued here as though the learned Judge had instructed the jury that because a station was located near to the land of the plaintiff, therefore it was a special advantage. He gave no such instruction, as has already been seen. A station may or may not be a special advantage. We cannot say as matter of law that it may not be. Its value would depend upon circumstances; the possibility of its being removed, etc., and the question of special value must be determined by the facts of each particular case.

The fourth assignment is covered by what has already been said in answer to the first.

The fifth assignment was strongly pressed upon the argument, and I understand it to be the one most relied upon by the plaintiff. It alleges that the Court erred in the following portion of its general charge:—

"In addition, you are what is called a struck jury. You were taken upon the ground and had the opportunity to view and examine the premises yourselves. This was done in order that you might be aided in coming to a correct conclusion as to the contention between the parties. In ordinary cases the jury is to be governed by the testimony of the witnesses examined in their presence, and while you have been qualified to give a true verdict according to the evidence, that evidence in this case consists of what you have seen on the ground, as well as the testimony of the witnesses who have been examined during the trial before you in Court. What you observed on the view, then, you must remember as a part of the evidence in the case. The statements of the witnesses who have testified must be considered by you, yet you are not bound to be controlled thereby, if your own examination of the premises leads you to a different conclusion."

The last sentence above quoted is the one which was especially criticised. It often happens that

by selecting a passage from a charge, and omitting what immediately preceded and followed it, an erroneous impression may be created. Moreover it does injustice to the learned Judge below.

The portion of the charge immediately following the extract quoted, is as follows:—

"You are to judge of the amount of damages suffered by the plaintiff from the inspection you made of the premises, as well as from the opinions of others who have made an examination and gave you their opinions under oath. What you saw on the ground, therefore, and what you have heard from the witness stand, should be the basis of your conclusion."

The portion of the charge assigned as error with this addition, is unobjectionable. The jury were instructed to base their verdict upon the testimony of the witnesses and what they saw on the ground. The object of a view in such cases is to enable the jury to better understand the testimony. "It was never intended that the view of the jury should be substituted for the evidence, and that they should make up their verdict from the view in disregard thereof." (*Flower v. Baltimore, etc. R. R. Co.*, 132 Pa. 524.) A view may sometimes be of the highest importance where there is a conflict of testimony. It may enable the jurors to see on which side the truth lies. And if the witnesses on the one side or the other have testified to a state of facts which exists only in their imagination, as to the location of the property, the manner in which it is cut by the road, the character of the improvements, or any other physical fact bearing upon the case, they surely cannot be expected to ignore the evidence of their senses, and give weight to testimony which their view shows to be false. This is all that is to be fairly implied from the language of the Court below. Were it otherwise, a view would be the merest farce. This is fully sustained by *Patten v. N. C. Ry. Co.* (*supra*); *Hartman v. The Penna. Schuylkill V. R. R. Co.* (22 WEEKLY NOTES 84); *Traut v. N. Y., C. & St. L. Ry. Co.* (Id. 540). It was said by Mr. Justice STERRETT in the case last cited: "The manifest purpose of this requirement (view) is to afford the viewers an opportunity of acquiring fuller and more accurate information as to the matters on which they are required to pass than it is possible in many cases to obtain from the testimony of witnesses alone."

The true rule in such cases is believed to be, that the jury in estimating the damages shall consider the testimony as given by the witnesses, in connection with the facts as they appeared upon the view, and upon the whole case as thus presented ascertain the difference between the market value of the property immediately before and immediately after the land was taken. This difference is the proper measure of the damages.

We find no error in the rejection of the testimony of the witness, Jonas Kohler; see sixth assignment. He appears not to have had any knowledge of the market value of lands in that neighborhood, which was a sufficient reason for the exclusion of his testimony. Nor do we think it was error to admit the testimony of Thomas R. Burgner. It is true he lived several miles away, but he knew the property; had passed along it on the road occasionally; moreover, he had acted as a viewer appointed by the Court. He was not asked to give his opinion as a viewer, but from his observation while acting as such. That a viewer, in such cases, is a competent witness, was ruled in *Dorlan v. The R. R. Co.* (46 Pa. 520). Judgment affirmed.

[See *Hoffman v. R. R. Co.*, *ante*, p. 361.]

R. H. N.

May '91, 15.

June 1, 1891.

**Commonwealth ex rel. Attorney-General
v. Denworth.**

Constitutional law—Article III., sec. 7, of Constitution—Division of cities into classes—Quo warranto pleading—Whether question of constitutionality is properly raised by pleadings.

The Act of March 24, 1877 (P. L. 47), providing that cities whose population does not exceed 30,000, and is not less than 8500, which shall by ordinance adopt the provisions of the Act, shall elect an officer called a city recorder, and its various supplements, are in conflict with Article III., sec. 7, of the Constitution, because they are confined in their operations to cities of a specified population which shall accept them by ordinance, etc., and in consequence thereof one city of the class may be subject to their provisions and others of the same class be exempt from them.

Seranton School District's Appeal (113 Pa. 176), followed.

Where a suggestion for a quo warranto sets forth that the respondent is in the exercise of a public office "under color" of certain Acts of Assembly . . . "without any warrant or lawful authority," and the answer sets up the said Acts of Assembly in justification, the question of the constitutionality of the Acts is sufficiently raised to support a judgment of ouster based on their unconstitutionality.

Appeal of James B. Denworth, respondent, from the judgment of the Common Pleas of Dauphin County, ousting him from the office of recorder of the city of Williamsport, in a proceeding by quo warranto at the suit of the Commonwealth *ex rel.* the Attorney-General.

The suggestion set forth that the respondent "hath, since the first day of January, 1889, used and exercised, and still doth use and exercise the office of recorder in and for the said city of Williamsport, under color of an Act of Assembly of 24th day of March, 1877, entitled 'An Act

creating and defining the powers and duties of a recorder for the cities whose population does not exceed thirty thousand, and is not less than eight thousand five hundred, which accept the provisions of this Act,' and a supplement thereto of May 1, 1879, entitled 'A supplement to an Act entitled "An Act creating and defining the duties and powers of a recorder for the cities whose population does not exceed thirty thousand, and is not less than eight thousand five hundred, which accept the provisions of this Act," approved March twenty-fourth, one thousand eight hundred and seventy-seven, amending said Act,' and another supplement thereto of the 14th day of February, 1881, entitled 'A supplement to an Act, entitled "An Act creating and defining the duties and powers of a recorder for cities whose population does not exceed thirty thousand, and is not less than eight thousand five hundred, which accept the provisions of this Act," approved the twenty-fourth day of March, Anno Domini one thousand eight hundred and seventy-seven, and the supplement thereto amending said Act, approved May first, Anno Domini one thousand eight hundred and seventy-nine, amending the same,' without any warrant or lawful authority therefor." The writ followed the suggestion.

The answer set up, *inter alia*: First, that the city of Williamsport was, at the time of the passage of an Act, entitled "An Act creating and defining the duties and powers of a recorder for cities whose population does not exceed thirty thousand, and is not less than eight thousand five hundred, which accept the provisions of this Act," approved March 24, 1877 (P. L. 47), and still is a city whose population does not exceed thirty thousand, and is not less than eight thousand five hundred; and said city did, by an ordinance duly adopted by the councils thereof, and approved by the mayor, accept the provisions of the said Act, and cause to be filed in the Court of Common Pleas of the county of Lycoming, in which said city is situated, and also to be recorded by the recorder of deeds of said county a duly certified copy of the said ordinance, the same being done prior to the passage of the supplement to the said Act of 1877, approved May 1, 1879 (P. L. 44), and the supplement approved February 14, 1881 (P. L. 6), and the said city of Williamsport, upon the filing and recording of the said ordinance as aforesaid, became, and still is, by the terms of the said Act of 1877, and the supplements thereto, entitled to have a recorder for the purposes and with the jurisdiction and powers by the said Act and its supplements provided. And, second, that defendant had been duly elected and qualified.

The Act of March 24, 1877 (P. L. 47), is entitled—

An Act creating and defining the duties and powers of a recorder for cities whose population does not exceed thirty thousand and is not less than eight thousand five hundred, which accept the provisions of this Act.

It provides—

SECTION 1. That the several cities of this Commonwealth whose population does not exceed thirty thousand, and is not less than eight thousand five hundred, shall, at the next annual election for city officers succeeding the passage of this Act, and every five years thereafter, elect a competent person learned in the law who shall be a qualified elector of such city, who shall be styled city recorder of such city, who shall hold said office for the term of five years and be duly commissioned by the governor. . . .

Sac. 14. That this Act shall only apply to cities whose population does not exceed thirty thousand, and is not less than eight thousand five hundred, which shall, by ordinance duly adopted by the council or councils thereof and affirmed by the mayor, accept the provisions of this Act.

The Act of May 1, 1879 (P. L. 44), enlarges the jurisdiction of the recorder, and section 9 amends section 1 of the former Act as follows, viz:—

That the several cities of this Commonwealth, whose population does not exceed seventeen thousand and is not less than ten thousand: *Provided*, That the provisions of this amendment shall not affect any city which has heretofore accepted the provisions of the Act to which this is a supplement and elected a recorder.

The Act of February 14th, 1881 (P. L. 6), amends section 9, of the Act of May 1, 1879—

That the several cities of this Commonwealth whose population does not exceed seventeen thousand and is not less than ten thousand, and in addition thereto all cities of the fifth class organized and incorporated in this Commonwealth under and by virtue of the provisions of an Act entitled "An Act dividing cities of this State into three classes, etc., and providing for the incorporation and government of cities of the third class," approved May 24, A. D. 1874, and the several supplements thereto, which have heretofore or may hereafter accept the provisions of the Act to which this is an amendment and its supplements.

On the trial, before McPHERSON, J., the Commonwealth admitted the facts set up in the answer "subject to their relevancy."

The Court charged as follows: "This proceeding is an action brought by the State against the recorder of the city of Williamsport. He was elected under the authority of certain Acts of Assembly which have been called to our attention, and which we believe to be unconstitutional. [We therefore instruct you to render a verdict in favor of the Commonwealth upon the ground that the Acts are unconstitutional, and the defendant has, therefore, no authority to exercise the office which he has been exercising for the last two years.]"

Verdict for the Commonwealth. A decree ousting the defendant was subsequently filed by

SIMONTON, P. J. Defendant appealed, assigning for error the portion of the charge of the Court inclosed in brackets, and the judgment of ouster.

M. E. Olmsted, for appellant.

William U. Hensel, attorney-general (*James A. Stranahan*, deputy attorney-general with him), for appellee.

October 5, 1891. McCOLLUM, J. This is an appeal from a judgment of ouster from a public office. The judgment was entered against the appellant on the ground that the statutes under which he claimed title to the office of recorder of the city of Williamsport were unconstitutional, and his contention here is that their validity was not called in question by the pleading. The objections to the judgment are purely technical, and there is no effort to show that the statutes, on which it is admitted the title of the appellant to the office from which he was ousted depends, are of any validity. It is obvious from an inspection of the record that the only question for the consideration of the Court below was the constitutionality of these statutes. In the information on which the writ of quo warranto was issued, it was charged that the appellant used and exercised the office of recorder under color of them, and in his answer thereto it was averred that by their terms he became and was entitled to hold the said office. The regularity of the proceedings under them was conceded upon the trial, subject to objection as to their relevancy. It is not possible, in the presence of the information, answer, and concession, to discover any dispute concerning the facts in the case; these were admitted, and the inquiry related to their legal effect. This inquiry necessarily involved a consideration of the validity of the statutes under which the appellant claimed he was entitled to hold the office, and which the Commonwealth alleged gave him no more than color of title to it. It is plain from the pleadings, the developments on the trial, and the charge of the learned Judge, that the question of the constitutionality of these statutes was presented, considered, and passed upon in the Court below, and whether the argument made there by the counsel for the Commonwealth was sufficiently specific to satisfy the appellant is a matter with which we have no concern. We may add, that if greater precision in the pleadings was deemed necessary it could have been secured by an amendment.

The statutes under which the appellant claims title to the office of recorder are in palpable conflict with section 7, article 3, of the Constitution. They are local because confined in their operations to cities of a specified population, which shall accept them by ordinance duly adopted by councils and approved by the mayor. Whether they shall apply to a city of the class described depends on

the action of its municipal officers, and in consequence thereof one city of the class may be subject to their provisions, and other cities of the same class be exempt from them. Without further elaboration of the subject it is sufficient to say of this legislation that it is such as was condemned in *Seranton School District's Appeal* (113 Pa. 176). It follows that a correct judgment was entered in this case, and the specifications are overruled.

Judgment affirmed.

R. H. N.

Jan. '91, 399.

May 6, 1891.

Commonwealth v. Morningstar.

Constitutional law—Acts of Assembly—Title of—Act of May 7, 1889—Life insurance companies—Rebate of premium—Police power.

The Act of May 7, 1889 (P. L. 116), entitled "An Act to prevent any life insurance company, or agent thereof, doing business in Pennsylvania, from making or permitting any distinction or discrimination in favor of individuals, between insurants of the same class and equal expectations of life, in the amount or payment of premiums or rates charged for policies of life or endowment insurance, and providing a penalty for violation thereof," is within the police powers of the State, is not in conflict with any rights guaranteed by the fundamental law, and does not violate Article III, § 3 of the Constitution of Pennsylvania, which requires that an Act of Assembly shall contain but one subject which is to be clearly expressed in its title.

An indictment under the above Act of Assembly charged that A., a duly authorized agent of an insurance company doing business in Pennsylvania, "did offer to pay and allow B. a rebate of a part of the premium, to wit, \$50 payable on a policy of insurance to be then and there issued to C. by said company for the sum of \$5000, which said rebate was not specified in the policy contract of insurance, and the said rebate so offered as aforesaid was then and there offered by the said A. to the said B. as an inducement to insure the life of C. in said company contrary to the form of the Act of Assembly, etc." A motion to quash was filed alleging that the charges did not constitute an offence; the indictment did not charge discrimination, and that the Act was unconstitutional in that its title did not clearly express the subject matter. Indictment quashed. On appeal:

Held, that the reasons alleged for quashing the writ were insufficient to justify the action of the Court.

An indictment should not be quashed for matters of form which are amendable under the Act of Assembly.

Appeal of the Commonwealth of Pennsylvania from a judgment of the Quarter Sessions of Warren County quashing an indictment against B. J. Morningstar.

The indictment in this case read as follows: "The grand inquest of the Commonwealth of Pennsylvania now inquiring in and for the body of the county of Warren, upon their oaths and

affirmations, respectively do present, that B. J. Morningstar, late of said county, yeoman, to wit: On the first day of November, A. D. 1889, at Warren, in the county and State aforesaid, was a lawfully constituted agent of the Mutual Life Insurance Company of New York, a corporation doing business in the State of Pennsylvania, with authority to solicit life and endowment insurance for said company, in the county and State aforesaid, and to receive the first yearly premium, payable on the policy issued by said company to the insured. And the said B. J. Morningstar, as such agent, on the day and year aforesaid, and within the jurisdiction of this Court, then and there did offer to pay and allow Jane Orr a rebate of a part of the premium, to wit, fifty dollars payable on a policy of insurance, to be then and there issued to Richard Orr by the Mutual Life Insurance Company of New York, for the sum of five thousand dollars, which said rebate was not specified in the policy contract of insurance. And the said rebate so offered as aforesaid was then and there offered by the said B. J. Morningstar to the said Jane Orr as an inducement to insure the life of the said Richard Orr in the said Mutual Life Insurance Company of New York for the said sum of five thousand dollars, contrary to the form of the Act of Assembly in such cases made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania."

The defendant moved to quash the indictment for the following reasons:—

(1) The charges set forth in the indictment, if true, do not constitute an offence under any Act of Assembly of the State of Pennsylvania, or under the common law.

(2) The indictment does not charge, or allege, that defendant did discriminate in favor of Richard Orr, or of any person for him, in offering to issue to him, or to procure for him a policy of insurance, as set forth in said indictment.

(3) The Act of Assembly under which said indictment was intended to be drawn is unconstitutional, for the reason that the title to said Act does not clearly indicate the subject matter contained in the Act, and is therefore in violation of section 3 of Article III. of the Constitution of Pennsylvania.

After argument the motion was granted by the Court, and the indictment quashed; whereupon the Commonwealth appealed, assigning as error the action of the Court in quashing the indictment.

Samuel T. Neill (J. W. Dunkle, district attorney, with him), for appellant.

No counsel appeared *contra*, nor was any paper-book filed.

agent of the New York Mutual Life Insurance Company, a corporation doing business in the State of Pennsylvania, offered to pay and allow one Jane Orr "a rebate of part of the premium, to wit, fifty dollars, payable on a policy of insurance, to be then and there issued to Richard Orr by the Mutual Life Insurance Company of New York, for the sum of five thousand dollars, which said rebate was not specified in the policy contract of insurance. And the said rebate so offered as aforesaid, was then and there offered by the said B. J. Morningstar to the said Jane Orr as an inducement to insure the life of the said Richard Orr in the said Mutual Life Insurance Company of New York for the said sum of five thousand dollars, contrary to the form of the Act of Assembly," etc.

This indictment was evidently framed upon the Act of May 7th, 1889 (P. L. 116), the first section of which provides, "That no life insurance company doing business in Pennsylvania, shall make or permit any distinction or discrimination in favor of individuals, between insureds of the same class and equal expectation of life, in the amount or payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contracts it makes, nor shall any such company or agent thereof make any contract of insurance, or agreement as to such contract, other than as plainly expressed in the policy issued thereon, nor shall any such company or agent pay or allow or offer to pay or allow, as, inducements to insurance, any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefit to accrue thereon, or any valuable consideration or inducement whatever, not specified in the policy contract of insurance."

The second section of said Act designates the penalty for its violation, which is by indictment in the Quarter Sessions as a misdemeanor.

The defendant moved to quash the indictment, which motion was allowed by the Court below. There is nothing upon the record to show upon what grounds the learned Judge sustained the motion, beyond the reasons assigned in support of it, nor were we aided by either an argument or a paper-book on the part of the defendant. It was alleged on behalf of the Commonwealth that the action of the Court was based upon the third reason alleged in the motion to quash, which denied the constitutionality of the Act. We can hardly believe the learned Court would have quashed the indictment for the matters of form referred to in the first and second reasons, which are amendable under the Act of Assembly. It is equally difficult to see how he could decide against the constitutionality of the Act, and thus in effect blot it out of the statute book, without assigning

October 5, 1891. PAXSON, C. J. The defendant was indicted in the Court of Quarter Sessions of Warren County, with having, as

any reason therefor. When this Court declares an Act of Assembly unconstitutional, we have always regarded it as a duty which we owe to the other two co-ordinate departments of the government to state our reasons, however briefly, for such action.

Being thus compelled to grope in the dark to some extent, it is sufficient to say that we see no reason why the Act in question should be held to be unconstitutional. Certainly no such reason has been called to our attention. The scope and purpose of the Act is clearly within the police powers of the State, and its terms are not in conflict with any rights guaranteed by the fundamental law. If, as was suggested on the argument, the objection to it is on account of its title, we are unable to see the force of it. The title is very full; it is almost an epitome of the Act itself, and, under *Allgheny County Home's Case* (77 Pa. 77); *Blood v. Mercelliott* (53 Id. 391); *Craig v. The Church* (88 Id. 42), and that line of cases, we think it is sufficient.

The judgment is reversed, the indictment is reinstated, and a *procedendo* awarded.

C. K. Z.

Jan. '91, 410.

May 7, 1891.

Thompson v. Ridelsperger.

Reservation in deed—Identity of lease referred to in deed with lease offered in evidence—Stenographer's notes.

Where a deed recites that the grant is made subject to certain leases, *inter alia*, "J. B. three (3) acres," and the plaintiffs in ejectment for a certain part of the land covered by the deed claim under a lease made by the grantors in the deed, seven years before the execution of the deed, to C. G. B., and J. B. D., for a tract of three acres known as lot No. 53, it is error to say as a matter of law that the above reservation in the deed and the lease under which plaintiffs claim are identical. Whether or not they are identical is a matter which can only be determined by extrinsic testimony, and the credibility and force and meaning of that testimony are to be determined by the jury.

When there is a dispute between counsel as to what has been said in an offer of testimony, but little consequence can be attached to what appears in the stenographer's notes. The statement is merely a declaration by the stenographer of a fact occurring in his presence and cannot be of any weight in determining the contention.

Appeal of W. D. Ridelsperger, L. M. Ridelsperger, W. P. Ridelsperger, and C. H. Shurmer, defendants, from the judgment of the Common Pleas of Warren County, in an action of ejectment brought by W. H. Thompson.

The plaintiff claimed title under a lease of the

lot in question from C. A. Cornen and D. Cornen to C. G. Beaumont and J. B. Drake, dated March 25, 1882, while the defendants claimed under a deed, *inter alia*, for same premises to them from C. A. Cornen and wife, D. Cornen and wife, and Peter P. Cornen and wife, dated June 28, 1889.

The facts of the case are sufficiently set forth in the opinion of the Supreme Court, and the charge of the trial Judge, *infra*.

On the trial, plaintiff made the following offer: "The plaintiff proposes to show by this witness and other witnesses, that the post from which the lease purports to start was pointed out and agreed upon by the parties, at the easternmost corner of the church lot—the fence-post of the fence of that lot—and that it left to the west of the well in question; and that the lessees Beaumont & Drake, were in quiet possession, and that they and their successors in the title have been in possession of that well, and if the lease as defined by commencing at that point instead of the point where the surveyors of the defendants have started in laying out their lines and boundaries of lot No. 53, and were so in possession when the deed was made by the Cornens to the defendants in this case; and that this agreement between the parties, and the conversation to be proven took place before or at the time the lease was made." Objected to as irrelevant and incompetent, and because the abstracts of title give no notice of the matter proposed to be proved. Objection overruled and evidence admitted. Exception. (First assignment of error.)

The defendants requested the Court to charge the jury as follows:—

(1) There is no evidence from which the jury can find that the defendants at the time of the purchase of the land including the land in dispute had any knowledge nor any means of obtaining knowledge that the Beaumont & Drake well was upon the land described in the lease from the Cornens to Beaumont & Drake, or that the same had been located as and for a well on subdivision No. 53. *Answer.* We affirm this point, but we think that it is not material as we view the law governing the case. (Seventh assignment of error.)

(2) If the jury find from the evidence that the defendants were the *bona fide* purchasers for a valuable consideration without notice of No. 53 of the lands of the Cornens as said subdivision is described by the terms of the lease, and that the well of Beaumont & Drake was not on said subdivision No. 53, as the same is so described, at the time of defendants' purchase, the fact that the Cornens located a well on other land and that Beaumont & Drake sunk the same would estop the Cornens from claiming a forfeiture by reason of a failure to sink a well on No. 53 as provided by the lease. But the fact

that such location was made by the Cornens and Beaumont & Drake on other land than No. 53, and without any knowledge of the arrangement or understanding between the Cornens and Beaumont & Drake would not affect the defendants here, and they would be entitled to insist upon the forfeiture for not sinking the well on No. 53 as provided by the terms of the lease, and the plaintiff cannot recover. *Answer.* We refuse to affirm this point. (Eighth assignment of error.)

(3) There is no evidence in the case that the plaintiff or any of his predecessors in title was in possession of the land described in the writ at or before the time that the Cornens conveyed to defendants. *Answer.* I think this is true so far as No. 53 is concerned, but we have already, in our charge, given you other reasons why we think the plaintiff should recover. (Ninth assignment of error.)

The Court (METZGER, P. J., of Lycoming County) further charged the jury as follows:—

"This is an action of ejectment, brought by W. H. Thompson against W. D. Riddelsperger and others, to recover a piece of land, situate in Mead Township, Warren County, which is described as follows: Beginning at a post in rear of church lot, thence southeasterly to a post, thence southerly along line of lot No. 39 to a post, 56 feet from post corner lots 39 and 40, thence westerly to corner lots 51 and 52, thence north along the line of lot 52 to post, thence northeasterly to place of beginning, containing three acres, more or less. The plaintiff in this action says that the defendants are in possession of this piece of land, and that they have not the title thereof, but that the title and right of possession is in the plaintiff, W. H. Thompson.

"It appears that, in 1882, C. A. Cornen and D. Cornen owned a piece of land in Mead Township, known as lot No. 528, containing 160 or more acres, and they may have owned other property there. But, however, afterwards they subdivided this tract of land into small divisions, numbering each of them, among which was No. 53. On the 25th of March, 1882, they leased this subdivision, No. 53, to parties by the name of Beaumont & Drake, for the purpose of boring for oil, I believe, for the period of fifteen years from that date. Among other things, it was provided in this lease, that they should commence drilling an oil well and locate it at such place as directed by the lessors. This contract of lease, was assigned by Beaumont & Drake, on the 9th of June, 1882, to a man by name of Joseph Seep; and Joseph Seep, on the 11th of April, 1889, assigned his interest in the lease to the plaintiff in this case, W. H. Thompson. In the meantime, on the 28th day of June, 1889, C. A. Cornen and wife and D. Cornen and wife, who

are the lessors as you have heard, conveyed this tract, known as No. 528, and other property to the defendants in this case. [In that conveyance, however, the Cornens reserve this lease, and made the conveyance subject to this lease.]

"Now, it seems that the actual lines, as contended by the defendants, at least, of No. 53, would not have included the place where the plaintiff, or those under whom he claims, drilled the well in pursuance of the lease that I have referred to. [But, as I have said, the defendants did purchase, however, subject to the lease.]

"As far as the facts are concerned, it appears that when this lease was made in 1882, that the parties went upon the ground, and that the lessors fixed and agreed, in fact, with their lessees, Beaumont & Drake, at the time, that the corner of their lease was to be the southeast corner of the church lot, and that it was then to run in a southeasterly direction to a certain post. And it is also the undisputed evidence in this case, that this well was directed to be located by the lessors near the line thus fixed by the parties, the lessors and lessees—I believe within the distance of about 16 or 18 feet of the line. And it is further undisputed that the lessees did commence drilling the well at that point within twenty days as required by the terms of their lease. Therefore, [it is clear, from the testimony in this case, that the lessees complied with the terms of their lease,] and the plaintiff has the benefit of the compliance by his predecessors with the terms of this lease. And the sole question now is, whether he should be prevented from recovering, if the well does not happen to be located within what would be the actual lines upon the ground of No. 53. Now, it is undisputed that the well was located there by the lessors, that it was accepted by the lessors as in compliance with the terms of the lease. It is not controverted, so far as the lessors are concerned, that they are estopped from making any defence or any claim that the terms of the lease have not been complied with, and the only question now is, How does it affect the defendants? [The defendants purchased subject to this lease; they therefore had notice that there was a lease, and the very fact that the conveyance to them was made subject to the lease, indicated that there was a valid subsisting lease for lot No. 53. Now, that in itself, in our judgment, was sufficient to put the defendants, when they made their purchase, upon inquiry as to whether the plaintiff had complied with the terms of the lease or not. They are not innocent purchasers without notice according to our view.] There is in this case, the additional fact, that this very well that was located at the point where it is by the direction of the lessors, was, at the time this purchase was made by the defendants, in the possession of either the plain-

tiff or his immediate predecessor, Joseph Seep. There was a well there in full operation, it was a flowing well at the time; there was a derrick, engine-house, and tank there. There was open, notorious, and visible possession—or at least all the indications of such an open, notorious, and visible possession as should affect any purchaser with constructive notice, and put him on inquiry. [Viewing the case as we do, we find no facts to submit to you, and therefore direct that you find a verdict for the plaintiff for the land described in the writ.”]

Verdict for plaintiff and judgment thereon; whereupon defendants took this appeal, assigning for error the admission of the above testimony; the answers to defendants' points, and the portions of the charge included between brackets.

William D. Brown (with him *J. H. Donly*, *James W. Wiggins*, and *George N. Frazine*), for appellants.

William E. Rice and *Watson D. Hinckley* (with them *Charles Dinsmoor*, *James Cable*, and *Charles A. Peterson*), for appellee.

October 19, 1891. GREEN, J. In the appellee's paper-book, it is alleged that the appellants omitted to print a part of the offer of their deed, and that the omitted part was in these words: “The conveyance is made subject to the lease in question of three acres.” It is further said by the counsel for the appellee, that when the defendants offered their deed in evidence, the counsel making the offer stated in open Court that the deed was subject to the lease in question, and that this was included in the offer and placed on the record. The counsel for the appellants in their reply to the appellee's argument deny this statement, and assert that one of the counsel for the appellee, at the time the defendants offered their deed, made a side remark in the words above quoted, and that the words crept into the stenographer's notes without their knowledge, and that they were no part of their offer. They further call upon the counsel for the appellee to deny, if he will, that he was the author of the words in question. It is lamentable and reprehensible that there should be such a conflict of statements between counsel. The offer of the deed was not objected to, and hence there is no bill of exception which can settle this question of veracity, and we can have no official knowledge of the truth of the matter. The subject of the controversy is not trivial but vital. If the deed was strictly subject to the lease in question the defendants took their deed with notice and were subject to the duty of inquiry, and were chargeable with knowledge of whatever the inquiry would have disclosed. The Court below assumed that this was so, and the appellants urge that this assumption was error. In consequence of this

assumption the Court withdrew the case from the jury and instructed them to find a verdict for the plaintiff. If it was error to give such binding instruction to the jury, the judgment must necessarily be reversed. In solving the question whether the defendants took their title expressly subject to the lease in controversy, but little, if any, consequence can be attached to what appears in the stenographer's notes. There is merely a statement by the stenographer that the deed was subject to the lease. The stenographer is not a witness, he was not of counsel for either party, he had no authority to bind either party by anything he might say. The offer of the deed was an offer to give a deed in evidence and nothing more. The deed was received without objection and the whole purpose of the offer was then subserved. It is incredible that the defendants' counsel then proceeded to give away their whole case by the entirely unnecessary, and uncalled for declaration, that the deed which they offered was subject to the lease which was the subject of the controversy. Stenographers are not infallible. They are just as likely to make mistakes as other persons, and when they are merely making a declaration of their own as to a fact occurring in their presence or hearing, not being under oath, and not being examined or cross-examined, and the truth of their statement is denied by the party sought to be bound by it, as a matter of course, such statement cannot be regarded by the Courts as of any weight in determining the contention.

But apart from all this the deed must speak for itself, and if, when examined, it corroborates the stenographer's statement the party affected will be bound by it, not because of what the stenographer said, but because of what the deed itself declares. And on the other hand if it does not corroborate the stenographer it will scarcely be contended that the remark of the stenographer will outweigh the language of the deed.

If now we recur to the deed we find that it contains these words: “This conveyance is made subject to the following leases for oil purposes, viz: Gorman Bros., six (6) acres; Collins and Cochran, six (6) acres; Ferguson *et al.*, nine (9) acres, and J. Beaumont, three (3) acres.” There is no other language but this in the entire deed on this subject. The deed is made by C. A. Cornen and wife, D. Cornen and wife, and Peter P. Cornen and wife, to W. D. Riddelsperger, L. M. Riddelsperger, W. P. Riddelsperger, and C. H. Shnrmer; is dated June 28, 1889, and is for lot No. 528, containing 165 acres more or less, and for part of lot No. 497, containing 37 acres and 140 rods more or less.

Now the lease which is claimed by the plaintiff as the source of his title, is a lease, dated March 25, 1882, made by C. A. Cornen and D. Cornen to C. G. Beaumont and J. B. Drake, for a lot or

piece of ground in Meade Township, Warren County, Pa., containing three acres more or less, known as lot No. 53 of subdivision of lot No. 528. The name of "J. Beaumont" does not anywhere appear in this lease. In the deed the reservation is of a lease to "J. Beaumont, three (3) acres" and that is all. There is no description of this lease in the deed. It is not referred to by its date, or its place of record, nor by its number 53, nor by the number of the subdivision of which it is a part. In other words there is no identification of the territory covered by the lease, and the name of the lessee is not the name of either of the two lessees of the lot in question, nor does the name of either of those two lessees appear in the lease that is reserved. Upon the face of the papers (the lease and the deed) it is impossible to say that the lease reserved is the lease in controversy. It was therefore error in the learned Court below to say, as a matter of law, that they are identical. Whether or not they are identical is a matter which can only be determined by extrinsic testimony, and the credibility and force and meaning of that testimony is necessarily to be determined by the jury. They may be the same, but whether or not they are the same is not a matter of law but of fact, and should be determined by the jury and not by the Court. We therefore sustain the third, fourth, fifth, and sixth assignments of error. We can hardly sustain the first assignment as the offer included the act of the lessors in locating the lot so that the Beaumont & Drake well was upon it, and that they so agreed with the lessees, and as such location would certainly bind the lessors who could not claim a forfeiture, it might bind the present defendants claiming under them. It would not be incompetent testimony, but yet it might not bind the defendants. That would depend upon what was the true location of lot 53, and if not, then whether the defendants knew of the acts of the lessees in locating the well where it is, as being a location within the lines of lot No. 53. If the defendants had such knowledge at the time of or before the inception of their title, they would be bound by it. But the true location of lot No. 53 is very much in dispute. According to the testimony of the defendants' surveyors, it does not include the well, and if that testimony is believed, the defendants would not be bound by the location of the well as a compliance with the terms of the lease, unless they had knowledge of the assent of the lessors to that location, and the acceptance of it by them as a compliance with the lease. It must be confessed that the knowledge of the defendants of the acts and declarations of the lessors in that regard, before the inception of their title, can scarcely be regarded as established by the testimony. Certainly it is not so established as to justify the Court in de-

ciding it. All the defendants testified that the Drake well was not within the lines of lot No. 53, as those lines are indicated in the lease, and that they did find a post corner, outside the church lot, starting from which and running the lines of the lot, the Drake well was excluded. If any proof of the location of the well, as a performance of the condition by the lessees with the consent of the lessors, and accepted as such by the latter, was made in such manner as to give notice thereof to the defendants before their title was acquired, or at the time of its acquisition, the effect of that proof would be necessarily for the jury, under proper instructions from the Court. But the case was not tried in that way by the learned Court below. On the contrary, the Court assumed that the defendants had notice when they purchased that the well was erected within the limits of the lot 53, because they bought subject to the lease, and the well was already there with all its appliances and in full operation. Of course this would be correct if the well was within the true location of lot 53, but this is the very matter in dispute, and must necessarily be determined by the jury.

We, therefore, do not sustain the first assignment, but do sustain the second and eighth; and the seventh and ninth are sustained, because, while the Court affirmed the defendants' first and third points, they took away all the effect of the affirmation by saying that they were not material, and that the case must be disposed of according to the views of the Court on the other matters mentioned in the charge. As these matters involved questions of fact which should have been submitted to the jury, we are of opinion the judgment must be reversed.

Judgment reversed, and new venire awarded.

H. S. P. N.

Jan. '91, 119.

April 27, 1891.

Wengerd's Estate.

Decedent's estate—Will—Construction of—Legacies, vested or contingent.

A testator died in March, 1888, leaving an estate which consisted almost entirely of securities, which could have been immediately distributed, the remaining portion being a house and lot. He directed his executors to sell this house, and the proceeds of the sale, together with the proceeds of his personal property, after the payment of a certain legacy, debts, and expenses of administration "to divide into three equal shares, which I hereby bequeath as follows: to M. one-third; to E. one-third; and to J. W., H. W., and C. W., children of my son D. W., deceased, the remaining one-third, to be equally divided between them, share and share alike, and in case of the death of any of the children of my son D., before the payment to them of their said share, then to be divided between the survivors." J. W. died eleven months

after the death of testator, having received \$200 of his share before his death, and by his will made his widow his sole legatee and executrix. The executors of the original testator, filed their account upon citation so to do, about two years after his death:

Held, that the legacy to J. W., vested at the time of the death of testator, and the right of his widow to receive it could not be defeated by the delay of the executors in making distribution.

In determining whether a legacy is vested or contingent, regard must always be had to the position of the parties.

Where a bequest is ambiguous, the inclinations of the Courts are always towards vesting the legacy; and the presumption that a legacy was intended to be vested, applies with far greater force where a testator is making provision for a child or grandchild, than where the gift is to a stranger or to a collateral relative.

A bequest of personal property relates to the time of the testator's death, unless a contrary intent is clearly indicated in the will.

If any immediate legacy is given, without specifying a time for payment, and is given over in case the legatee dies before it becomes payable, the word "payable" can only have reference to the death of the testator.

Appeal of Jane E. Wengerd from the decree of the Orphans' Court of Cumberland County dismissing exceptions filed to the report of an Auditor appointed to make distribution of the estate of John Wengerd, Sr., deceased.

The decedent died on March 2, 1888. An inventory was filed in April, 1888, amounting to \$10,322, which consisted of assets readily convertible into cash. An account was filed in obedience to a citation, two years after testator's death, and referred to an Auditor (R. M. Parker, Esq.), who reported, *inter alia*, that John Wengerd the testator died in March, 1888. By his will, proven March 9, 1888, after bequeathing to Marian Beaver a legacy of \$150 to be paid to her as soon after his decease as convenient, he directed as follows:—

Item. I direct my executors, hereinafter named, to sell at public or private sale my house and lot on the east side of Penn Street, known as the *pastorage*, and for the purpose of enabling them to do so, I hereby authorize them to make, execute, acknowledge, and deliver the necessary deed or deeds to grant and convey the same to the purchaser or purchasers thereof, and the proceeds of the said sale together with the proceeds of all bonds, notes, and cash on hand with the proceeds of my personal property, I direct my said executors after paying the legacy hereinbefore mentioned, my just debts and funeral expenses and the expenses of administration, to divide into three equal shares, which I hereby bequeath as follows: To Mary Gettle, one-third; to Elizabeth Kozer, one-third; and to John Wengerd, Harry Wengerd, and Catharine Wengerd, children of my son David Wengerd, deceased, the remaining one-third to be divided between them share and share alike, and in case of the death of any of the said children of my son David before the payment to them of their said share, then to be divided between the survivors.

John Wengerd, the legatee above mentioned, died before the payment to him of his legacy in full, and a contention has arisen, under this clause in the will above recited, between his widow, who is executrix and sole legatee under his will, and the survivors, a brother and sister; the former claiming the legacy as vested at the death of testator, and the latter as surviving legatees under the will of decedent.

The Auditor further reported that John Wengerd died about eleven months after testator, leaving to survive him, a widow, to whom he devised his entire estate, and appointed her his executrix. There was paid to him in his lifetime \$200 on account of his legacy; and after his death, \$100 was paid to his widow, by consent of all parties interested. The Auditor, citing Baker's Appeal (115 Pa. 590), and being of opinion that the testator intended the legacy to vest, subject to be divested upon the contingency of the death of the legatee before payment, awarded the unpaid share of John Wengerd to the surviving legatees, Harry Wengerd and Catharine Wengerd.

Exceptions filed to this report by Jane E. Wengerd were dismissed, the Court, SADLER, P. J., saying: "The conclusion arrived at by the Auditor seems to be fully supported by Haverstick's Appeal (103 Pa. 394). I believe that the distribution made is also in accordance with the intention of the testator. In Muller's Estate (19 WEEKLY NOTES, 320) the direction in the will was to pay the legacy 'immediately' after the decease of the testator. In the will of Wengerd the provision is that 'in case of the death of any of said children of my son David, before the payment to them of their said share, then to be divided between the survivors.' It was not immediately payable on the death of the testator. In Haverstick's Appeal (*supra*) it was provided that should any of them die before the distribution of the estate without heirs, then the part allotted to such shall be divided equally among the others named; so that the present case and that of Haverstick's Appeal may be distinguished from that of Muller's Estate. Again, the latter decision is by the Orphans' Court of Philadelphia, and not therefore controlling."

Exceptant then appealed, assigning this action of the Court for error.

F. E. Beltzhoover (J. E. Barnitz with him), for appellant.

J. W. Witzel, for appellees.

October 5, 1891. PAXSON, C. J. The contention in this case arises over the following clause in the will of John Wengerd, deceased:—

"I direct my executors, hereinafter named, to sell at public or private sale, my house and lot on the east side of Penn Street, known as the *pastorage*, and for the purpose of enabling them to

do so, I hereby authorize them to make, execute, acknowledge, and deliver the necessary deed or deeds to grant and convey the same to the purchaser or purchasers thereof, and the proceeds of the said sale, together with the proceeds of all bonds, notes, and cash on hand, with the proceeds of my personal property, I direct my said executors, after paying the legacy hereinbefore mentioned, my just debts and funeral expenses, and the expenses of administration, to divide into three equal shares, which I hereby bequeath as follows, viz., To Mary Gettle one-third; to Elizabeth Kozer one-third; and to John Wengerd, Harry Wengerd, and Catharine Wengerd, children of my son David Wengerd, deceased, the remaining one-third, to be divided between them share and share alike, and in case of the death of any of the said children of my son David, before the payment to them of their said share, then to be divided between the survivors."

John Wengerd, one of the grandsons above named of the testator, died about eleven months after the death of the latter. He had received \$200 of his share before his death. He left a will in which he made his widow, Jane E. Wengerd, the appellant, his sole legatee and executrix. She now claims, under her husband's will, the balance due him under the will of his grandfather. The Court below rejected her claim, hence this appeal.

The question is, When did the legacy to John Wengerd vest, if it vested at all? and if it vested at the death of the testator, was it divested by the accident of John's death before the full and final distribution of his grandfather's estate? That the executors regarded his interest as vested is clear from the fact that they paid him \$200 on account of it; and it is equally clear, had the distribution been made, as it might well have been, prior to John's death, he would have been entitled to the share. The testator had no debts; with the exception of a house and lot his estate not otherwise disposed of consisted of cash securities and money, which could readily have been distributed almost immediately after his death. The account was not filed until two years after the testator died, and then in obedience to a citation. We do not think the executors can defeat the rights of a legatee by delaying distribution.

In considering the nice question whether a legacy is vested or contingent, regard must always be had to the position of the parties. In construing a will, where the bequest is ambiguous, the inclinations of the Courts are always towards vesting the legacies. (Coggins's Appeal, 124 Pa. 10.) The presumption that a legacy was intended to be vested applies with far greater force where a testator is making provision for a child or a grandchild than where the gift is to

a stranger, or to a collateral relative as in *Haverstick's Appeal* (103 Pa. 394). It would be straining a point to hold that this testator intended that his grandchild should be deprived of his share, though he should die leaving a child or children, by the mere accident of his death the day before the money was distributed. This would enable an executor, under some circumstances, absolutely to defeat the will of his testator by withholding or refusing distribution for a certain period. We cannot assume that this testator intended to lodge such a power in the hands of the executors of his will.

The doctrine of this State, from the time of *Corbin v. Wilson* (2 Ashmead, 178), has uniformly been that a bequest of personal property relates to the time of the testator's death unless a contrary intent is clearly indicated in the will. "If any immediate legacy is given, without specifying a time for payment, and is given over in case the legatee dies before it becomes payable, the word payable can only have reference to the death of the testator" (Jarman on Wills, 809); and the same learned author says (in vol. iii. of the same work, p. 672): "Executory gifts over, in the event of legatees dying before receiving their legacies, have given rise to much litigation. Actual receipt may be delayed by so many different causes that the Court is unwilling to impute to the testator an intention to make that a condition of the legacy, and thus indefinitely postpone the absolute vesting of it." In *Rammell v. Gillow* (15 L. J. Ch. 35), where the will directed that the fund should go in equal shares to testator's children when they should attain twenty-one years of age, but in the event of the decease of any of said children before they should have received or become possessors of their share said share was to go to their children, it was held that those who had attained the age of twenty-one took vested interests even though they died before receiving the money. In *Hutcheon v. Mannington* (1 Ves. Jr. 366), there was a gift over if the legatee should die before he may have received it, and Lord THURLOW said: "I am to compute what time would be sufficient to enable these parties to receive their legacies. It is all too uncertain. . . . Suppose he had given a real estate in the manner you specify; it is clear, that it will neither depend upon the caprice of the trustee to sell, for that would be contrary to all common sense, nor upon his dilatoriness: in some way it may be sold immediately; but I should not inquire when a real estate might have been sold with all possible diligence, for it might be the very next day or that very evening; and therefore the Court always in such a case considers it as sold the moment the testator is dead; for where there is a trust, that is always considered here as done which is ordered to be done,

and the Court cannot measure the time. . . . In this case it is an immeasurable purpose. I can do nothing with it; it must be considered as vested from the death of the testator." *Martin v. Martin* (L. R. 2 Eq. 404); *Minors v. Battison* (L. R. 1 App. Cases, 428), and many other English cases, hold the same doctrine. The only case cited in opposition to this line of authority is *Haverstick's Appeal* (*supra*), which, while it gives color to the appellees' contention, differs in some respects from the case in hand. There the appellant claimed as the heir of his deceased wife. The clause in the will was: "Should any of them die before the distribution of my estate, without heirs, then the part allotted to such shall be divided equally among the others named." The Court held that the word "heirs" meant "children," and that the appellant was not entitled as heir to the legacy. The whole contention was over this point.

The decree is reversed at the costs of the appellees, and it is ordered that the record be remitted with instructions to make distribution in accordance with this opinion. H. C. O.

July '89, 1865. April 15, 1890; June 4, 1891.
Hill et al. v. Pardee et al.

Co-defendants—When improperly joined—Lessor and lessee.

Suit was brought against a railroad company and a mining company for a joint act in unlawfully and negligently removing the coal from under plaintiffs' mill without leaving sufficient support, whereby the surface of the land settled, with resulting damage to the mill. It appeared that the railroad company had leased the mines to the mining company before any of the acts which were claimed to have caused the injury were done, and that all of said acts were done by the lessee:

Held, that the railroad company under this evidence was not liable.

The predecessor of the railroad company in the title to the land which had been conveyed to plaintiffs covenanted with the vendee to make good any damage done to the surface of plaintiffs' lot by the mining operations conducted beneath it:

Held, that the railroad company was not liable upon this covenant for the reason that it was not declared upon.

Held further, that had it been declared upon, the mining company would have been improperly joined as defendant as not being a party to the covenant.

Where the liability of a defendant arises from covenant, and that of a co-defendant from a tort pure and simple, they may not be joined as parties in the same action.

Appeal of Ario Pardee & Co. and the Lehigh Valley Railroad Company, defendants, from the judgment of the Common Pleas of Luzerne

County, in an action of case brought by S. W. and T. J. Hill to recover damages to plaintiffs' property caused by the unlawful and negligent removal of coal from under plaintiffs' mill without leaving sufficient support. Pleas, not guilty, and the Statute of Limitations.

Upon the trial, before RICE, P. J., it appeared that in 1837, the Hazleton Coal Company began mining coal under what is now the borough of Hazleton, and in 1840 leased the coal under the lands to Pardee, Miner & Company, which by successive changes in the partners became, in 1842, the firm of A. Pardee & Co. Up to 1844, the rental of the coal company was a share of the coal mined; from that time down to 1868, a stated royalty per ton was paid to it. On July 19, 1867, the Hazleton Railroad Company, formerly the Hazleton Coal Company, conveyed a lot of land in the borough of Hazleton to Charles Meyers, in fee, reserving the coal and other minerals unto the grantors, "their successors or assigns," covenanting in the deed of conveyance that "earth covering such coal and other minerals shall not be in any manner cut, broken or displaced, and that every damage which may be done to the said lots or the buildings erected thereon, by the exercise of the mining privileges herein reserved, shall be made good by the Hazleton Railroad Company, their successors or assigns." This lot became vested by various mesne conveyances in the plaintiffs, who built a mill and other buildings upon it. On May 4, 1868, in pursuance of the Act of May 16, 1861, the Hazleton Railroad Company, by articles of merger, filed in the secretary of the Commonwealth's office, was consolidated into the Lehigh Valley Railroad Company. At the time of the sale of this property, by the Hazleton Railroad Company, July 19, 1867, mining had been done near the property in the construction of a gangway prior to 1858, and no mining has been done since that time under the property, or as closely to it as that done in the construction of the said gangway.

There was testimony to show that on Oct. 21, 1883, a crack or a squeeze occurred owing to the robbery of pillars, etc., by the Pardee Company, whereby plaintiffs' property was seriously damaged. There was much evidence offered upon this point, and also as to the amount of damage sustained.

Defendants requested the Court to charge, *inter alia*:—

(4) There can be no recovery against the Lehigh Valley Railroad Company, under the evidence. *Answer*. We answer that point in the negative. It is a purely legal question, and we shall not undertake to discuss it at this time. If it is desired hereafter to have this legal question considered, either by this Court or by the Court

above, the record is in such a condition that it may be done more satisfactorily than than it can be now. We answer the point in the negative. (Third assignment of error.)

Verdict for plaintiffs for \$3400. * A motion for a new trial having been refused, defendants appealed, assigning error, *inter alia*, as above.

The case was argued on April 15, 1890, PAXSON, C. J., and MITCHELL, J., being absent. It was subsequently reargued on June 4, 1891, before a full bench.

Henry W. Palmer, J. Vaughan Darling, and George H. Troutman (G. L. Halsey with them), for appellants.

A lessor is not liable for the negligence of his lessee.

Offerman v. Starr, 2 Pa. 394.

Little Schuylkill Co. v. Richards, 57 Id. 142.

Q. A. Gates (A. R. Brundage with him), for appellees.

The company was under an express covenant to maintain and support the surface; and an action on the case may therefore be maintained against it.

Lindeman v. Lindsey, 69 Pa. 93.

Union Petroleum Co. v. Bliven Co., 72 Id. 173.

Bombaugh v. Miller, 82 Id. 203.

Bainbridge on Mines and Minerals, 497

Defendants also were engaged in a joint venture and there is nothing to show any different relation than that between any other joint and several trespassers or wrongdoers.

October 5, 1891. MITCHELL, J. This action joins two defendants whose liability may be essentially different. The declaration is in case for a joint act in unlawfully and negligently removing the coal from under plaintiffs' mill, without leaving sufficient support, whereby the surface of the land settled, with resulting damage to the mill. But the evidence, even on the part of the plaintiffs, showed that the Railroad Company had leased the land to Pardee, the other defendant, before any of the acts which were claimed to have caused the injury were done, and that all of such acts were done by Pardee. *Prima facie*, therefore, the Railroad Company was not liable under the evidence in this action (Offerman v. Starr, 2 Pa. 394), and the defendants' fourth point should have been affirmed.

It is argued now that the Railroad Company is liable under the covenant by its predecessor to make good any damage done to the surface of plaintiffs' lot by the mining operations conducted underneath it. But this covenant is not declared upon as the basis of the action, and if it had been then Pardee & Co. would have been improperly joined, for they were not parties to the covenant. The cases, like Horn v. Miller (136 Pa. 640), which hold that trespass, or trespass on the case, is the proper remedy for disturbance of

a right, even where such right has been acquired by grant or covenant, do not apply, nor do they authorize the joinder of parties where the liability of one arises if at all from covenant, and that of the other from a tort pure and simple.

The other questions in the case, the extent to which the obligation of lateral support applies in favor of a party acquiring title after the operation causing the injury has been completed, and the Statute of Limitations can be better determined when plaintiffs have elected which of the defendants to pursue in the present action.

Judgment reversed, and venire de novo awarded. H. C. O.

July '91, 41.

May 22, 1891.

Dunlap v. Linton.

Seduction—Action by father for seduction and loss of service of his daughter—When right of action accrues—Statute of Limitations.

In an action for damages for seduction and loss of services occasioned thereby, it is the act of seduction that gives the right of action, though not actionable unless loss of service follow, and the Statute of Limitations runs from the date of the seduction.

The lying-in expenses, the support of the daughter, the mental pain she may have sustained, though forming the principal feature in awarding damages, do not of themselves give the cause of action.

Logan v. Murray, 6 S. & R. 175, approved.

Appeal of John A. Linton, defendant, from the judgment of the Common Pleas of Lancaster County in an action of trespass brought by James Dunlap for the seduction of the plaintiff's minor daughter.

On the trial, before LIVINGSTON, P. J., it appeared that the seduction occurred on August 16, 1883, and that a child was born May 16, 1884. The daughter was an inmate of her father's family, and the expenses of her confinement and the subsequent support of herself and child were borne by him. There was some evidence that in 1884 or 1885 the defendant went to Quincy, Illinois, and resided there until January, 1890. The writ in this case issued January 25, 1890. The defendant pleaded "Not guilty" and the Statute of Limitations.

The defendant requested the Court to charge, *inter alia*: (1) That the facts in this case prove that more than six years had elapsed after the cause of action had occurred before the suit was brought, and the verdict of the jury should be for the defendant. *Refused.*

Verdict and judgment for the plaintiff for \$550. Defendant thereupon appealed, assigning for error, *inter alia*, the refusal of the above point.

J. W. F. Swift and Hugh R. Fulton, for appellant.

The cause of action is the seduction; hence the statute begins to run from that time.

Act of March 27, 1713, 2 *Purd. Dig.* 1065, pl. 18.

Battle v. Faulkner, 3 *Barn. & Ald.* 288.

Badgley v. Decker, 44 *Barb.* 577.

Mohry v. Hoffman, 86 *Pa.* 358.

Owen v. Saving Fund, 97 *Id.* 47.

The residence of the defendant in another State did not prevent the running of the statute.

Gonder v. Estabrook, 33 *Pa.* 374.

Benjamin F. Davis, for appellee.

The Statute of Limitations only begins to run from the time the right of action accrues.

No right of action accrues to a parent for the mere seduction of his child.

2 *Add. Torts*, 1274; 1361.

The injury is the loss of service; hence the right of action accrues at pregnancy and confinement.

Ream v. Rank, 3 *S. & R.* 215.

Hornketh v. Barr, 8 *Id.* 36.

Jones v. Conoway, 4 *Yeates*, 109.

Roberts v. Read, 16 *East*, 215.

Bank v. Waterman, 26 *Conn.* 324.

October 5, 1891. *MITCHELL, J.* The Courts have been always liberal in sustaining actions of this kind, and we have accordingly looked carefully through the present case with every disposition to save the verdict, but settled principles seem clearly against it.

Though no authority has been found on the exact point as to the Statute of Limitations, yet all the cases treat the seduction as the cause of action, even though it be not actionable unless loss of service follow. Thus in *Christian's Note* to 3 *Blackstone*, 143, it is laid down as settled, that "in that action, which is in most general use, viz: a *per quod servitium amisit*, the father must prove that his daughter, when seduced, actually assisted in some degree in the housewifery of his family," and though the later authorities are that, if the daughter be under age, or over age and residing with the father, service will be presumed if it is within the power of the father to command, yet no change has been made as to the time to which the test shall be applied, to wit, the time of the seduction. And all of our own cases in which the subject is touched at all, go upon the same view. Thus in *Wilson v. Sproul* (3 *P. & W.* 49), it is said by *Ross, J.*, "the relation of master and servant must exist between the plaintiff and the person seduced, at the time when the injury is committed." In *South v. Denniston* (2 *Watts*, 474), it was held that a widowed mother, with whom the daughter did not live at the time of the seduction, could not maintain the action, although the lying-in took place in the mother's house, and the expenses were paid by her. *GIBSON, C. J.*, said the action was founded

exclusively on the relation of master and servant, and the gist of it being the consequential loss of service, "if this right be divested or expired, the relation can be renewed but by actual service, which to found an action for the interruption of it, must have existed at the doing of the act of which the interruption is a consequence. . . . But a mother being at best in the category of a father who has parted with his right, can maintain the action but on proof of actual service at the time of the seduction." And this is quoted with approval by *SERGEANT, J.*, in *Fernsler v. Moyer* (3 *W. & S.* 416), "The mother not being bound to maintenance can maintain the action only by proving actual service at the time of seduction."

But a case which seems to put the matter beyond further contention is *Logan v. Murray* (6 *S. & R.* 175). There the daughter was seduced during her father's lifetime, but was not confined until after his death while living with and rendering service to her mother, who was at the expense of the confinement. It was held that an action by the mother could not be maintained. "Whatever damage the mother might sustain," said *DUNCAN, J.*, "arose from an act committed in the father's lifetime. The daughter was his servant. When the mother became on her husband's death, the mistress of the house, the mischief was done; the daughter came into her service pregnant. If the alleged trespass gave her no cause of action, the consequence of the trespass could not. . . . I agree that this action is considered with great liberality, and that Courts of justice have extended it very far in comprehending not only parents, but other relatives *in loco parentis*; but they have always adhered to the nature of the action; have never extended it to cases where, at the time of the injury done, the person complaining was not, in contemplation of law, either enjoying the services of others, or having a right to retain them. . . . The lying-in expenses, the support of the daughter, the mental pain she may have sustained, do not of themselves give the cause of action, although in truth the latter forms the principal feature in giving damages." This case is decisive that the cause of action is the seduction, and that no new action arises from the subsequent results to the plaintiff. It establishes, therefore, that the cause of action in the present case was complete more than six years prior to the writ, and that the Statute of Limitations was a bar.

The defendant's first point should have been affirmed.

Judgment reversed.

R. H. N.

WEEKLY NOTES OF CASES.

VOL. XXVIII.] FRIDAY, NOV. 6, 1891. [No. 29.

Supreme Court.

Jan. '91, 236.

April 8, 1891.

Weigley v. Coffman.

Partners—Partnership account—Settlement of—Jurisdiction of Common Pleas and of Orphans' Court—Res adjudicata—When judgment of Court may be pleaded in bar in another action—Estoppel.

The final decree of a Court of Chancery dismissing a bill upon its merits, without a stipulation against prejudice, is conclusive between the same parties upon the same matter coming in question in another Court.

Where a bill is dismissed for want of jurisdiction, which shows that the merits were not heard, the dismissal is not a bar to a second bill.

The determination of the question of jurisdiction is but preliminary to the consideration of the case upon its merits.

Where a party succeeds in defeating an action by his pleading, by motion or the like, he cannot defeat a second action by taking a position inconsistent with that taken in the first.

G., the surviving partner of the firm of G. & C., filed a bill for an account against the executrix of C. in the C. P. No. 3, of Philadelphia County. The bill was dismissed upon demurrer, without prejudice, on the ground that it was plaintiff's duty as surviving partner to settle the business and state an account, and that if a balance was found to be due him, the Orphans' Court had jurisdiction to allow it from the estate of the deceased partner. G. thereupon settled an account, which the executrix of C. refused to pay. G. then filed a second bill for an account in C. P. No. 1, to which the defendant demurred on the ground of the want of jurisdiction. This demurrer was sustained on the ground that the jurisdiction was in the Orphans' Court, and the bill dismissed. The executrix of C. filed her account in the Orphans' Court, where G. presented his claim. The Orphans' Court declined jurisdiction on the ground that it involved the settlement of a partnership account. This decree was affirmed by the Supreme Court upon appeal. Pending this appeal, another bill was filed in C. P. No. 3, to which defendant pleaded *res adjudicata*, setting up the dismissal of the bill in C. P. No. 1 as a bar, to which appellant replied that the bill filed in C. P. No. 1 was not heard upon the merits, but was dismissed for want of jurisdiction. After hearing upon bill, plea, and replication, the Court dismissed the bill:

Held, to be error.

Appeal of William W. Weigley, executor of George A. Miller, deceased, who was surviving

partner of the firm of C. B. & G. A. Miller, plaintiff, from the decree of the Common Pleas No. 3, of Philadelphia County, dismissing a bill in equity for an account of partnership filed by plaintiff against Grace M. Coffman, surviving executrix of Charles B. Miller, deceased.

The facts are fully stated in the opinion of the Supreme Court, and are reported in *Miller v. Coffman* (16 WEEKLY NOTES, 423); *Miller's Estate* (22 Id. 11); *Weigley v. Coffman* (23 Id. 27); and *Miller's Estate* (27 Id. 3).

John H. Colton and Samuel C. Perkins, for appellant.

The cause alleged in appellant's bill in the Court below was not *res adjudicata* in C. P. No. 1. The bill in that Court was dismissed for want of jurisdiction. The appellant's reply to the plea of *res adjudicata* avers that the merits of the case "were not in controversy or decided."

An order of dismissal is a bar only where the Court has determined that the plaintiff had no title to the relief sought by his bill.

Story's Eq. Pleading, § 793.

A decree dismissing a bill in chancery, generally, may be set up in bar of a second bill; but where the bill has been dismissed on the ground that the Court had no jurisdiction, which shows that the merits were not heard, the dismissal is not a bar to a second bill.

Walden v. Bodley, 14 Peters, 156.

This rule is followed in this State. The conclusiveness of judgments is limited to "the judgment of a Court of competent jurisdiction . . . upon a point litigated between the parties."

Marsteller v. Marsteller, 132 Pa. 517.

Black on Judgments, § 713.

Freeman on Judgments, §§ 119, 120, 260.

Wells on Res Adjudicata, §§ 422, 455.

1 Chitty on Pleading, 198.

Haws v. Tiernan, 53 Pa. 192.

Rose v. Himely, 4 Cranch, 241.

Homer v. Brown, 16 How. 355.

Smith v. McNeal, 109 U. S. 426.

1 Greenleaf Ev., § 529.

Messinger v. Kintner, 4 Binn. 97.

Outram v. Morewood, 3 East, 346.

Amos Briggs (Abraham M. Beidler with him), for appellee.

The effect of the judgment in C. P. No. 1 is not simply that that Court had no jurisdiction, but that no Court of Common Pleas had jurisdiction.

Marsteller v. Marsteller, 132 Pa. 523.

Passmore Williamson's Case, 26 Id. 9.

Doyle v. Com., 107 Id. 25.

Conn. v. Lecky, 1 W. 67.

Hoffman v. Coster, 2 Wh. 472.

Helfenstein's Estate, 135 Pa. 293.

Taylor v. Cornelius, 60 Id. 199.

Kase v. Best, 15 Id. 102.

Silver v. County of Schuylkill, 32 Id. 357.

Freeman on Judgments, §§ 118, 267.

Bank of U. S. v. Moss, 6 How. 31.

October 26, 1891. **CLARK, J.** This bill is for an account of the firm of C. B. & G. A. Miller. The partnership was formed in November, 1878, and continued until the decease of Charles B. Miller, who died November 13, 1884. Grace M. Coffman is the surviving executrix of his last will and testament. G. A. Miller, the surviving partner, died January 12, 1888, and letters testamentary on his will were issued to W. W. Weigley.

No settlement of the partnership affairs was had in the lifetime of Charles B. Miller. After his death, however, George A. Miller, the surviving partner, filed his bill for an account in the Court of Common Pleas No. 3, of Philadelphia, setting forth that at the death of said Charles B. Miller the clear profits amounted to a sum not less than \$35,000, which should be equally divided, and that the said Charles B. Miller at his decease had in his hands the sum of \$16,000, which was due and owing to him; that no settlement had yet been made, and therefore praying for an account. To this bill the defendant demurred, filing, *inter alia*, the following grounds of demurrer: (1) The defendant is but a trustee, and has no interest in the corpus of the estate; (3) As surviving partner of the alleged co-partnership of C. B. & G. A. Miller, it is the plaintiff's duty to convert the co-partnership assets into money; to pay all the debts of the co-partnership; to account to the representatives of the estate of the deceased partner, and to show that he is a creditor partner of said firm, before any procedure calling on the testator's estate to make answer to his alleged claim; (4) The said bill does not allege or show that the assets of said co-partnership will not pay the debts thereof, and also what may be due, if anything, to the plaintiff. At the hearing, the President Judge, LUDLOW, said: "The bill does not show that an account of the partnership business has been stated by the plaintiff. It is his duty, as surviving partner, to settle the business, and to account to the estate of his deceased partner. If it is found that there is a balance due to himself, the Orphans' Court has jurisdiction to allow his claim out of the estate of the decedent." The Court was of the opinion that the bill was fatally defective, and the demurrer was sustained, and the bill dismissed, without prejudice. (*Miller v. Coffman*, 16 WEEKLY NOTES, 423.)

The surviving partner, as he alleges, thereupon settled up the outstanding accounts, and prepared a statement of the affairs of the firm, which exhibited an indebtedness to him of \$16,000.61 by the estate of Charles B. Miller, deceased. This claim he presented to the executrix of the estate of Charles B. Miller, deceased, who refused to pay the same. He then, on the eighth of January, 1886, filed in the Common Pleas No. 1 of Philadelphia, a second bill for an ac-

count, to which the defendant again demurred, and as cause for demurrer assigned the want of jurisdiction in the Common Pleas to give the relief prayed for. On June 19, 1886, the Court, being of opinion that the jurisdiction was exclusively in the Orphans' Court, sustained the demurrer, and dismissed the bill with costs.

The executrix of Charles B. Miller, deceased, having filed her account on the twenty-eighth of December, 1885, George A. Miller accordingly went into the Orphans' Court, when it was called for audit, and presented his claim for \$16,000.61, alleged to be due him as surviving partner on his own statement of the partnership accounts. The Orphans' Court, in like manner, declined jurisdiction, for the reason that the claim involved the settlement of a partnership account, and that ordinarily the authority of the Orphans' Court did not extend to the settlement of accounts between partners. Pending the proceedings in the Orphans' Court, George A. Miller died. The decree of the Orphans' Court, having been brought into this Court upon an appeal, was affirmed. (*Weigley's Appeal*, 136 Pa. 349; 27 WEEKLY NOTES, 8.) Our brother MITCHELL, delivering the opinion of the Court, said: "Has the Orphans' Court jurisdiction of such an issue? To state the question, thus cleared of irrelevant matters, seems to answer it in the negative. It is not claimed that an account was stated by the assumed partners in the lifetime of both, and a balance found due to the appellant upon which he would have standing as a creditor to maintain assumpsit, or to come in as a claimant upon the fund. His standing as a creditor at all, in which character alone can he make his claim, depends on the establishment of the disputed facts of the existence of a partnership, and a balance due him as a creditor-partner upon the account. These facts the Orphans' Court has no jurisdiction to determine, nor would it have any means of enforcing payment by appellant, should the account when stated show a balance against him. Such issues belong to the Common Pleas, either in an action of account, or in the more convenient form of a bill in equity, where the Chancellor has control over both parties to enforce performance whichever way the result may turn out." (*Wiley's Appeal* (84 Pa. 270), and *Ainey's Appeal* (11 WEEKLY NOTES, 568), were cited in support of this doctrine.

Pending an appeal from the Orphans' Court, the appellant in this case filed the bill now under consideration, to which the appellee pleaded *res adjudicata*, setting up the dismissal of the bill in the Common Pleas No. 1 as a bar to the present bill. To this the appellant replied, that the bill filed in Common Pleas No. 1 was dismissed solely for want of jurisdiction in the said Court, and not upon the merits. As the cause is here

for argument upon the bill, answer, and replication, the facts set forth in the replication must be assumed; and that the fact thus assumed is true, appears from the action of the Court upon the motion to amend. (*Weigley v. Coffman*, 23 WEEKLY NOTES, 27.)

The final decree of a Court of Chancery dismissing a bill upon its merits, without a stipulation against prejudice, is, of course, conclusive between the same parties, upon the same matter coming in question in another Court. (*Kelsey v. Murphy*, 26 Pa. 78; *Westcott v. Edmunds*, 68 Id. 34; *Daniels Ch. Pr.* 659, 994 n., and cases cited.) Every Court has the power, in the first instance, to determine its own jurisdiction. The first point decided by a Court in any case, although it may not be in terms, is that of jurisdiction, and it has that power, although its decision and the law may be that it really has no such jurisdiction. (*King v. Poole*, 36 Barb. 242; 12 Am. & Eng. Ency. of Law, 307, and cases cited.) Judgment upon a point not touching the merits of the principal matter in dispute, will, in respect of that point, ordinarily raise an estoppel. "The parties and their privies will be precluded from asserting the contrary of the fact found in such judgment. Thus, dismissal of a suit for want of jurisdiction will estop the plaintiff from alleging, after the expiration of the Statute of Limitations, that he had begun suit (no other one having been undertaken) within the proper time. And, indeed, it appears to be true, as a general proposition, that where a party succeeds in defeating an action by his pleading, by motion, or the like, he cannot defeat a second action by taking a position inconsistent with that taken in the first." (*Bigelow on Estoppel*, 534.)

At the hearing of the bill in Common Pleas No. 1, the appellee demurred, assigning want of jurisdiction in the Court. She now contends and seeks to dismiss the plaintiff's bill, upon the plea of *res adjudicata*, upon the alleged ground that the Court had jurisdiction. This is an inconsistency which cannot be allowed. It is a matter of no consequence in this case that the Court of Common Pleas No. 1 in fact had jurisdiction; that Court decided otherwise, and refused to exercise its jurisdiction. It is true that an appeal might have been taken, but none was taken, and the decision against jurisdiction in consequence became the law in that particular case; but as the decision was not upon the merits, and did not determine the plaintiff's title to relief under the bill, it was not, according to all the cases, a bar in another suit.

The determination of the question of jurisdiction is but preliminary to the consideration of the case on its merits. A decree to be conclusive in other cases between the same parties, must have been on the merits of the case.

(*Freeman on Judgments*, 3d ed. secs. 260-266.) The judgment must be upon the merits; if the real merits of the action are not decided in the prior judgment, it is no bar. (*Herman on Estoppel*, 278, and cases there cited.) "It is only where the point in issue has been determined that a judgment, is a bar. If the suit is discontinued, or the plaintiff becomes nonsuit, or for any other cause there has been no judgment of the Court upon the matter in issue, the proceedings are not conclusive. So, also, in order to constitute the former judgment a complete bar, it must appear to have been a decision upon the merits; and this will be sufficient, though the declaration were essentially defective, so that it would have been adjudged bad on demurrer. But if the trial went off on a technical defect, or because the debt was not yet due, or because the Court had not jurisdiction, or because of a temporary disability of the plaintiff to sue, or the like, the judgment will be no bar to a future action." (1 *Greenleaf on Ev.*, secs. 529-530.) "If the decision was rendered upon a mere motion or a summary application, or if the cause was dismissed upon some preliminary ground, as upon a plea in abatement, *e. g.*, because the wrong forum or mode of suit had been resorted to, for want of jurisdiction, defect in the pleadings, misjoinder, nonjoinder, non-appearance of the plaintiff, or the like, the parties are at liberty to raise the main issue again in any other form they choose." (*Bigelow on Estoppel*, 52.) An order of dismissal is a bar only when the Court has determined that the plaintiff has no title to the relief sought by his bill. (*Story's Eq.*, sec. 793.)

"The doctrine of *res adjudicata*," said Mr. Justice FOSTER, in *Foster v. Rusteed* (100 Mass. 409), "is plain and intelligible, and amounts simply to this, that a cause of action once finally determined, without appeal, between the parties, on the merits, by any competent tribunal, cannot afterwards be litigated by new proceedings either before the same or any other tribunal. But no such effect is attributable to a decree dismissing a bill for want of jurisdiction, failure of prosecution, want of parties, or any other cause not involving the essential merits of the controversy. And where in the answer various matters of defence are set forth, some of which relate only to the maintenance of the suit and others to the merits, and there is a general decree of bill dismissed, from which it does not appear what was the prevailing ground of defence, it is impossible to hold that the decree operates to preclude future proceedings." In *Walden v. Bodley* (14 Peters, 156), it was held that a decree dismissing a bill in chancery, generally, may be set up in bar of a second bill; but where the bill has been dismissed on the

ground that the Court had no jurisdiction, which shows that the merits were not heard, the dismissal is not a bar to a second bill. To the same effect, also, is *Hughes v. United States* (4 Wallace, 232).

From the authorities cited, and the reasons assigned therein, it is plain that when a bill is dismissed upon the ground of want of jurisdiction, the dismissal cannot be said to be upon the merits. For, whether the action of the Court be right or wrong, the complainant's title to the relief sought is not thereby determined.

The decree of the Common Pleas is reversed at the costs of the appellee, and the record is remitted for further proceeding. H. C. O.

Jan. '90, 345.

May 7, 1890: May 5, 1891.

Pickett v. Pacific Mutual Ins. Co.

Accident insurance—Exception as to inhalation of gas—Whether applies where the assured is overcome by gas while working in a well—Requirement of external visible mark of accident.

A. insured his life in the sum of \$5000 "to be paid after . . . proof that [he had] . . . sustained such violent and accidental injuries as shall be externally visible upon his person and which alone shall have caused his death within ninety days of such accident." There was an exception in case of injury "in any occupation or exposure classed" as "more hazardous," and in case "of death or injury . . . from taking of poison, contact with poisonous substances, inhalation of gas," etc. An hour or two after the policy was delivered he went into a well (with which he was familiar and in which he had been with safety a short time before) for the purpose of repairing the pump; he was overcome by gas and taken out dead; his death having been caused, as testified to by the physician who made a *post-mortem* examination, "by asphyxia caused by inhalation of gas."

Held (1), That the death occurred from "external accidental injuries without any conscious or voluntary act on the part of the insured," and was as purely accidental as if he had been suddenly and unexpectedly engulfed in water and drowned.

(2) That the presence of gas in the atmosphere as an external cause was a violent agency.

(3) That its violent effect upon the vital organs being evident on the *post-mortem* examination the injuries were "visible upon his person."

(4) That death was not caused "by the inhalation of gas" within the exception in the policy, which exception related only to the voluntary inhalation of gas as in dentistry, surgery, etc. (*Paul v. Travelers' Ins. Co.*, 112 N. Y. 472, followed.)

(5) That therefore the legal representatives of the assured were entitled to recover.

Pollock v. Acc. Assn., 102 Pa. 230, distinguished.

Under the provisions of the Act of May 11, 1881 (P. L. 20), an insurance company failing to attach a copy of its by-laws to its policies, may not offer the same in evidence, and where such evidence is received under objection and a verdict is rendered against the

company, the Supreme Court on appeal will not consider the questions predicated upon the evidence thus erroneously received.

Appeal of the Pacific Mutual Life Insurance Company of California, defendant, from the judgment of the Common Pleas of Warren County, in an action brought by H. W. Pickett, administrator of John W. Moore, deceased, upon a policy of insurance issued to the said Moore.

The policy was issued for the sum of \$5000, which was—

To be paid to the legal representative of the insured after due notice and satisfactory proof that the insured has, during the continuance of this policy, sustained such violent and accidental injuries as shall externally be visible upon his person, and which alone shall have caused his death within ninety days of the date of such accident. . . .

Except that if injured in any occupation or exposure classed by the company as more hazardous than here specified, then the insurance and weekly indemnity shall be for such amounts as the premium paid will purchase at the rates fixed by this company for such increased hazard.

Among the conditions made part of the policy was the following:—

6. This insurance shall not cover disappearances nor injuries of which there is no visible external mark upon the body of the insured; nor death or injury resulting from or attributable partially or wholly to any of the following causes: Disease or bodily infirmity, or acts committed by the insured while under mental aberration produced by disease or bodily infirmity, fits, vertigo, hernia, sleep-walking, intoxication, medical or surgical treatment, sunstroke, freezing, taking of poison, contact with poisonous substances, inhalation of gas, war or riot, quarreling, dueling, fighting, wrestling, racing, excessive lifting, over-exertion, gymnastic sports (except for amusement), suicide (sane or insane), voluntary exposure to unnecessary danger or perilous venture (unless in the humane effort to save human life), violating the rules of any company or corporation, intentional injuries inflicted by the insured or beneficiary, or through their connivance or provocation, or being engaged in any unlawful or vicious act.

The policy was issued and delivered to the insured on June 4, 1889, between 4 and 5 P. M. An hour or two later he met his death in the manner described by one of the witnesses as follows: He came there about 5 o'clock, I should think. Q. Just state what took place in connection with his death. A. Mr. Moore said to me, I guess I will go out and get a drink of fresh water; and he says, I wish you would get me something to eat, I have not had any dinner. He started out to the well, and he came back to get water to prime the pump. He says, I guess I will fix it so it will not bother us any more. He started out to the barn and got a hatchet. He opened the well and went into it, and I went on and got some supper. I walked out in the garden for something and I looked in the well,

about ten minutes after he went in, and he was lying at the bottom of the well. I thought he had fainted, and I called to my mother to bring me some water, and I went into the well and I raised up his head. That is the last I remember after I got in the well. Q. This well was out of doors? A. Yes, sir. Q. What kind of a well was it? A. A drive well. There was a hole dug down about ten or twelve feet, and a working-barrel at the bottom of this hole. And this little hole drilled in the pipe was about half way down, I should judge. Q. How large is this hole? A. I should think about four feet square. Q. How did Mr. Moore go down? A. He put a ladder into the well and went down it. Q. You say he had to remove some planks in order to go down? A. Yes, sir, he removed two planks, I think. Q. Do you know what Mr. Moore's condition of health was prior to that time? A. He was healthy, as far as I know. He was in the well about two months before, the latter part of March. The well was all right then. He and my father worked in it half a day at that time. Q. What happened to Mr. Moore? A. Well, he died, is all that I can remember. Q. When you got down there, I understood you to say that you became insensible yourself? A. Yes, sir. I don't remember anything until I came to after they had drawn me out.

It was further testified that assistance was called, and that some of the persons going into the well were overcome by gas, and that Moore was taken out quite dead. The physician who made a *post-mortem* examination testified that death was caused by asphyxia caused by inhalation of gas. The testimony of the physician as to the condition of the body is quoted in the opinion of the Supreme Court. It was also shown that the occupation of the deceased was given in the application as "contractor and driller overseer;" that the premium paid by him was \$37.50; that under a provision in the by-laws of the company the employment in which the defendant was engaged at the time of his death would be classed as "hazardous;" that the company would not insure for more than \$1000 in such occupation, but if it should insure for a larger sum, that \$37.50 would purchase only \$2500 insurance.

The by-laws of the company were not attached to the policy, and were received in evidence under plaintiff's objection.

The defendant requested the Court (Brown, P. J.) to charge:—

(1) The clause in the policy of insurance sued upon, to wit: "This insurance shall not cover . . . death or injury resulting from or attributable partially or wholly to . . . inhalation of gas," applies to the case of death resulting from asphyxia caused by inhaling gas accumulated in the bottom of a well.

(2) Under the uncontradicted evidence in the case that the plaintiff's decedent met his death from asphyxia caused from inhaling gas at the bottom of a well, the plaintiff cannot recover, and the verdict of the jury should be for the defendant.

If the Court should decline to affirm the preceding 2d point, then the Court is further requested to instruct the jury, (3) That if the jury believe from the evidence that the plaintiff's decedent, John W. Moore, descended into the well where he met his death; that at the bottom thereof there was a large accumulation of gas into which he entered; that he inhaled said gas sufficient to exclude from his lungs the proper amount of air to support life, and died therefrom, then the plaintiff cannot recover, and the verdict should be for the defendant.

(4) That if the jury believe from the evidence that the plaintiff's decedent, John W. Moore, died from inhaling gas at the bottom of the well, whether from accident or not, then the plaintiff cannot recover in this suit, and their verdict should be for the defendant.

(5) Under the evidence in this case that the plaintiff's decedent, John W. Moore, was insured as "contractor and driller," which occupation was classed by the defendant company, and said Moore's application, in the classification of risks as "ordinary;" that the said Moore met his death in an occupation classed by defendant company in its classification of risks as "hazardous;" that the premium of \$37.50 paid by said Moore for \$5000 insurance in the occupation classed as "ordinary" would purchase only \$2500 insurance in the occupation classed as "hazardous;" the plaintiff if otherwise entitled to recover can recover only for \$2500, with interest after due proofs made of the death of said Moore.

(6) If the plaintiff is otherwise entitled to recover, he can in no event, under the evidence, recover a verdict for more than \$2500 with interest after due proofs made of the death of said Moore.

(7) If the Court should decline to affirm the preceding 5th and 6th points, then it is further requested to say to the jury, if the plaintiff is otherwise entitled to recover, that if the jury believe from the evidence that the \$37.50 premium paid by said John W. Moore was for a policy of insurance in an occupation classed by defendant company, and in said Moore's application as "ordinary;" that said Moore met his death while engaged in an occupation classed by the defendant as "hazardous;" that the premium paid of \$37.50 in the occupation classed as "ordinary" would purchase only \$2500 insurance in the occupation classed as "hazardous," then the plaintiff can recover only \$2500, with interest after due proofs made of the death of said Moore.

THE COURT. We decline to answer the several points presented by the defendant as unnecessary.

The Court directed a verdict for plaintiff. Verdict and judgment accordingly for \$5125. Defendant thereupon appealed, assigning for error the refusal of the points and the instructions to the jury as above.

The case was argued on May 7, 1890, STERRETT and MITCHELL, JJ., being absent. On May 19, 1890, an order was filed for a reargument before a full bench. The case was accordingly reargued on May 5, 1891.

D. I. Ball (*C. C. Thompson* with him), for appellant.

If the exception concerning inhalation of gas were intended only to cover the voluntary taking of it, the word "voluntarily" would have been inserted. Similar expressions have been held to include the involuntary doing of the dangerous thing.

Pullock v. Accident Ass'n, 102 Pa. 230.

There was no pretence of any evidence of violent and accidental injuries "externally visible on the person of" the insured; this was a bar to recovery.

Charles H. Noyes (on first argument) and *William E. Rice* (*Watson D. Hinckley, R. Brown, and Charles W. Stone* with them), for appellee.

The provision that injuries shall be externally visible on the person only applies in cases where death does not take place within ninety days.

Mallory v. Ins. Co., 47 N. Y. 52.

Trew v. Assurance Co., 5 H. & N. Exch. 211.

Winspear v. Ins. Co., L. R. 6 Q. B. Div. 42.

Ins. Co. v. Crandal, 120 U. S. 532.

McGlinchey v. F. & C. Co., 80 Me. 251.

The exception as to inhaling gas has been held to refer only to "those common uses of gas, in dentistry, surgery, etc."

Paul v. Travelers' Ins. Co., 112 N. Y. 472.

Assn. v. Newman, 3 Southeast. Rep. 805.

October 5, 1891. STERRETT, J. The undisputed facts, upon which the jury in this case was instructed to find for the plaintiff the full amount of his claim, are briefly as follows: On June 4, 1889, the plaintiff's intestate, John W. Moore, received and paid for the policy of insurance on which this suit was brought, a copy of which will be found in the record. Returning to his boarding-house, the same evening, he informed his landlady that he had no dinner and requested that his supper be prepared. He then went to the well in the open yard for a drink, and finding that the pump required priming with water he remarked that he would fix it so as to obviate that difficulty in the future. After procuring a hatchet and removing planks from the opening at the top, he descended into the dug out portion of the well, which was four or five feet wide and

only ten or twelve feet deep, for the purpose of closing a small opening in the iron pipe, about midway down. A few minutes later his lifeless remains were found at the bottom of the well. He died from *asphyxia*, or suffocation due to the accidental and unconscious inhalation of carbonic acid or other deadly gas that had unexpectedly accumulated in the dug out portion of the shallow well.

The well, with which deceased was familiar and in which he had been shortly before, was one of those known as a "driven well," made by driving an iron pipe into the ground, to the depth, in this case, of about forty feet. For the distance of about ten or twelve feet from the top, the earth around the iron pipe was dug out so as to form, as above stated, an open well, of about four or five feet in diameter, in which there was little or no water. The top of the well was covered with planks.

The deceased was a strong, healthy man. His sudden and wholly unexpected death, under the circumstances above stated, and within a few hours after he had procured the policy of insurance, undoubtedly resulted from external, violent and accidental injuries or means, and without any conscious or voluntary act on his part. There was no evidence, nor was it even suggested, that he had committed suicide, or that "he was wanting in reasonable care," or that he voluntarily exposed himself to danger. In describing the condition in which he found the body of deceased, the physician who made the *post-mortem* examination, testified: "The surface of the body was of a livid, bluish color; the lips and tongue were blue; the right side of the head was partially distended with dark blood; the left side was nearly empty; the lungs contained more blood than they would under different circumstances; they were somewhat congested; the pulmonary arteries were distended with blood; the liver was slightly congested, and also the kidneys; there was, however, no disease of the kidneys, no disease of any of the internal organs. . . . His death was caused by asphyxia, due to the inhalation of gas."

If the latter undisputed and undoubtedly correct conclusion of fact needed any confirmation, it may be found in the testimony as to the effect of the same noxious gas on those who went to the relief of the deceased and assisted in removing his remains from the well. It shows how narrowly they escaped a similar violent and accidental death.

The notice and proofs of death were full and complete. Their sufficiency was not even questioned.

In view of the undisputed facts, of which the above is an outline, the learned President of the Common Pleas refused to affirm defendant's

points for charge, some of which are predicated of the foregoing facts, and instructed the jury that upon the undisputed facts before them the plaintiff was entitled to recover; and there was accordingly a verdict and judgment in his favor. This action of the Court in refusing defendant's points and instructing the jury in plaintiff's favor are the subjects of complaint in the several specifications of error.

The first and main point was as follows: "The clause in the policy of insurance sued on, to wit: 'This insurance shall not cover . . . death or injury resulting from or attributable partially or wholly to . . . inhalation of gas,' applies to the cause of death resulting from asphyxia caused by inhaling gas accumulated at the bottom of the well."

This, in connection with the remaining seven points, was rightly refused. According to the undisputed facts, above referred to, the death of the insured was caused by external, violent and accidental means, and without any conscious or voluntary act on his part. No one knowing, as he did, the shallowness of the dug-out portion of the well, would ever suspect the presence of noxious gas therein. Doubtless he never, for a moment, contemplated the slightest danger. His death was purely accidental, quite as much so as if he had been suddenly and unexpectedly engulfed in water and drowned. The deadly but invisible gas, by which he was unconsciously and accidentally enveloped, was undoubtedly the external and violent cause of his injury and death. According to the physician's testimony, above quoted, its violent effect, upon the vital organs of the deceased, was plainly visible at the time of the *post-mortem* examination. As was well said in *Paul v. The Travelers' Ins. Co.* (112 N. Y. 472), which in principle rules this case: "As to the point raised by appellant that the death was not caused by external and violent means, within the meaning of the policy, we think it a sufficient answer that the gas in the atmosphere, as an external cause, was a violent agency, in the sense that it worked upon the intestate so as to cause his death. That a death is the result of accident, or is unnatural, imports an external and violent agency as the cause." In that case, the policy on which suit was brought provided that the insurance should not extend to death caused "by inhaling gas." It appeared that the insured was found dead in bed. Gas had escaped in the room, and death was caused by breathing the atmosphere of the room filled with gas. It was held that death was not caused by the inhaling of gas within the meaning of the policy. The company relied upon the same narrow and technical defence that is made by the defendant in this case. In an able opinion, reported in 45 Hun, 313, the learned Judge of the General

Term, whose judgment was afterwards affirmed by the Court of Appeals, said, *inter alia*: "Was the death of the intestate caused by or through external, violent, and accidental means, within the language of the policy? . . . We should say the death was due to external and violent means as clearly as drowning. . . . The cause of death came from outside as surely as would a rifle ball, or water in the case of drowning. The escape of gas into the room was violent in the same sense that would be the flow of water into a wrecked vessel. In either case, the external means constitute the cause which produces death. It is a violent death, produced by an external power, not natural. Some poisons, such as opium and chloral, produce no violent action on the human system. The man who descends into a well of carbonic acid gas is killed with no greater violence, perhaps, than was the intestate. Yet in all these cases the result would be called a violent death. . . . We also think the words, 'inhaling of gas,' were used to designate those common uses of gas in dentistry, surgery, etc. . . . Evidently an exception from death caused by a surgical operation was not broad enough to include the use of anesthetics preparatory to the operation. It contemplated a voluntary and intelligent act by the assured, not an involuntary and unconscious act."

On this question, the Court of Appeals, in affirming the decision of the General Term, said: "A careful consideration of this instrument and of the scope and design of its provisions, leads us to the conclusion that the appellant must fail in its contention. . . . In expressing its intention not to be liable for death from 'inhaling of gas,' the company can only be understood to mean a voluntary and intelligent act by the insured, and not an involuntary and unconscious act. Read in that sense and in the light of the contrast, these words must be interpreted as having reference to medical or surgical treatment, in which, *ex vi termini*, would be included the dentist's work, or to a suicidal purpose. Of course the deceased must have, in a certain sense, inhaled gas; but, in view of the finding that the death was caused by accidental means, the proper meaning of the words compels, as does the logic of the thing, the conclusion that there was not that voluntary or conscious act, necessarily involved in the process of inhaling. An accident is the happening of an event without the aid and the design of the person, and which is unforeseen. . . . To inhale gas requires an act of volition on the person's part before the danger is incurred. Poison may be taken by mistake, or poisonous substances may be inadvertently touched; but, whatever the motive of the insured, his act precedes either fact. . . . If the policy had said that it was not to extend to any death caused wholly or in

part by gas, it would have expressed precisely what the appellant now says is meant by the present phrase, and there could have been no room for doubt or mistake. Policies of insurance are to be liberally construed, and, as in all contracts, conditions are to be construed strictly against those for whose benefit they are reserved."

The principles, so well stated and enforced in the cases above cited, were afterwards approvingly considered in *Bacon v. United States Mut. Accident Association* (123 N. Y. 304). In further support of the same principles reference might be made to other authorities, among which are 2 May on Insurance, 3 Ed. §§ 516, 530, in which reference is made to *Trew v. Assurance Co.*, 5 H. & N. Exch. 211; *Winspear v. Accident Ins. Co.* (L. R. 6 Q. B. D. 42); *Accident Ins. Co. v. Crandall* (120 U. S. 532); *Mallory v. Travelers' Ins. Co.* (47 N. Y. 52); *Life and Accident Ins. Co. v. Burroughs* (69 Pa. 43); *McGlinchey v. Fidelity and Casualty Co.* (80 Maine, 251); *EGgenberger v. Guarantee M. A. Association* (41 Fed. Rep. 172); *U. S. Mut. Accident Association v. Newman* (3 Southeastern Rep. 805); but further elaboration is unnecessary.

This case is not ruled by *Pollock v. U. S. Mut. Accident Association* (102 Pa. 230), on which defendant relies. While that case may well stand upon its own peculiar facts, we think the present case is clearly distinguishable in its controlling facts as well as in the principles applicable to them. In that case the injury did not result from external, violent, and accidental means. The fatal drug was voluntarily and intentionally taken by the deceased. In deciding that case this Court never could have intended to lay down the broad rule that in construing an accident policy there is no distinction between external, violent, and accidental causes of death and those cases in which death results from voluntary acts. What was decided in that case was that, under the various clauses of the policy sued on, there could be no recovery; and it was unimportant whether the means arose from the designing act of the insured or otherwise.

Another ground of defence suggested in defendant's fifth, sixth, and seventh points was that the deceased was injured in an occupation or exposure classed by the company as more hazardous than that specified in the policy, etc. The points referred to appear to be predicated of testimony which was improperly before the jury. The company, in disregard of the provisions of the Act of May 11, 1881 (P. L. 20), had failed to attach to the policy copies of the by-laws or application, and should not have been permitted, against plaintiff's objection, to give them in evidence. The Act was passed in the interest of honesty and fair-dealing, and its provisions should be

strictly enforced. We have no doubt they apply to such companies as the defendant.

Without further referring to the specifications of error, it is sufficient to say that neither of them is sustained.

The deceased was accidentally, violently, and fatally asphyxiated by the unknown presence of a fluid foreign to his person. If that fluid had been oil, smoke, water, or molten metal, the result would have been substantially the same; death, caused not so much by the inhalation of the fluid as by its action in excluding life-supporting air, would have inevitably resulted. A fair construction of the policy leads to the conclusion reached by the Court below that death resulting from causes such as killed the intestate is not within any of the exemptions relied on by the company.

Judgment affirmed.

R. H. N.

July '91, 65.

May 21, 1891.

Snider v. Baer.

Decedent's estate—Will—Construction of—Act of April 8, 1833.

A testator who was childless, after expressing his desire "to settle my worldly affairs," provided as follows: "Also, I direct that my beloved wife, A., shall have and hold the property in B., where I now reside, said A. to have the sole control of the same, during her lifetime, and at the discretion of my beloved wife A., she shall order my executor to sell the real estate at public sale or at private sale, all my real estate to the best advantage of my wife, and I hereby empower my executor to make deeds of conveyances for the same as fully as I could have done in my lifetime; and the moneys realized from the sale of my real estate, my executor shall pay over to my beloved wife, A., and she, the said A., shall have power to dispose of the same by bequeath or as she directs. . . . Also, I direct that my wife, A., shall have and hold all my personal property for her own."

Held, that A. took a fee.

It detracts nothing from a fee for a testator to say that his devisee shall have the sole control of the property during her lifetime; and an absolute gift of money is not qualified by a superfluous authority to bequeath it.

Appeal of Jacob H. Baer, executor of Anna Shaffer, deceased, defendant, from the judgment of the Common Pleas of York County, in an action of ejectment, brought by Catharine Snider, to recover a lot of ground in the city of York.

The parties agreed upon a case stated which set forth in substance that Michael S. Shaffer, the brother of the plaintiff, died February 16, 1877, testate, seised of the land in question, and of no other real estate, and leaving to survive him a widow, Anna Shaffer, but no lineal de-

scendants. Testator, after reciting his desire to settle his worldly affairs, provided as follows:—

First. I direct that all my debts and funeral Expenses be paid as Soon after my decease as possible, out of the first monies that Shall come into the hands of my Executor from any portion of my Estate real or personal. Also, I direct that my beloved wife Anna, Shall have and hold the property in Bottstown, where I now reside. Said Anna to have the Sole control of the Same, during her lifetime, and at the discretion of my beloved wife Anna, She Shall order my Executor to Sell the real Estate at public Sale, or at private Sale, all my real Estate to the best advantage of my wife. And I hereby Empower my Executor to make deeds of conveyances for the Same as fully as I could have done in my lifetime; and the moneys realized from the Sale of my real Estate, my Executor Shall pay over to my beloved wife, Anna, and She the Said Anna, Shall have power to dispose of the Same by bequest or as she directs.

Also, I direct that my wife Anna, Shall have and hold all my personal property for her own.—*o*— And I do hereby make and ordain Jacob Bear Executor of this my last will and Testament; In witness whereof, etc.

Anna Shaffer died November 14, 1889, seised of no other real estate than the property in question, leaving a will dated February 15, 1885, whereby she provided, *inter alia*:—

Also, I direct that my Executor Shall Sell at public Sale all my real Estate to the best advantage of my heirs hereinafter named and I hereby empower him to make Deeds of conveyances for the same as fully as I could have done in my lifetime; and also, all my personal property, to be Sold by my Executor, and the balance if any is left, Shall be Equally distributed among the several named persons to Jenny Petery wife of Jonathan Petery, Fertuent Petery, Daniel Petery, and Catharine Snyder wife of Henry Snyder, Share and Share alike, among those four persons named above, or their heirs. And I do hereby make and ordain Jacob H. Baer Executor of this my last will and Testament; In witness whereof, etc.

Catharine Snider, named in this latter will and the plaintiff, are one and the same person. If the Court should be of opinion that the fee in said land is in the heir-at-law of said Michael S. Shaffer, then judgment to be entered for the plaintiff with costs, otherwise for the defendant, etc.

The Court, LATIMER, P. J., entered judgment for the plaintiff, saying:—

"This is a close case, but a careful examination of the numerous cases cited and of many others, has strengthened the impression formed at the argument that the fee in the premises in dispute is in the plaintiff; and that defendant's testatrix, Anna Shaffer, took under the will of Michael S. Shaffer no more than a life estate, with powers to direct a sale and appoint the proceeds, which she never exercised.

"The 9th section of the Act of April 8, 1833, declares: 'All devises of real estate shall pass the whole estate of the testator in the premises devised, although there be no words of inheri-

tance or of perpetuity, unless it appears by a devise over, or by words of limitation, or otherwise in the will, that the testator intended to devise a less estate.' The will of Michael Shaffer contains no devise over, but it does contain an express limitation of the estate devised to his wife '*during her lifetime*,' and hence the Act of 1833 does not apply.

"But it is contended that as the testator preceded the devise to his wife by general words expressive of an intent to dispose of his whole estate—'As to such worldly estate as it has pleased God to bless me with, I dispose of the same as follows,'—and as the wife was the sole beneficiary under the will, and is clothed with certain powers of disposal over the realty, and as there is no devise over, the widow took a fee notwithstanding the limitation contained in the devising clause.

"It is a perfectly familiar principle, illustrated by a multitude of cases, which it is not necessary now to cite, that where a testator, by general introductory words, evinces an intent to dispose of his whole estate, those words are to be carried into the devising clauses, and under them specific devisees may take the fee without words of inheritance, but such introductory phrases will not of themselves create a fee nor carry an estate clearly omitted (*Rupp v. Eberly*, 79 Pa. 141); nor enlarge a devisee's estate into a fee when there is a clear intention to give a less estate. (*Burkall v. Bucher*, 2 Binn. 455.) They may serve to supply the want of words of inheritance, but not to contradict or defeat an express limitation of the estate devised, such as this will contained.

"It is true that a general devise with power to dispose of the corpus may carry a fee (*Musselman's Estate*, 39 Pa. 469; *Church v. Disbrow*, 52 Id. 219), and that a devise for life with an absolute power of disposal in some cases carries a fee. (*Morris v. Pfahler*, 1 Watts, 389; *Grove's Estate*, 58 Pa. 429.) But here the power of disposal given to the widow, the life-tenant, is by no means an absolute power; on the contrary it is limited both as to time and method. She is given discretionary power to direct a sale of the realty devised, but such sale is to be made *by the executor*; she is given the right to receive the proceeds, but has no power to expend them, only to dispose of them '*by bequest or as she shall direct*,' which seems to contemplate a disposition of the proceeds by will. Her power is confined to the use of the realty for life, to directing its sale, and to appointing the proceeds by will. Such limited powers are entirely insufficient to enlarge an expressly defined life estate into a fee under any of the decisions. And where the estate is given for life only, though coupled with a general power of disposal, the devisee takes only for life, unless the general intent would be

defeated by adhering to the particular intent. (*Church v. Disbrow*, 52 Pa. 219.) There is no general intent apparent in this will that would be defeated by carrying out the expressed intention of the testator to give his wife a life estate in his realty with power of appointment of its proceeds if sold in her lifetime. In *Forsythe v. Forsythe* (108 Pa. 129), there was a devise for life, with an *absolute* power of disposal of the corpus, unlimited as to time or manner, and it was held that the devisee took only a life estate, with power of disposal, that was well executed by her devise of the premises in fee. Thus the primary intent to give her only a life estate prevailed, though she was clothed with all the powers of absolute ownership. In *Hinkle's Estate* (116 Pa. 490), it was held that when there was an express life estate, a power 'to sell and dispose of the same as he may desire,' did not serve to enlarge the life estate into a fee. It is true that in the latter case there was a devise over, but the ruling is not put upon that ground.

"It is true that this widow was the only object of the testator's solicitude, and the only beneficiary under his will; and that, in general, testamentary provisions for widows are to be liberally interpreted. *Prima facie* the first taker is the principal object of testator's bounty, and in doubtful cases the construction leans in favor of making the gift to him as effectual as possible. (*Rewnit v. Ulrich*, 23 Pa. 388.) But these rules of construction are only operative in doubtful cases, assisting in the interpretation of obscure phraseology, and are never permitted to modify a clearly defined gift or defeat an unambiguously expressed intent. When there is no ambiguity in the language there will be no construction against the plain meaning, is a cardinal rule of construction of wills; and the interpretation is always to be liberal in favor of the heirs-at-law and strict against devisees. An heir-at-law can only be disinherited by express devise, or necessary implication, which has been defined to be such a strong probability that an intention to the contrary cannot be supposed. (3 *Jarman on Wills* (5th edition), 704.)

"Here the words of the devise clearly define the estate given to the widow to be a life estate. The particular intent to provide for his widow in that way, and by the powers of sale and appointment of proceeds conferred on her, is not in conflict with any general intent to be drawn from the whole scope of the will, and the particular intent prevails. Especially is this so in favor of the heir-at-law, who is the plaintiff in this case, and who is not to be disinherited by doubtful construction or conjecture as to the testator's intention. (*Rupp v. Eberly*, 79 Pa. 141.)

"We can only judge of this testator's intention by the language he used, and its meaning is free

from doubt. We must believe that he intended to die intestate of this land, if his widow should fail to exercise the power he conferred upon her of compelling the sale of the land, and of appointment of its proceeds. She did not exercise these powers. She never directed the land to be sold, and consequently the time never arrived for her to exercise the power of appointment of the proceeds. Her power was limited, not general, but expressly confined to the proceeds of sale. And a power of appointment of the proceeds of sale is not well exercised by a *devise of the corpus*. (*Wood's Estate*, 1 Barr, 368.) And hence her will containing a general devise of all her land was not an exercise of the power, even though the premises in dispute devised under her husband's will were all the lands she possessed. It follows from what has been said that the plaintiff, the heir-at-law of Michael S. Shaffer, took at his death a fee simple estate in the premises in dispute, subject to the widow's life estate, and subject to be defeated by her exercise of the powers of sale and appointment conferred on her by her husband's will. This estate became absolute at the death of Anna Shaffer, without having exercised the powers, and the plaintiff having an indefeasible estate in fee simple in the premises in dispute is entitled to their possession as against Anna Shaffer's executor."

Whereupon defendant appealed, assigning the judgment of the Court for error.

V. K. Keesey (*Horace Keesey* with him), for appellant.

The devising clause, "I direct that my beloved wife Anna shall have and hold the property in Bottstown, where I now reside," passes a fee. The next clause was merely intended to enlarge her powers, and is surplusage.

Roberts v. Unger, 2 Pears. 241.

Shirey v. Postlethwaite, 72 Pa. 40.

Martin v. McDevitt, 30 Leg. Int. 92.

Rockell v. Eddinger, *61 Pa. 523.

The introductory clause, "and as to such worldly estate as it has pleased God to intrust me, I dispose of the same as follows," should be read with the devising clause, to show that an intestacy was not intended, and to show the amount and character of the estate disposed of.

Schriner v. Meyer, 19 Pa. 67.

Wood v. Hill, Id. 513.

Walker v. Walker, 28 Id. 40.

Mutter's Estate, 38 Id. 314.

Even if the gift to his wife be for life, it is without any limitation over and without the intervention of a trustee; such a bequest is absolute.

Merkel's Appeal, 109 Pa. 238.

Smith's Appeal, 23 Id. 9.

Diehl's Estate, 36 Id. 120.

Silkmitter's Appeal, 45 Id. 365.

Grove's Estate, 58 Id. 432.

Church v. Disbrow, 52 Pa. 219.

Post v. Dillon, 8 Phila. 31.

Roloson v. Collum, 23 Pa. L. J. 155.

Smith v. Fulkinson, 25 Pa. 109.

Morris v. Phaler, 1 W. 369.

Musselman's Estate, 39 Pa. 369.

Schuffelme v. Kessler, 5 R. 115.

Mrs. Shaffer, at all events, executed the power contained in her husband's will.

Mutter's Estate, 38 Pa. 321.

1 Jarman on Wills, 415, 416.

Keefer v. Schwartz, 47 Pa. 503.

Act of June 4, 1879, § 3 (Purd. 1713, § 25).

Robert F. Gibson, for appellee.

The devising clause followed by the next one gave only a life estate.

A will must be so construed as to render every part of it effective. This restricting clause cannot be ignored.

Mutter's Estate, 38 Pa. 321.

1 Jarman on Wills, 415-6.

There is no residuary clause, but its omission, even though accidental, cannot be supplied.

Carman's Appeal, 2 Penny, 336.

The rule established by the Act of April 8, 1833, is, that if the intention of the testator to the contrary appears in the will, the Act does not apply.

Shirley v. Postlethwaite, 72 Pa. 40.

Rockell v. Eddinger, 81 Id. 525.

Only in doubtful cases the law leans in favor of the first taker as the principal object of the testator's bounty.

Amelia Smith's Appeal, 23 Pa. 9.

Rewalt v. Ulrich, Id. 388.

An introductory clause, expressive of an intent to dispose of the testator's whole estate, will not carry an estate clearly omitted. Much less will it have any weight where there is not only a clear omission but also an express restriction. For it is found that in none of the cases in which such an introductory clause has been permitted to have a deciding or partial weight in construing a fee, are there words of limitation or restriction.

Schrivver v. Meyer, 19 Pa. 87.

Wood v. Hills, 19 Id. 513.

Walker v. Walker, 28 Id. 40.

Burkart v. Bucher, 2 Binn. 455.

Steele v. Thompson, 14 S. & R. 64.

It is contended by appellant that even if it is a gift for life, it is without any limitation over and without the intervention of a trustee, and therefore a fee. Merkel's Appeal, cited in support of this, involved only personality, and all of the cases cited involved personality solely, except Smith's Appeal (23 Pa. 9), in which there were words of entailment, and Grove's Estate (58 Id. 429), in which realty and personality were jointly devised, but the realty was held to vest in fee on other and distinct grounds.

A life estate is not enlarged by even an absolute power of disposal.

Fisher v. Herbell, 7 W. & S. 63.

Musselman's Estate, 39 Pa. 469.

Palethorp v. Bergner, 52 Id. 149.

Hoffner v. Wynkoop, 97 Id. 132.

Forsythe v. Forsythe, 108 Id. 131.

Hinkle's Appeal, 116 Id. 497, and the cases therein cited.

The power here is not absolute, and not over the corpus.

October 5, 1891. PAXSON, C. J. We agree with the Court below that this is a close case. Its solution must mainly depend upon the proper construction of the will of Michael S. Shaffer, deceased. The testator, after expressing his desire "to settle my worldly affairs," thus disposes of the real estate in controversy. "Also, I direct that my beloved wife, Anna, shall have and hold the property in Bottstown where I now reside, said Anna to have the sole control of the same, during her lifetime, and at the discretion of my beloved wife, Anna, she shall order my executor to sell the real estate at public sale, or at private sale, all my real estate to the best advantage of my wife. And I hereby empower my executor to make deeds of conveyances for the same as fully as I could have done in my lifetime; and the moneys realized from the sale of my real estate, my executor shall pay over to my beloved wife, Anna, and she, the said Anna, shall have power to dispose of the same by bequest, or as she directs. . . . Also, I direct that my wife, Anna, shall have and hold all my personal property for her own."

The learned Judge below held that the widow of the testator took but a life estate in the land, with a power to compel a sale thereof, and to appoint the proceeds, and that the testator intended to die intestate in case his widow failed to exercise these powers.

From the case stated it appears that the widow never did exercise these powers; the real estate in controversy remained unsold at the time of her death. This contest is between the heir-at-law of the testator, and the executor of his wife. The Court below entered judgment upon the case stated in favor of the heir-at-law.

A careful consideration of the case leads us to a different conclusion. The testator evidently intended to dispose of his entire estate. He was childless; his wife was the sole object of his bounty; there is no other person named or referred to in the will. The first sentence of the will, in the paragraph above quoted, carried the fee. He says his wife "shall have and hold the property in Bottstown, where I now reside." While this language in a deed would not carry the fee, it is otherwise in a will. Having thus given the fee, what was there to cut it down to a life estate? Admittedly nothing, except the next sentence in which the testator says: "Said Anna to have the sole control of the same during her lifetime," etc. But this was mere surplusage. After giving a fee it cannot be cut down to a

life estate by the unnecessary provision that she should have the control of it during her life. The testator may have thought that in some way which he did not understand, his executor might interfere with his widow's enjoyment of the property, and the clause in question may have been inserted to prevent this. In either view of the case the language is without legal effect, and might well have been omitted. He then orders the executor to sell the property whenever the widow shall direct, and then follows this significant sentence: "And the moneys realized from the sale of my real estate, my executor shall pay over to my beloved wife, Anna, and she, the said Anna, shall have the power to dispose of the same by bequeath or as she directs." The learned Judge below construed this as merely a power of appointment of the proceeds of the sale, whereas it is an absolute gift of the money, and the superadded power of appointment is the merest surplusage.

It detracts nothing from a fee for a testator to say that his devisee shall have the sole control of the property during her lifetime; and an absolute gift of money is not qualified by a superfluous authority to bequeath it.

We have here a childless testator who gives the sole interest in the land to his wife. We think the case comes within the ninth section of the Act of April 8, 1833, which declares: "All devises of real estate shall pass the whole estate of the testator in the premises devised, although there be no words of inheritance or of perpetuity unless it appears by a devise over, or by words of limitation or otherwise in the will, that the testator intended to devise a less estate."

The will of Michael Shaffer contains no devise over, nor do we find any express limitation of the estate to his wife for life only. I have not discussed the authorities. It is sufficient to refer to *Morris v. Phaler* (1 Watts, 389); *Musselman's Estate* (39 Pa. 469); *Church v. Disbrow* (52 Id. 219); *Grove's Estate* (58 Id. 429).

The judgment is reversed, and judgment is now entered in favor of the defendant in the case stated.

H. C. O.

July '91, 4.

May 22, 1891.

Logan v. Eva.

Resulting trust—Evidence sufficient to raise—Purchase by one having knowledge of trust from a bona fide owner without such knowledge—Effect of.

Evidence that a wife is possessed of a separate estate, and that a portion thereof is applied to the purchase of real estate, the deed to which is taken in her husband's name without her knowledge, and that a party subsequently sought to be charged with knowledge of

these facts, knew of the existence of the separate estate, and of its application, is sufficient to establish a resulting trust.

A purchaser of land is unaffected by a secret trust or equity unknown to him, and he may pass a title untrammelled by the trust to a person who has notice of it.

This rule which protects a purchaser with notice is not the result of a regard for him, but is the logical sequence of the doctrine that a *bona fide* purchaser without notice of a trust takes a title unaffected by it. If such a one could only pass his title to persons ignorant of the trust, the value of his property would be depreciated and its enjoyment impaired.

Notice to a purchaser at sheriff's sale under a mortgage comes too late if the mortgagee had no notice when the mortgage was executed.

Appeal of John N. Logan, plaintiff, from the judgment of the Common Pleas of York County, in an action of ejectment brought against Henry G. Eva (and in which Susan Eva was added as a defendant), to obtain possession of a certain farm in Carroll Township.

The proceedings were originally brought before a justice of the peace under the Act of June 16, 1836, and were removed by the defendants into the Common Pleas.

On the trial, before LATIMER, P. J., the plaintiff gave in evidence deed dated May 4, 1885: John N. Logan, assignee of Lemuel Ross and wife, to Henry G. Eva, for the premises in dispute; mortgage dated September 19, 1885, from Henry G. Eva to Vincent K. Keesey upon same premises; scire facias and judgment thereon; levavi facias with sheriff's return thereon that he levied upon, seized, and took into execution the real estate of Henry G. Eva mortgaged, and sold the same to John N. Logan for \$1500, June 29, 1889; and also deed from the sheriff to John N. Logan, acknowledged July 3, 1889, for the property in dispute. After giving evidence of the rental value of the property, plaintiff rested.

It was testified on the part of the defendants, that about 1875 Susan Eva inherited from her uncle in England about \$1775, transmitted by drafts payable to her own order, and by her indorsed and delivered to her husband, and by him deposited in his own name in the Dillsburg Bank, and shortly thereafter checked out by him. The plaintiff was cashier of the bank at the time of this transaction. About two years after, Susan Eva loaned \$600 of this money to her sister, Eliza Berryman, who gave no note or other evidence of the loan, and invested it in a farm. The balance of Mrs. Eva's inheritance was used by the husband in the purchase of such things as they needed. Some time after, this Berryman farm was conveyed to Henry G. Eva, and the \$600 was considered as part of the purchase-money, Mrs. Eva testifying that she allowed her husband to take the title in her name. This

farm Mr. Eva and wife sold in the spring of 1885, and Henry G. Eva agreed to buy from John N. Logan, assignee of Lemuel Ross, the premises in dispute for \$3500, and paid him on account of the purchase-money, \$1200 of the money received from the sale of the Berryman farm. A deed was executed by Logan to Mr. Eva May 4, 1885, but retained by him until the payment of the balance of the purchase-money, September 19th. Mr. Eva and Logan called on V. K. Keesey, Esq., and applied to him for a loan of \$2000. He agreed to loan Mr. Eva the money on a mortgage provided Mr. Logan would become surety on the accompanying bond. The bond was so executed, and the mortgage from Mr. Eva to Keesey executed, and the deed to Mr. Eva from Logan and the mortgage from Mr. Eva to Keesey duly delivered. Mr. and Mrs. Eva testified that after the sale of the Berryman farm Mr. Eva received the money and took it home to Mrs. Eva, who had it in her possession, and, after paying off some debts of her husband's, sent him to buy from Logan the premises in dispute, giving him \$1200 to pay on account of the purchase-money, and directed him to have the deed made in her name. Mr. Eva testified that when he made one of the payments he said he wanted the deed in his wife's name. This Logan denied. The written agreement of sale was between Logan, assignee of Ross, and Henry G. Eva, with no reference to Mrs. Eva, and the receipts in the same form were in evidence. There was no evidence that Keesey, the mortgagee, had any notice whatever of there being any money of Mrs. Eva's used in the purchase.

The plaintiff requested the Court to charge, *inter alia*, as follows:—

(3) It is undisputed that John N. Logan purchased this land in controversy at a sheriff's sale of the same on a *levari facias* issued upon a judgment on a *scire facias* upon the mortgage given by Henry G. Eva to V. K. Keesey, Esq., to raise money with which to pay the balance of the purchase-money; that said mortgage was duly recorded, and that V. K. Keesey had no knowledge or notice of this resulting trust. Under these circumstances John N. Logan took the same title V. K. Keesey would have taken had he purchased the property at the sheriff's sale free and discharged from the alleged resulting trust; and this without regard to whether he had actual notice or not. *Answer.* This point is refused. (Fifth assignment of error.)

(4) Under the law and the evidence in this case, the verdict of the jury must be for the plaintiff. *Answer.* This point is already answered in the general charge, and is refused. (Sixth assignment of error.)

(5) Where a purchaser with notice of a resulting trust buys real estate from a *bona fide* pur-

chaser who has no notice of such resulting trust, he is entitled to shield himself behind the title of his vendor. *Answer.* As a legal proposition this is correct; but I do not think the question arises precisely in this case. (Seventh assignment of error.)

In the general charge the Court said: "Now, to recapitulate, the plaintiff in this case has the legal title; he is entitled to recover in this case on that legal title, unless the defendant, Mrs. Eva, has shown such a case as establishes a resulting trust in her by reason of the money of her separate estate having gone into the purchase of the property, and unless the evidence shows that at the time of the execution of the mortgage by Mr. Eva, under which Mr. Logan claims, he had knowledge of that fact. The measure of evidence I have fully detailed to you—the amount of proof that is required to be adduced by a woman claiming property against her husband's creditors, and against her husband's mortgagee. If you find that there is not sufficient evidence to show clearly and convincingly that her money went into the purchase of the property, it is your duty to find in this case a verdict for the plaintiff for the property described in the writ. It will then be your further duty to inquire into the annual value of this property from the time it left the possession of John N. Logan down to the bringing of the present action, and find the damages or meane profits for the plaintiff to the extent of the value of the possession of the property."

"If, on the other hand, you find that the defendant, Mrs. Eva, has shown that a portion of her separate estate went into this property, and that John N. Logan at the execution of this mortgage knew it, you inquire how much of her money went into it; and then you will find a verdict for the plaintiff for the property described in the writ, subject to the payment of such sum of money as you shall find belonging to Mrs. Eva entering into this purchase."

Verdict for the plaintiff, subject to the payment of \$600 to Susan Eva, one of the defendants, and with stay of execution until the said sum is paid. Plaintiff thereupon appealed, assigning for error, *inter alia*, the answers to his points as above.

H. C. Niles (W. F. Bay Stewart and George E. Neff with him), for appellant.

Where a purchaser with notice of a resulting trust buys real estate from a *bona fide* purchaser who has no notice of such resulting trust, he is entitled to shield himself behind the title of his vendor.

Lowther v. Carlton, 2 Atk. 241.

Sweet v. Southcote, 2 Brown's Ch. 65.

Bracken v. Miller, 4 W. & S. 102.

Stewart v. Reed, 91 Pa. 287.

Thompson v. Christie, 27 WEEKLY NOTES, 87.

Henry L. Fisher, for appellees.

Where one buys land and pays for it with his own money, but permits the conveyance to be made in the name of another, a resulting trust arises in favor of him who paid the money; and the nominal grantee holds the land as trustee for the real purchaser.

Strinpler v. Roberts, 18 Pa. 295.

Rupp's Appeal, 100 Id. 531.

Bigley v. Jones, 114 Id. 515.

There was abundance of evidence to fix the appellant with knowledge of the trust, and hence the ruling of the Court was correct.

October 5, 1891. *McCOLLUM, J.* The substantial questions raised by this appeal are whether the evidence is sufficient to establish a resulting trust, and whether the appellant is protected by the mortgagee's want of notice of it. The instructions to the jury respecting the nature and kind of proof required to develop and successfully assert the trust were unobjectionable and in harmony with our decisions on the subject. It is not with the principles announced in this connection, that the appellant takes issue, but with the evidence which he affirms is not full and clear enough, under the decisions, to support the appellee's claims. This objection necessitates an examination of the testimony to determine its adequacy. It shows that Mrs. Eva received, during coverture, from the estate of a deceased uncle in England, \$1775; that this was an inheritance, and constituted her separate estate; that she loaned \$600 of it to her sister, which was afterwards paid in the purchase of the Berryman property; that she and her husband testified that \$1200 of it was used in that purchase; that on the sale of this property she received \$1200 of its proceeds, which she gave to her husband, with directions to invest in the property in dispute, and upon an understanding between them that she should have the title, and that the money was used in the purchase of the property as directed, but that her husband, unknown to her, took the deed of it in his own name. It shows further that the appellant knew that she had a separate estate, a portion of which was paid upon the property.

We think the evidence was sufficient to justify a finding of all the facts essential to establish a resulting trust. It was contradicted, but the credibility of the witnesses was for the jury. It was ascertained by their verdict that the appellee had \$600 in the land, and it seems very clear to us from the evidence that at least that amount of her separate estate was used in its purchase.

It is well settled that a purchaser of land is unaffected by a secret trust or equity unknown to him, and that he may pass title thereto, untrammelled by the trust, to a person who has notice of it. "A mortgagee is regarded as a

purchaser, and is protected from all secret equities and trusts of which he had no notice. (*Heister v. Fortner*, 2 Bin. 40; *Cover v. Black*, 1 Barr, 493.) Notice to a purchaser at the sheriff's sale on the mortgage comes entirely too late if the mortgagee had no notice when the mortgage was executed." (*Martin v. Jackson*, 27 Pa. 509.)

V. K. Keesey was the mortgagee of the land in dispute, and it is conceded that he had no notice of the alleged trust in favor of Mrs. Eva. At a sheriff's sale of the land on the Keesey mortgage, public notice of Mrs. Eva's claim was given, and the appellant became the purchaser. It is admitted that his knowledge of the trust derived from the notice given at the sale does not impair his title, but it is claimed that inasmuch as he was surety in the bond secured by the mortgage and familiar with the transaction in consummation of which the mortgage was executed, he cannot find shelter under Keesey's title. This claim was sustained in the Court below, and we must give it our sanction or reverse the judgment.

It will be seen at the outset that the claim of the appellee makes the source of the appellant's knowledge of the trust, and the time he acquired it, factors in determining whether he has a title subject to the trust or independent of it. We cannot assent to this proposition. It must be borne in mind that the rule which protects a purchaser with notice is not the outcome of a tender regard for him. It is the logical sequence of the doctrine that a *bona fide* purchaser without notice of a secret equity takes a title unaffected by it. If such a purchaser could only pass his title to persons ignorant of the trust, the market value of his property would be depreciated by the restriction, and his enjoyment of it would be very much impaired. Hence, the law declares that the knowledge of his vendee is not in the way of the transmission of his title, untrammelled by the trust.

Nor can we see how the fact that the appellant was a surety in the bond secured by the mortgage, can affect the question under consideration. The learned Judge of the Court below, in his opinion refusing a new trial, said in substance that the appellant's position as surety entitled him to subrogation to all the rights of the mortgagee. If so, why could he not purchase the mortgagee's title at the sheriff's sale? In *Stewart v. Reed* (91 Pa. 287), McClurken bought the property at sheriff's sale; he then sold it to Stewart, who, by agreement between them, received his deed for it directly from the sheriff. An attempt was made to impeach Stewart's title on the ground that he made false representations which deterred certain parties from bidding at the sale, in consequence of which the land was sold for less than it was worth. It was held that

as McClurkan was the purchaser and had no knowledge of the fraud, his equity protected his vendee, this Court saying: "In the absence of any collusion between McClurkan and Stewart we are clearly of opinion that Stewart is entitled to take shelter behind McClurkan's equitable title." Certainly, if McClurkan's equity was sufficient to protect Stewart notwithstanding his participation in a fraud connected with the sale, Keesey's title will sustain the appellant's contention although he may have been cognizant of the facts which raised the resulting trust. The 5th, 6th, and 7th specifications of error are sustained, and the remaining specifications are dismissed.

The judgment is reversed, and a *venire facias* de novo awarded.

R. H. N.

July '90, 50.

May 11, 1891.

Thornton v. Britton.

Form of action brought by husband and wife—Amendment—Effect of return to writ of ejectment—Possession—Evidence—Depositions and notes of testimony taken at former trial.

The difference between an action brought by a woman and her husband in her right, and one brought by the husband to her use, though formal, is material. In the first form it would not be a bar to another action by the husband in his own right; in the second, it would.

Such an error being formal is amendable, and where the case appears to have been tried on the merits between the real parties, it may be amended in the Supreme Court, under the provisions of the Act of May 20, 1891 (P. L. 101).

The Court cannot say, as a matter of law, that no verdict can be rendered against one who, as is shown by the return to the writ of ejectment, was in possession at the time of service. Such a return is presumptive evidence of his continuance in possession, and can be overcome only by evidence to the satisfaction of the jury.

The onus of proving that his possession has terminated is upon the person who has been returned as in possession; but when the only testimony on this point is that of a co-tenant, whose evidence shows no claim of adverse title or ouster of the joint legal possession, this is far short of the standard required, and is insufficient to overthrow the legal presumption arising from the return to the writ.

Depositions or notes of testimony taken in a previous case between the same parties and in relation to the same matter, are not a full equivalent for the testimony of the witness in the presence of a jury, especially if much time has elapsed, or the litigation has taken another turn; but whether it is practicable to have the witness before the jury or not must be determined by the trial Judge, and is largely within his discretion.

judgment of the Common Pleas of Fayette County, in an action brought by Julia Thornton and John R. Thornton, her husband, in right of the said Julia, to recover mesne profits of a certain tract of land in Luzerne Township, Fayette County.

On the trial it appeared that the defendants went into possession of the land in question, under a writ of *habere facias*, on February 11, 1880, and after the trial of another action in ejectment they were dispossessed, and the plaintiffs put in possession on February 9, 1885. To recover mesne profits while the land was in the possession of defendants, this suit was brought.

The facts of the case are sufficiently set forth in the opinion of the Supreme Court, *infra*.

Plaintiffs' counsel offered to read the testimony of Ephraim R. Crawford taken on the trial at Pittsburgh on the question of mesne profits. The defendants objected that the evidence is incompetent; that the witness is living in the county, and his deposition should have been taken.

THE COURT. The offer being to read the testimony of the witness taken on a former trial of the case between the same parties in relation to the same subject-matter, the objection is overruled and an exception sealed for the defendants.

Defendants further objected that the testimony does not relate to the time included in this action.

THE COURT. Well, if it doesn't, then the rulings here will have to be different, because Mr. Playford states that he offers it as to one year of this time.

MR. PLAYFORD. Yes, sir; for one year of this time. (Fourth assignment of error.)

The defendants requested the Court to charge the jury, *inter alia*, as follows:—

(1) The defendants request the Court to charge the jury that the plaintiff cannot recover because no right nor title has been shown in Julia Thornton. *Refused*. (First assignment of error.)

(2) That there being no evidence connecting George E. Hogg with the possession of the premises from the 11th of February, 1880, until the bringing of this suit, no verdict can be rendered against him. *Refused*. (Second assignment of error.)

(4) If the jury believe from the evidence that George E. Hogg never had any possession of the premises within six years prior to bringing of this suit, no verdict can be rendered against him. *Refused*. (Third assignment of error.)

Verdict for plaintiffs for \$6896.82 and judgment thereon; whereupon defendants took this appeal, assigning for error the admission of the above offer of testimony and the answers to the foregoing points.

S. E. Ewing (R. H. Lindsey with him), for appellants.

Appel of William Britton, George E. Hogg, and George A. Wilson, defendants, from the

W. H. Playford (Edward Campbell with him), or at least with his obligation to do so. Such evidence falls far short of the standard required by *Sopp v. Winpenny*, and the Court was right in treating it as insufficient to overthrow the legal presumption arising from the return to the writ.

October 5, 1891. MITCHELL, J. The first assignment of error relates to the form of the action. It is stated by appellants as an action by Julia Thornton and John R. Thornton, her husband, in right of the said Julia, while the counter-statement by appellee describes it as an action by J. R. Thornton for the use of Julia Thornton, his wife. The difference, though formal, is material. In the first form it would not be a bar to another action by the husband in his own right; in the second it would. The record as sent up to us does not contain the original præcipe, summons, or narr. So that we are unable to say positively which contention is right; but from the copy of docket entries, and the entire absence of any evidence as to title in the wife, we presume that the action, though in form by the wife, was intended to be by the husband for her use. The error being formal was amendable, and as the case seems to have been tried on the merits between the real parties we will allow it to be amended here. (Act of May 20, 1891, P. L. 101.)

The second and third assignments may be taken together. The second is easily disposed of. The Court was asked to say as matter of law that no verdict could be rendered against Hogg. But the return to the writ was conclusive as to his possession at the time of service, and presumptive evidence of his continuance in possession. This presumption could only be overcome by evidence to the satisfaction of the jury. In no view, therefore, could the Court say as matter of law that there was no evidence connecting Hogg with the possession.

The next point should have been submitted to the jury, if it was supported by sufficient evidence. The return was, as already said, presumptive evidence of continued possession. Under the cases of *Sopp v. Winpenny* (68 Pa. 78) and *Miller v. Henry* (84 Id. 33) Hogg was entitled to show in this action that his possession had terminated, but the onus was on him to do so to avoid liability. The only evidence tending to that result was that of Britton, who testified, "I had possession. Q. You personally, or who else? A. Well, I moved on to it personally. I could get no one to go on to it. Q. Has Mr. Hogg . . . had it in possession? A. No, sir; I had it individually." This clearly refers to actual residence on the land. But Hogg was Britton's tenant in common, and there is nothing in the latter's evidence to show any claim of adverse title, or ouster of Hogg's joint legal possession. It is entirely consistent with Britton's accounting to Hogg for his share of the profits,

or at least with his obligation to do so. Such evidence falls far short of the standard required by *Sopp v. Winpenny*, and the Court was right in treating it as insufficient to overthrow the legal presumption arising from the return to the writ.

The testimony of Crawford, the subject of the last assignment, was taken in a previous action between the same parties, and in relation to the same matter. The best evidence, of course, is the testimony of the witness himself given in the presence of the jury. A deposition is not a full equivalent, and especially if much time has elapsed, or the litigation has taken another turn. Both parties, therefore, are entitled to have the witness before the jury in *propria persona* if that be practicable. But whether it is practicable or not must be determined by the trial Judge, and is largely within his discretion. Of course, if the witness be dead or out of the jurisdiction of the Court, the notes of his testimony are competent evidence, being equivalent to a deposition. (*Pratt v. Patterson*, 81 Pa. 114.) But even if the witness, though alive and within the jurisdiction of the Court, be old or infirm or sick, to a degree that renders his attendance in Court dangerous or unduly burdensome to himself, or impracticable for other reasons, then his deposition may always be substituted for his bodily presence, and the determination of this question, in each case, as it arises, rests largely in the discretion of the Court. On a trial for murder, for instance, the Judge presiding would feel it his duty to enforce the attendance of a witness having knowledge of the crucial facts, even at some risk to the witness's health or life, while in a civil action he might feel free to hold that a much smaller risk to the witness would be sufficient to excuse him from personal attendance. In the present case, it was shown that Crawford was eighty-seven years old, and confined to his room. We cannot say that the learned Court was wrong in holding that his testimony at the former trial might be read instead of enforcing his attendance, or compelling plaintiff to take his deposition over again, when lapse of time since the occurrence to which it related and advancing years might render it less weighty with the jury.

Appellee has leave to amend the form of action, and thereupon judgment affirmed.

H. S. P. N.

Jan. '91, 388.

May 6, 1891.

Edgett v. Douglass.

Equity—Jurisdiction—Effect of lack of jurisdiction not being objected to—Easement—Right to maintain and repair dam reserved on conveyance of land—Whether such reservation implies the right to enter on the lands of the grantee to make repairs.

Where parties submit to the jurisdiction of a Court of equity and take the chances of a decree in their favor, objection made for the first time in the Supreme Court comes with a bad grace, and will not, as a general rule, avail, unless the want of jurisdiction is so plain that the Supreme Court would feel justified in dismissing the bill of its own motion.

Upon a conveyance of land the grantor reserved to himself and his assigns "sufficient water to run a grist-mill on the same mill-dam and the right at all times to maintain a dam across the T. Creek where it now is, and the right to flow the land hereby conveyed so far as may be necessary for the use of the water privilege."

Held, that the right to maintain the dam involved the right to maintain the banks, and if they were washed away, to enter on the grantee's land and repair them.

Appeal of C. L. Douglass, defendant, from the decree of the Common Pleas of McKean County, in a proceeding in equity brought by A. J. Edgett.

From the pleadings and the proofs submitted to the Master (GEORGE A. BERRY, Esq.), it appeared that the plaintiff and the defendant were owners of adjoining lands, both titles being derived from Wm. R. Fisher. In 1844 Fisher constructed a dam in Tunungwant Creek and erected thereon a saw-mill, and subsequently, on the opposite bank, a grist-mill. On October 18, 1866, he conveyed the saw-mill property to Henrietta Peterson, the plaintiff's predecessor in title, the deed containing the following reservation:—

Reserving, however, to the party of the first part sufficient water to run a grist-mill on the same mill-dam, and the right at all times to maintain a dam across the Tunungwant Creek where the dam now is, and the right to flow the land hereby conveyed so far as may be necessary for the use of the water privilege; the reservation of the use of the water hereinbefore made being intended to give to the party of the first part, his heirs and assigns, the exclusive use of the water power effected and produced by the said dam, so far as may be required at all times as power for the grist-mill and machinery appurtenant thereto.

The grist-mill continued to be operated by Fisher down to July 27, 1886, when it became the property of the appellant. To form this dam Fisher constructed a breast-work, cutting the stream transversely, of wood, stone, and earth embankment. This earth embankment was continued for some distance beyond the west or left bank of the stream, and thence, at almost a right angle, up the stream, at a short distance from its

west bank, two or three hundred feet, when it touched the west bank and continued along it for one hundred feet or more. The configuration of the ground in the locality of the dam made the erection of the embankment along the west bank of the stream absolutely necessary to the formation of a useful dam. The dam was broken by floods many times after the deed of October 18, 1866, and was repaired by Fisher during his ownership of the grist-mill. On May 30, 1889, it was again washed away, and the defendant entered upon the plaintiff's land to repair it; whereupon this bill was filed.

The bill alleged in substance that the entry was "without any authority," and that defendant threatened to continue to make such entries; that the dam, as defendant proposed to construct it, would back up water on plaintiff's land and would cause him irreparable injury; that by reason of the continuous entries he would be put to a multiplicity of suits at law, and hence needed equitable relief, etc., and prayed an injunction.

The defendant set up his right to repair the dam under the reservation in the deed of Fisher, and that his only purpose was to repair this dyke in the usual manner, and to restore it to the state and condition in which it had been kept since 1844.

The Court granted a preliminary injunction.

The Master found that by reason of the situation of the lands the reservation gave the defendant the right to flow the lands of the plaintiff, but reported further, as follows: "It is too well settled to admit of controversy, that this reservation must be construed most strictly against the grantor. Fisher owned both properties, and was in a position to put into his deed, in plain terms, all that was necessary to fully protect his rights as he understood them, and what he said was simply to give him the right to flow this land and to maintain a dam across the Tunungwant Creek where the same now is. He reserved no right to enter upon his grantee's land for any purpose, although this land was the subject-matter of the trade. He had owned the land and property at least from 1844 to 1866, and was in a position to know its needs, and yet his reservation is totally silent as to anything except the right to maintain the dam across the creek, making no reference to any dyke along side of the creek on plaintiff's land, and yet if this dyke existed, as claimed by the defendant, it would have been quite as prominently before Fisher's mind as the dam itself. Fisher clearly had in his mind the right to maintain the dam across the creek, as he had conveyed the dam to Peterson in the same deed (though not a part of the seven acres conveyed to her), and was providing for the maintenance of the dam to use his grist-mill in case Peterson should fail to keep it up, and to properly maintain the dam across the

creek as it then was, he had to enter upon the lands of Peterson in the dam itself.

"The testimony is clear and uncontradicted that the break is almost entirely on the land of the plaintiff, and the defendant in insisting upon going upon the lands for the purpose of fixing the break, using the plaintiff's earth to do so, is in both particulars a trespasser."

The Master, therefore, reported a decree making the injunction perpetual.

Defendant filed exceptions to the Master's report, which were dismissed by the Court; whereupon he took this appeal, assigning this action of the Court for error.

J. M. McClure (Eugene Mullin with him), for appellant.

M. F. Elliott and G. L. Roberts (D. H. Jack with them), for appellee.

October 5, 1891. **PAXSON, C. J.** This case involves some questions of fact which could have been more appropriately settled at law. Indeed, had this point been made below we would have been inclined to sustain it. But where parties submit to the jurisdiction, and take their chances of a decree in their favor, the objection here comes with a bad grace, and will not, as a general rule, avail, unless the want of jurisdiction is so plain that we would feel justified in dismissing the bill of our motion.

Aside from this, in the view we take of the case, the disputed facts are not of special importance, as it turns in a great measure upon the proper construction of the reservation in the deed of October 16, 1866, from William R. Fisher and wife to Henrietta Peterson. The language of said reservation is as follows: "Reserving to the party of the first part sufficient water to run a grist-mill on the same mill-dam, and the right at all times to maintain a dam across the Tunungwant Creek where the dam now is, and the right to flow the land hereby conveyed so far as may be necessary for the use of the water privilege."

We think the Master and the Court below took a narrow view of this reservation. Their construction of it was, in the language of the former, "simply to give him (Fisher) the right to flow this land and to maintain a dam across the Tunungwant Creek where the same now is. He reserved no right to enter upon his grantee's land for any purpose, although this land was the subject-matter of the trade." The Master's view, as we understand it, was that the right to maintain the dam consisted solely in the right to keep up the breast-work across the creek, and to overflow the seven acres. But he has failed to enlighten us how the dam is to be maintained if the bank by the side of the creek is washed away, so as to allow the water to escape. In such case, repairing the bank which crosses the creek would

be of no avail. In this case there was a break in the side of the dam, and admittedly on the plaintiff's land. This break could only be repaired by going upon the land of the latter, and it was in doing this that the alleged trespasses occurred.

It is to be observed that the reservation is "to maintain a dam across the Tunungwant Creek where the dam now is." That is to say, the right was reserved to maintain the dam in its length and breadth as it existed at the time of the reservation. This included all the banks by which the water was confined. The right to maintain the dam means the right to keep up the banks, and, if they are washed away, to repair them.

The right to repair necessarily involved the right to go upon the land for that purpose, and must have been so understood by the parties to the reservation at the time it was made. Were it otherwise, the reservation would have been worthless, and we are not to presume that the parties intended a vain thing. We are of opinion that the defendant has the right to go upon the plaintiff's land for the purpose of making any repairs to the bank necessary to maintain his dam.

The decree is reversed, and the bill dismissed at the costs of the appellee.

R. H. N.

Jan. '91, 41.

February 5, 1891.

Bodey & Livingston v. Thackara et al.

Mechanics' lien—Material men—Husband and wife—When separate property of married woman rendered subject to lien by building agreement signed by husband alone.

A husband, by the execution of a contract signed by his own name, for the erection of a building upon his wife's property, may charge the said property, if it is made to appear that the wife assented to the contract, knowingly received the goods or materials, or assented to their application to the construction of the building, provided they were furnished upon the credit of the building, and were reasonably necessary for the improvement of her separate estate.

T. made a contract with K. in his own name for the erection of a building on land which had been conveyed to the wife of T. There was evidence to show that the wife assented to the contract, that materials were furnished with her knowledge and consent; that they were reasonably necessary for the improvement of her separate estate, and were used for that purpose; that she was frequently upon the premises during the progress of the work, giving directions as to the materials that were being furnished, and as to the manner of construction. A lien was fled against the property by material men. Upon trial:

Held, that under the above facts plaintiffs were entitled to recover.

Appeal of Alexander M. Thackara and Eleanor Sherman Thackara his wife, in right of said

wife, owners, etc., who, with L. W. Kitzelman, contractor, were defendants, from the judgment of the Common Pleas of Montgomery County, in an action of *scire facias sur mechanics'* claim brought by William H. Bodey and James Livingston, trading as Bodey & Livingston.

Plaintiffs filed a lien against the real estate of Eleanor Sherman Thackara, one of the defendants, on August 21, 1888, and joined as defendants Alexander M. Thackara, the husband, and L. W. Kitzelman, contractor. The claim filed was for \$1395.12 alleged to be due for materials furnished by claimants in the construction of a dwelling-house belonging to Eleanor S. Thackara. A *scire facias* on said mechanics' claim having been issued January 28, 1889, the cause was on plaintiffs' motion under a rule of reference to arbitrate, referred to an arbitrator, who on June 21, 1889, filed an award in favor of plaintiffs for \$1506.03, upon which judgment was entered. From this award and judgment defendants appealed to the Common Pleas. Defendants pleaded *nil debet*, payment with leave, and coverture as to Eleanor S. Thackara.

The facts are sufficiently set forth in the opinion of the Supreme Court.

The Court (SWARTZ, P. J.), charged the jury, *inter alia*: "That a husband cannot, by making a contract like this, charge his wife's property, unless it appeared . . . that the materials were furnished with her consent and knowledge." If "she assented to the contract made by her husband in this respect; . . . if she knowingly received the goods, assented to the application of the goods to the construction of her property, she is bound by the contract."

Defendants requested the Court to charge, *inter alia*:—

(4) Before the plaintiffs are entitled to recover at all in this proceeding they must prove that Mrs. Thackara made a contract to build this house with L. W. Kitzelman, the contractor, and if you find that Kitzelman made the contract with A. M. Thackara, her husband, as appears in the written contract, then your verdict must be for the defendants. *Answer.* This is true, unless you also find that the contract was made by the husband for the wife, and that with her knowledge and assent the materials were furnished and used in the construction of the house, and were reasonably necessary for the improvement of her separate estate.

(5) If you believe and find that Bodey & Livingston did not know at the time they sold these materials to Kitzelman that the land upon which this house was erected belonged to Mrs. Thackara, but thought it belonged to A. M. Thackara, her husband, and so treated the transaction, as appears by the letters and books of charges of Bodey & Livingston, then your verdict

would be for the defendants. *Answer.* This is affirmed. Of course, if they treated the property in this way throughout they could not recover; but, as I have just said, if you find that the contract was made by the husband for the wife, and that with her knowledge and assent the materials were furnished and used in the construction of the house, and were reasonably necessary for the improvement of her separate estate, then plaintiffs could recover.

(6) It is absolutely necessary to entitle Bodey & Livingston to recover in this proceeding, for you to find from the evidence that they sold and furnished these materials on the credit of the house and land in question, knowing that the same were the separate property and estate of Mrs. Thackara, and knowing also that she had made a contract with Kitzelman for its erection, for if she did not authorize Kitzelman to build the house, he, Kitzelman, could not bind her estate by making a contract with Bodey & Livingston, and your verdict should be for the defendants. *Answer.* This is refused as a whole, but it is true that unless Mrs. Thackara authorized Kitzelman to build the house, he, Kitzelman, could not bind her estate by making a contract with Bodey & Livingston, but you are to say whether the contract by the husband was made for the wife, with her knowledge and assent, and that the materials were furnished and used in the house, and were reasonably necessary for the improvement of her separate estate, and that they were so furnished with her knowledge and assent.

(7) It is an admitted fact in this case, gentlemen, that the contract for the building of this house was in writing, and was between L. W. Kitzelman and A. M. Thackara (not Mrs. Thackara); the presumption of law is, therefore, that these parties dealt with Kitzelman as contractor for A. M. Thackara, and hence it is absolutely necessary in order for you to find a verdict for the plaintiffs that you find that the contract with Kitzelman for the building of the house was either made personally by Mrs. Thackara, or in her name by her authority, and it is my duty to say to you, gentlemen, that there is no evidence of any contract in her name, for the contract is in the name of A. M. Thackara; the book of charge names A. M. Thackara and not Mrs. Thackara, and the letters of plaintiffs inquiring for a settlement look to Mr. Thackara: this being so, your verdict should be for the defendants. *Answer.* This is refused. It is true, as I have already stated, that if the contract were made with the husband, and there was nothing else in the case, he could not bind the wife, and could not subject her property to this lien; but you are to take all the evidence in this case and determine what the contract was. If the contract was made by the

husband, and the wife assented to it, and had knowledge of the materials being furnished; if they were furnished with her assent, and were reasonably necessary for the construction of this house, for the improvement of her separate estate, and were so used, you would have a right to say that the plaintiffs should be compensated and paid for the bill which they claim before you, if you find that it is correct in charge. Of course, they could not recover unless the bill is a fair charge, such as is in accordance with the ruling rates in the neighborhood where these materials were furnished.

(8) It is the law, gentlemen, and I so charge you, that the plaintiffs cannot recover in this proceeding, unless it is proven, to your satisfaction, that the materials furnished by plaintiffs were necessary for the improvement of the separate estate of Mrs. Thackara, that the materials so furnished were actually used and applied in the construction of the house, and were furnished on the credit of Mrs. Thackara, upon her contract with Kitzelman. *Answer.* This is affirmed, except that it is not necessary that there should be direct testimony that they were furnished upon the credit of Mrs. Thackara. If they were furnished upon the credit of the building, and it shows that the materials were furnished with her knowledge and consent, and were reasonably necessary for the improvement of her separate estate, and were used for that purpose with her knowledge and consent, she would be liable, and it would not be necessary to prove positively that Bodey & Livingston knew that she was the owner of this property at the time they furnished it, if they furnished it upon the credit of this building—if she was the owner of the real estate, and the materials were furnished with her knowledge and assent, as I have repeated to you again and again.

(9) The contract of A. M. Thackara, the husband, is in his own name, and on his own credit, does not make Mrs. Thackara's land liable to this lien, and your verdict should be for the defendants. *Answer.* This is true. If this were all that were in the case, I would have to affirm it. Simply because he made the contract would not authorize you to charge her property.

(10) The plaintiffs must satisfy you that they furnished these materials on Mrs. Thackara's credit, and if you believe that the plaintiffs did not know that Mrs. Thackara owned the land at the time they were furnishing these materials, but only learned it was her land when they came to file their lien, then your verdict should be for the defendants. *Answer.* This is refused, for the reasons I have already stated.

Verdict for plaintiffs for \$1514.27. A motion for a new trial having been dismissed, defendants appealed, assigning for error the portion of the

charge quoted above, the answers to their points, and further, that the Court erred—

(1) In admitting in evidence the plaintiffs' book to charge Mrs. Thackara; said charge being the same as in plaintiffs' bill of particulars, viz., "L. W. Kitzelman for Lieut. Thackara's house, Rosemont, to Bodey & Livingston, Dr."

(2) In permitting the plaintiffs to offer in evidence the agreement in writing, dated July 15, 1887, between A. M. Thackara and L. W. Kitzelman, for the building of the house in question.

(3) In overruling defendants' offer to prove that A. M. Thackara and his wife have more than paid in full for the house to the contractor, that is to say, the contract price for the house was \$8135, the stable \$800, and they have paid more than \$9000 under the contract.

William Henry Peace and F. G. Hobson, for appellants.

A husband cannot bind his wife's real estate by a contract made in his own name and responsibility and upon his own credit, while not acting for her.

Dearie v. Martin, 78 Pa. 57.

Berger v. Clark, 79 Id. 340.

Act of April 11, 1848, *Purd.* 1150.

Her subsequent declarations alone, without primary evidence of facts tending to raise a contract to bind her separate estate, cannot make her liable.

Finley's Appeal, 67 Pa. 453.

Hough v. Jones, 32 Id. 432.

Murray v. Keyes, 35 Id. 384.

Bear's Admr. v. Bear, 33 Id. 525.

Parke v. Kleeber, 37 Id. 251.

Cummings v. Miller, 3 Grant, 146.

It is the plaintiffs' duty to know by what authority the contractor acts in ordering materials.

Schroeder v. Galland, 134 Pa. 277.

Brown v. Cowan, 110 Id. 588.

Campbell v. Seaffe, 1 Phila. 187.

Kitson v. Crump, 9 Id. 41.

A married woman is not governed by the ordinary principles of the law of estoppel.

Silvers v. Tucker, 126 Pa. 74.

Conway v. Crook, 7 Atlantic Reporter, 402.

Irving P. Wanger, for appellees, cited—

Fahnestock v. Wilson, 95 Pa. 304.

Einstein v. Jamison, Id. 403.

Forrester v. Preston, 2 Pittsb. 298.

October 5, 1891. *STERRETT, J.* This scire facias sur mechanics' lien was issued by the plaintiffs, Bodey & Livingston, against the appellants, Alexander M. Thackara, Eleanor Sherman Thackara his wife, in right of said wife, owners or reputed owners, and L. W. Kitzelman, contractor, to recover for materials furnished in and about the erection of a house.

It appears that the written contract of July 15, 1887, with Kitzelman for the erection of the building on land conveyed to the defendant, Mrs. Thackara, about two months before, was made

in the name of and executed by Lieut. Thackara without his wife joining therein.

It was claimed by the plaintiffs, and evidence was introduced tending to prove that Mrs. Thackara assented to the contract, which was in fact made by her husband on her behalf and for her benefit; that the materials were furnished with her knowledge and consent; that they were reasonably necessary for the improvement of her separate estate, and were used for that purpose; that Mrs. Thackara was frequently upon the premises during the progress of the work, giving directions as to the materials that were being furnished by the plaintiffs, and also as to the manner of construction. In short, that she understandingly acted as though she herself, and not her husband, was one of the parties to the written contract.

Without undertaking to review the evidence tending to prove the plaintiffs' contention that the contract was made for Mrs. Thackara and fully adopted by her, reference may be made to the proof that she examined the plans for the building, watched the progress of the work, visited the plaintiffs' mill, urging them to push on the work, etc. In her letter to them, of November 1, 1887, she wrote, "The wood sent so far is excellent and greatly admired, but . . . Please push these parts and the doors through as soon as possible, and greatly oblige."

Again, in a letter of November 29, 1887, . . . "We want Mr. Kitzelman to put on seven carpenters, but he says you will not keep them in work. With a few lines from you, saying you will send the wood fast and constantly, I can urge him on."

The evidence was abundantly sufficient to warrant the jury in finding the facts as claimed by the plaintiffs. It was fairly submitted, in a clear and correct charge, and the verdict must be accepted as a finding of all the facts necessary to entitle the plaintiffs to recover.

In view of the facts established by the verdict, there was no error in the rulings complained of in the first three specifications of error, nor was there any error in charging, as recited in the fourth specification, "that a husband cannot, by making a contract like this, charge his wife's property, unless it appears that the materials were furnished with her knowledge and consent. If she assented to the contract made by her husband in this respect, . . . if she knowingly received the goods, assented to the application of the goods to her property, she is bound by the contract."

There was no error in the answer of the learned Judge to either of the defendants' points, and hence the remaining specifications of error are not sustained.

As already intimated, the right of the plaintiffs to recover hinged upon questions of fact, which

were properly submitted to the jury, and by them found in favor of the plaintiffs.

Judgment affirmed.

[See next case.]

H. C. O.

Jan. '91, 83.

February 5, 1891.

Bevan & Bro. v. Thackara et al.

Mechanic's lien—Requisites of—When defective—Material men—Husband and wife—When separate property of married woman rendered subject to lien by a building agreement signed by husband alone—Sub-contractor chargeable with knowledge of terms of agreement made by contractor.

In a suit upon a mechanic's lien for materials furnished for the erection of a house and stable upon the property of a married woman, by virtue of contracts made by the builder with the husband alone, the jury found from the evidence which was properly submitted by the Court, that the contracts were made with the knowledge and consent of the wife; that the materials were reasonably necessary for the erection of the house and stable; that the buildings were necessary for the improvement of her separate estate; that the materials were furnished and used with her knowledge and consent; and that the stable was appurtenant to the house, and necessary for the convenient use of the house and lot:

Held, that there was sufficient evidence to sustain a verdict for plaintiffs, if the lien was filed in proper form.

While the Courts should carefully protect married women in the enjoyment of their separate property, and not permit it to be unjustly charged with incumbrances, they should not be permitted to enhance the value of their property at the expense of innocent and confiding creditors.

A lien was filed against "a dwelling-house two stories high, with attic, the first story being of stone, and the second and attic being of frame . . . erected on a certain lot," particularly described. The building was further described in detail. The amount claimed was for materials, the particular items, etc., "being specifically set out in bill annexed and made part of this claim, and furnished for the erection of said building," etc. The lien as to this building was filed in proper form. In the bill of particulars there appeared in the caption the words "House and stable near Rosemont, Pa.:"

Held, that the value of any materials used in the construction of the stable could not be recovered in an action upon said lien; but only the value of the materials used in the construction of the dwelling-house.

A claim under the mechanics' lien law must set forth the nature of the work and materials, with such a specification of the building as will exclude work done or materials supplied for anything else.

A sub-contractor is chargeable with notice of all the terms and stipulations between the original contractor and the owner.

Appeal of A. M. Thackara and Eleanor S. Thackara his wife, owners, etc., who with L. W.

Kitzelman, contractor, were defendants, from the judgment of the Common Pleas of Montgomery County, in an action of *scire facias sur mechanics' claim*, filed by Walter Bevan and H. C. Bevan, trading as Bevan & Bro., against real estate of Eleanor S. Thackara, to recover the value of materials furnished in the construction of a dwelling-house and stable. Pleas, *nil debet*, payment with leave, and coverture of Eleanor S. Thackara.

The facts are fully set forth in the opinion of the Supreme Court.

The Court, SWARTZ, P. J., charged the jury, *inter alia* :—

"Something has been said in your hearing that the defendants in this case have already paid more than the contract price for the construction of these premises. I charge you that that is entirely immaterial for your inquiry." The question is whether these materials "were furnished upon the credit of this building or the buildings, and if they were, were they reasonably necessary for the improvement of the separate estate of the married woman. If they were, then they were entitled to recover in this case. The fact that they have paid more than was due on the contract price would not prevent a recovery in this case. These are material men; if they furnished the material, if they were proper and reasonably necessary for the construction of the house, if they went into the house, into the buildings, and the erection of the buildings was necessary for the improvement of her separate estate, that would be sufficient to enable the plaintiffs in this case to recover." (Second assignment of error.)

... "If she accepted the contract made by him, and knowingly received the goods, assented to the application of the goods to the construction of her property, and the goods were reasonably necessary for the improvement of her property, and were so used, she, assenting to it, and having knowledge of it, is bound by the contract." (Third assignment of error.)

Defendants requested the Court to charge, *inter alia* :—

(3) I also instruct you, as a matter of law, that any materials charged in the plaintiff's lien, which were used in the construction of the stable, cannot be recovered in this proceeding, and should be separated from the charges for materials which entered into the construction of the dwelling-house and deducted from the account. *Answer*. I refuse this, but this is a question reserved for the consideration of the Court hereafter. (Sixth assignment of error.)

(4) Your verdict in any event in this case, gentlemen, in case it is for the plaintiffs, can only be for the amount and value of the materials which were actually used and applied in the construction of the dwelling-house in question.

Answer. This is refused, but reserved, as I have stated. (Seventh assignment of error.)

(15) I charge you, gentlemen, that it is the law that if the house was constructed under a different and earlier contract than the one made for the stable, then it being admitted from the undisputed testimony in the case that the contract for the house was made in writing in July, 1887, and did not include the stable, and that the stable was not part of this contract, but was built under a subsequent contract, and in writing made November 11, 1887, and was not a part of the house, but was a separate and distinct structure, then the plaintiffs cannot recover here, and your verdict should be for the defendants.

Answer. This is refused, but reserved. (Seventeenth assignment of error.)

(16) The plaintiffs having failed to separate their items of charge, specifying what went to the house described in the lien, and what went to the barn or stable, the jury cannot at random guess the same, and therefore the verdict must be for the defendants. *Answer*. This is refused, but reserved. (Eighteenth assignment of error.)

Verdict for the plaintiffs for \$999.68, subject to the point reserved whether they could recover on their lien under the following facts :—

"On July 15, 1887, L. W. Kitzelman, contracted in writing with A. M. Thackara, the husband of Eleanor S. Thackara, for the erection of a dwelling-house, and on November 11, 1887, made a similar contract with said husband for the erection of a stable. The lot, upon which these buildings were erected, was owned by the wife. The plaintiffs furnished materials continuously upon the order of the contractor, and they were used part in the construction of the house and part in the construction of the stable. The plaintiffs had no knowledge that there were separate contracts for the erection of the respective buildings, nor that the contracts were in writing, but they knew that Kitzelman was building both the house and stable. The building of the house was commenced in July, 1887, and completed about February 11, 1888. The stable was commenced in November, 1887, and completed February 10, 1888.

"The jury find the value of the materials furnished and used, with interest, to be \$999.68; that the materials were reasonably necessary for the erection of the house and stable; the buildings were necessary for the improvement of the wife's separate estate; that the contract was made with the knowledge and consent of the wife; that the materials were furnished with her knowledge and assent; that the stable was appurtenant to the house and was necessary for the convenient enjoyment of the house and lot; upon which verdict judgment was entered for the plaintiffs."

A motion for judgment, *non obstante veredicto*, and for a new trial having been filed, after argument the Court entered judgment for plaintiffs upon the verdict. (Nineteenth and twentieth assignments of error.)

Defendants then appealed, assigning error, *inter alia*, as above.

William Henry Peace and *F. G. Hobson*, for appellants, cited, as to the sixth, seventh, and eighteenth assignments—

Barclay's Appeal, 13 Pa. 495.

Diller v. Burger, 68 Id. 432.

Norris's Appeal, 30 Id. 122.

Huduit v. Roberts, 10 Phila. 535.

Hills v. Elliott, 16 S. & R. 58.

[See also argument in *Bodey v. Thackara et al.*, ante, p. 472.]

B. E. Chain, for appellees.

The stable, as well as the house, is mentioned in this lien as being that for which the materials were furnished, and the Act of June 16, 1836 (§ 2, *Purd. Dig.* 1158), provides that the lien shall extend to the lot on which the buildings stand and so much of the adjacent ground of the owner as may be necessary for the purposes of the building.

Lauman's Appeal, 8 Pa. 473.

That a part of the materials for which the claim was filed was used in building out-houses will not defeat the lien.

Gaule v. Bilyean, 25 Pa. 521.

If the new buildings, the stable, the yard, and the original house, were all included by the owner as parts of one tenement, then they indicate the ground covered by the lien; and, of course, the houses go with the ground.

Nelson v. Campbell, 28 Pa. 156.

Lightfoot v. Krug, 35 Id. 348.

Pretz & Gausler's Appeal, Id. 349.

The jury have passed on this and have found that the buildings together were one erection. *Barclay's Appeal*, and *Diller v. Burger* (*supra*), confirm this view, the building being one.

The lien avers and sets forth that Mrs. Thackara is not only the owner of the building, but also of the ground, and it is submitted conforms to the requirements mentioned in—

Shannon v. Shultz, 87 Pa. 481.

Kuhns v. Turney, Id. 501.

Schriffer v. Saum, 81 Id. 385.

Dearie v. Martin, 78 Id. 56.

Besides, it was the buildings which were credited in the delivery of the materials, they having been furnished the contractor of the same for the buildings he was erecting.

October 5, 1891. *STERRETT, J.* The lien, on which this *scire facias* issued, was filed against a building described therein as "a dwelling-house, two stories high, with attic, the first story being of stone, and the second and attic being of

frame, . . . erected on a certain lot situate in the township of Lower Merion, in said county, containing one and 899-1000 acres of land, bounded by Thornbrook Avenue, lot No. 8," etc., . . . and "being the same premises which Wm T. Tiers and wife, by deed dated May 17, 1887, . . . conveyed to the said Eleanor S. Thackara in fee." The building is further described by giving, somewhat in detail, its length, width, etc. The "amount claimed is \$923.42 for lumber, lime, etc., furnished within six months last past, continuously, the particulars, items, amounts, dates, etc., being specifically set out in bill annexed and made part of this claim, and furnished for the erection of said building, said building having been erected for the improvement of the separate estate of Eleanor S. Thackara, and by her direction, authority, and consent, and with the consent of her said husband, the said Alexander M. Thackara; the said materials were furnished under and in pursuance of a contract made by and between the said Eleanor S. Thackara and the said L. W. Kitzelman, and were reasonably necessary for the improvement of her separate estate, and said improvement is a necessary improvement. And due and legal notice of the amount and character of this claim was given said owner when the said materials were furnished and within ten days thereafter."

Appended to the claim is "the bill of particulars" referred to therein as part of the claim. It is entitled as follows:—

"*Bill of particulars.*"

"July 20, 1888.

"L. W. Kitzelman, contractor.

"A. M. Thackara, owners, and wife.

"House and stable near Rosemont, Pa.

"Bought of Walter Bevan & Bro.," etc.

It will be observed that neither in the body of the claim, as filed, nor in the "bill of particulars" annexed thereto, except in the above quoted caption, is there any mention made of "stable," or any other out-building appurtenant to the dwelling-house. While the location, dimensions, etc., of the latter are minutely stated in the body of the claim, there is nothing whatever said as to the stable. The only suggestion of any out-building is in the use of the word "stable" in the above caption.

It appeared that, on July 15, 1887, Kitzelman contracted, in writing, with A. M. Thackara, husband of the other defendant, for the erection of the house on her lot, and, on November 11, 1887, a similar contract was made with said husband for the erection of the stable on same lot. The plaintiffs furnished the materials specified in the bill of particulars, on the order of the contractor, and they were used partly in the construction of the house, and partly in the stable.

The building of the house was commenced in July, 1887, and completed about February 11, 1888. The stable was commenced in November, 1887, and finished about February 10, 1888. The plaintiffs had no knowledge that there were separate contracts for the erection of the respective buildings, nor that they were in writing; but they knew that Kitzelman was building both the dwelling-house and the stable. These facts are either undisputed or established by the verdict.

Under the findings of the jury the value of the materials furnished and used in both buildings, with interest, was \$999.68. They were reasonably necessary for the erection of the house and stable; and the buildings were necessary for the improvement of the wife's separate estate. The contracts were made and the materials furnished with her knowledge and consent. The stable was appurtenant to the house, and was necessary for the convenient enjoyment of the house and lot.

One general ground of defence, in the Court below, was, that under the evidence there could be no recovery for any part of the materials, mainly because the contracts were with the husband alone, and Mrs. Thackara, owner of the lot, was not a party thereto.

The evidence tended to show that the contracts were made with the knowledge and consent of Mrs. Thackara; that the materials were reasonably necessary for the erection of the house and stable, and that those buildings were necessary for the improvement of her separate estate; that said materials were furnished and used in the erection of both buildings, with the knowledge and assent of Mrs. Thackara, and that the stable was appurtenant to the house and was necessary for the convenient use of the house and lot.

That evidence was properly submitted to the jury, with instructions that unless they found the facts as above stated, their verdict must be for the defendants. The verdict in favor of the plaintiffs therefore establishes those facts, and, if there was nothing else in the case, the judgment thereon should be sustained. As was said in *Einstein v. Jamison* (95 Pa. 403), "While Courts should carefully protect married women in the enjoyment of their separate property, and not permit it to be unjustly charged with incumbrances, they should not be permitted to enhance the value of their property at the expense of innocent and confiding creditors. If the materials were furnished and used in the improvement of her property by her directions or with her knowledge and assent, and were reasonably necessary, and there was no agreement that her property should not be liable therefor, the law will give a lien thereon for the value of the materials." To the same effect is *Forrester v. Preston* (2 Pittsburgh Rep. 298). In that case

it was well said: "If this were the case of the erection of a building on the wife's separate estate without her authority, . . . the building would not be liable to a lien for the materials furnished . . . for the contractor. But the building in this case was not erected without the consent of the wife, under a contract made with a stranger. It was erected under a contract made with the husband, and, as the facts abundantly show, with the knowledge, approbation, and concurrence of the wife. It is true that the husband made the contract in his own name, but the building contracted for was, with the knowledge and concurrence of the wife, designed and erected for her; and, therefore, in making the contract, the husband may be regarded in law as the agent of the wife; as much so as if he had avowedly acted by her express authority."

Several of the specifications of error are to the rulings and instructions of the Court bearing on the defence above stated. It is unnecessary to consider them in detail. There appears to be no substantial error in either of them.

Another ground of defence was that under the claim as filed, the plaintiffs could not, in any event, recover more than the value of the materials shown to have been furnished for, and used in the construction of the dwelling. The Court was accordingly requested, in defendants' third and fourth points, to instruct the jury, as matter of law, "That any materials, . . . which were used in the construction of the stable, cannot be recovered in this proceeding; that in any event, the verdict can only be for the amount and value of the materials which were actually used and applied in the construction of the dwelling-house."

These points were refused *pro forma*, and the question of law raised by them was reserved for future consideration.

The learned Judge subsequently disposed of the question of law, thus reserved, by refusing judgment *non obstante veredicto* and entering judgment on the verdict for the amount found by the jury. This is the subject of complaint in the 19th and 20th specifications.

Conceding the fact specially found by the jury, "that the stable was appurtenant to the house and necessary for the convenient enjoyment of the house and lot;" and further, that the plaintiffs were entitled to a joint lien against both buildings, without being required to apportion the amount between them, they should have included the stable in their claim. As we have seen, the stable is entirely ignored in the body of the claim. It is not even referred to as "appurtenant" to the house; nor is it anywhere stated that any part of the materials was furnished for, or used in the construction of the stable. In *Barclay's Appeal* (13 Pa. 495), it

was held that a claim under the mechanics' lien law, must set forth the nature of the work or materials, with such a specification of the building as will exclude work done or materials supplied for anything else; and hence "a claim for work and labor done to a house (describing it) . . . for or about the erection and construction of the said building and *appurtenances* is not sufficiently certain."

In *Lauman's Ap.* (8 Pa. 473), the claim was filed against a mansion-house, barn, wagon-house, etc., on a farm to which they were all appurtenant and intended to be occupied and used together. It was held, that under the circumstances, an apportionment of the claim among the several buildings was unnecessary.

The plaintiffs doubtless had a right to include the stable in their claim, but it was not sufficiently done. The mere mention of the word "stable" in the caption of the "bill of particulars" cannot be regarded as an inclusion of the building in the claim.

Conceding that the lien against the house and ground upon which it stands, and so much other ground as is necessary for the ordinary and useful purposes of the house, embraces the entire lot of nearly two acres, and that a sale on that lien would carry the lot and all the improvements thereon including the stable, it does not follow that the plaintiffs have a right to include in the lien against the house, the value of the material furnished for and used in the construction of the stable not included in the claim as filed.

The facts found by the jury, that plaintiffs had no knowledge of the separate contracts for the erection of the respective buildings, nor that the contracts were in writing, can have no bearing in their favor. They might have known, and it was their duty to ascertain the fact. "It is the duty of one who deals with an alleged contractor to know the relation he bears to the owner, and failing in this, he furnishes material at his peril." (*Brown v. Cowan*, 110 Pa. 588.) In *Schroeder v. Galland* (134 Pa. 277), this Court held that the sub-contractor is chargeable with notice of all the terms and stipulations between the original contractor and the owner.

It follows from what has been said that the plaintiffs were not entitled to recover in this suit for the value of the materials furnished by them for the stable and used in the construction thereof, and that the defendants' 3d and 4th points for charge should have been affirmed, or else the question of law presented by those points should have been decided in favor of the defendants. The record furnishes no data by which a final judgment can now be entered and it is therefore necessary to reverse the judgment, and order a new trial.

Judgment reversed, and a *venire facias de novo* awarded.

[See preceding case.]

H. C. O.

Jan. '91, 324.

April 15, 1891.

Dershimer and Griffin v. Maloney et al.

Mechanics' liens—Sub-contractors—Rights of—Notice—Stipulation by builder that no liens shall be filed binding upon sub-contractors.

By an agreement between the owner of a dwelling house and a contractor for work thereupon, it was provided that "the owner will not in any manner be answerable . . . for any of the materials or other things used and employed in finishing and completing the said works," etc., and further, that there shall not "be any legal or lawful claims against the contractor, in any manner, from any source whatever, for work or materials furnished on said works."

Held, that the above words constituted an implied covenant against filing liens; and that a sub-contractor could not recover against the owner for materials furnished.

The only connection between the owner and the sub-contractor being through and by means of the contract between the owner and the principal contractor, the sub-contractor is chargeable with notice of all its terms and stipulations, and is bound thereby; he cannot have the benefits of the builder's contract without accepting its conditions.

Schroeder v. Galland (134 Pa. 277) followed.

Appeal of P. W. Dershimer and B. Griffin, trading as Dershimer & Griffin, plaintiffs, from the judgment of the Common Pleas of Luzerne County, in an action of *scire facias sur mechanic's lien*, in which Thomas Maloney, owner, and Thomas J. Nichols, contractor, were defendants.

Upon the trial, before *WOODWARD, J.*, it appeared that on August 20, 1886, Thomas Maloney entered into a contract with Thomas J. Nichols whereby the latter agreed to do all carpentering, plastering, painting, and glazing upon a dwelling house, according to plans and specifications, for seven thousand two hundred and twenty dollars. The contract was partly printed and partly written. Concerning payments, it contained clauses which, stripped of some verbiage, are as follows:—

Second. Thomas Maloney (the proprietor) agrees to pay to Thomas J. Nichols 85 per cent. as the work progresses, on labor and material, in monthly payments, according to estimates of the architect; the proprietor reserving the right to pay bills, deducting 15 per cent. until completion:

Provided, that in each case of payment a certificate shall be obtained from the architect, . . . and, *provided further*, that in each case a certificate shall be obtained by the contractor from the clerk of the office where liens are recorded, signed and sealed by the

clerk, that he has carefully examined the records and finds no liens or claims recorded against said work; neither shall there be any legal or lawful claims against the contractor in any manner, from any source whatever, for work or materials furnished on said works.

Seventh. The proprietor will not, in any manner, be answerable or accountable for loss or damage that shall or may happen to said work or any part or parts thereof respectively, or for any of the materials or other things used and employed in finishing and completing said works; or for injury to any person or persons, either workmen or the public, or for damage to adjoining property, etc.

The Court charged the jury as follows:—

“P. W. Dershimmer and B. Griffin, doing business as Dershimmer & Griffin, filed a mechanic's lien, as it is called, against a property in Pittston, this county, of which Thomas Maloney was the owner and T. J. Nichols the contractor or builder. Upon this mechanic's lien a scire facias was issued, and served upon the defendant to make defence. After hearing patiently all the testimony in the case, it seems to the Court that the whole matter resolves itself into a question of law, which it is our duty to dispose of by giving to the jury what are called binding instructions.

“The building in question was erected for Mr. Maloney by Thomas J. Nichols, the contractor, under a written contract, which has been read in your hearing and is in evidence; and without quoting the language of that contract accurately at this time, we call your attention to the fact that it substantially provides that Nichols, the contractor, is to finish this house for Maloney, the owner, and that said Maloney is not to be liable for any claim, or incumbrance, to sub-contractors, arising out of work and labor performed, or for material furnished in the erection of the building. That, in effect, in our judgment, is the meaning of the provision in the contract to which your attention has been called. I do not profess to quote the language precisely. If we are correct in this view of the contract, then it follows that Dershimmer & Griffin, who were sub-contractors under Nichols, and furnished lumber and material for this building, had no right to file their lien. In other words, they were bound by the covenants of the contract between Maloney and Nichols, and their right, which under other circumstances might exist, to have a lien against this property, was gone and disposed of by the contract.

“Now, the counsel have submitted to us two points, which raise distinctly the legal questions I have suggested.

“Defendant's first point reads as follows:—

“(1) If the jury believe Dershimmer & Griffin sub-contracted with Nichols to furnish a part of the material for the building, and that Nichols had contracted with Maloney to build a house at a price agreed upon between them, and that

Maloney under the contract was not in any manner to be answerable or accountable for any of the materials or other things used and employed in the finishing and completing of the building, Dershimmer & Griffin cannot maintain a lien against Maloney's building for material furnished by them under a contract with Nichols.

“That point, gentlemen, we feel it our duty to affirm.

“The other point reads as follows:—

“(2) Under the law and the evidence the verdict must be for Maloney, the defendant.

“There being no dispute about the facts referred to in the second point and assumed therein, we say to you that it is well taken also, and it is our duty to charge you that under the law and the evidence your verdict in this case should be for the defendant.”

Verdict accordingly and judgment thereon. Plaintiffs thereupon appealed, assigning for error the answers to the points as above.

S. J. Strauss (*B. F. McAtee* with him), for appellants.

John T. Lenahan (*P. A. O'Boyle* with him), for appellee.

October 5, 1891. *STERRETT, J.* The lien in question was filed by plaintiffs against the building erected by Thomas J. Nichols, one of the defendants, for Thomas Maloney, the other defendant, under a written contract, the seventh clause of which provides, *inter alia*, that “the owner will not in any manner be answerable . . . for any of the materials or other things used and employed in finishing and completing the said works,” etc. In the second clause, specifying the terms and conditions on which payments on account of the work shall be made as it progresses, it is provided, among other things, that there shall not “be any legal or lawful claims against the contractor, in any manner, from any source whatever, for work or materials furnished on said works.”

On behalf of defendant, Maloney, the Court was requested to charge: “1. If the jury believe Dershimmer & Griffin sub-contracted with Nichols to furnish a part of the materials for the building, and that Nichols had contracted with Maloney to build a house at a price agreed upon between them, and that Maloney under the contract was not in any manner to be answerable or accountable for any of the materials or other things used and employed in finishing and completing the building, Dershimmer & Griffin cannot maintain a lien against Maloney's building for materials furnished by them under the contract with Nichols.” “2. Under the law and the evidence the verdict must be for Maloney, the defendant.”

These points were affirmed and a verdict rendered accordingly; and that action of the

Court constitutes the two specifications of error before us.

If the provisions contained in the agreement between the owner and the contractor amount to an express or necessarily implied covenant that no lien shall be filed against the building, the plaintiffs, on the authority of *Schroeder v. Galland* (134 Pa. 277), are bound thereby. As was held in that case, the only connection between the owner and the sub-contractor being through and by means of the contract between the owner and the principal contractor, the sub-contractor is chargeable with notice of all its terms and stipulations and is bound thereby; he cannot have the benefit of the builder's contract without accepting its conditions.

While the language of the contract in that case differs from that employed in the agreement before us, we have no doubt the parties intended to provide against the filings of liens; and while they have not done so in express terms, we think that, by fair intentment, the words used necessarily include both liens and personal liabilities. The owner is not to "be answerable or accountable . . . in any manner," for any of the materials, etc. If this is not an implied covenant against filing liens, then the owner is "answerable or accountable" in at least one mode or manner; not liable in person, it is true, but in property, which is equally efficacious. Again, in the second clause, the inhibition is: "Neither shall there be any legal or lawful claim against the contractor, in any manner, from any source whatever, for work or materials."

An observance of this provision would have excluded the conditions on which alone the right to file a lien is based.

We cannot say there was any error in the rulings complained of, and, therefore, the judgment should be affirmed.

Judgment affirmed.

H. C. O.

Jan. '90, 180.

April 2, 1890; April 6, 1891.

Henderson, Hull & Co., Limited, v. Philadelphia and Reading Railroad Co.

Negligence—Railroad company—Engines—Negligent operation of—Damages resulting therefrom—Evidence of negligence—Injuries caused by identified and unidentified engines—Circumstantial evidence, when admissible—Period to which limited—Spark-arresters.

A railroad company in the proper use of its road is in the lawful pursuit of a legitimate business, and if injury results to property-owners thereby it is *damnum absque injuria*, and the company cannot be mulcted in damages except upon proof of negligence.

Negligence is the gist of the action, and the burden of proof is upon the plaintiff to establish it. For ordinary risks the land-owner is compensated in the damages for right of way.

The mere existence of a fire along the line of a railroad caused by sparks from the company's engines is not enough to fasten upon the company the charge either of negligence or want of skill.

In case of loss by fire, fairly attributable to sparks from a railroad company's locomotive engine, the absence of a spark arrester is *prima facie* evidence of negligence on the part of the company.

It is the duty of railroad companies to adopt the best precautions against danger in general use, and which experience has shown to be superior and effectual, and to avail themselves of every such known safeguard, or generally approved invention, to lessen the danger.

The mere fact that sparks are thrown from the stack of an engine is not evidence, in itself, of negligence. Where, however, sparks of large size are emitted, which, carried to a long distance, set fire to fields, fences, or buildings, it may, at present, be inferred that the engine is not provided with a sufficient spark arrester.

Where an injury complained of is shown to have been caused, or, in the nature of the case, could only have been caused, by sparks from an engine which is known and identified, the evidence should be confined to the condition of that engine, its management, and its practical operation. Evidence tending to prove defects in other engines of the company is irrelevant, and should be excluded.

The inquiry, in such cases, is as to the existence or condition of the spark arrester at the precise time of the injury; but in order to make this practicable by proof that it was defective, or threw out sparks of an unusual size, a reasonable latitude must be allowed to show its management and operation, both before and after. The evidence, however, must be confined to its operation at, or about, the time of the occurrence.

When loss or injury is shown to have been caused, or, according to the proof, may have been caused by sparks from an engine unknown and unidentified, or by one of several engines, some of which are unknown and unidentified, the rule of evidence is necessarily somewhat enlarged; the burden of proof, in the first instance, however, being upon the plaintiff to show that the fire in question was communicated from defendant's engines, and that there was negligence in the construction or management of them.

The evidence may be circumstantial, however, and any proper evidence from which negligence may be inferred is sufficient to throw the burden on the defendant.

Where the offending engine is not clearly or satisfactorily identified, it is competent for the plaintiff to prove that defendant's locomotives generally, or many of them, at or about the time of the occurrence, threw sparks of unusual size, and kindled numerous fires upon that part of their road, to sustain or strengthen the inference that the fire originated from the cause alleged.

This class of testimony is exceptional in character at the best, and is only admissible because the ordinary sources of proof are inaccessible, and direct evidence impracticable. The rule should not, therefore,

be carried beyond the necessity which justifies its admission.

If at or about the time where fires are alleged to have been set by locomotive engines, unknown by number or other means of identification, the company is shown to have been habitually negligent in the equipment or management of its engines, or of many of them, this is a circumstance to be considered in connection with others, not only in determining the origin of the fire, but in deciding whether or not the company was at the time negligent in failing to provide suitable precautions against danger. If many of the company's engines, at or about the time, are without sufficient spark-arresters, and frequent fires are kindled in consequence, it may well be inferred, in view of the effectual character of mechanical inventions of this kind, not only that the fire in question originated from this cause, but that it occurred from the habitual negligence of the company in failing to provide sufficient spark-arresters.

Where a fire was caused by one of four engines, three of which were unknown and unidentified, evidence was admitted to show that the property of persons along the line of defendant's road, which passed the property of the plaintiff, and within ten miles of said property, was repeatedly set on fire by unknown and unidentified engines of defendant, and that the sparks emitted by said engines exceeded a hickory-nut in size, which was accompanied by evidence of experts showing that engines throwing sparks of that size either did not use the most approved spark-arresters in general use, or if they did, the spark-arresters used were permitted to become defective and out of repair, or were negligently managed by those in charge of them. Some of this testimony was confined to two or three months before the time of the fire, some to six months, and some was general. Evidence was also admitted to prove that many unidentified engines which passed plaintiff's mill frequently, during a period of six months preceding the fire, habitually threw sparks of the size of a hickory-nut, or larger, etc.:

Held, that the admission of this evidence was error. The examination should have been confined to the negligent operation of the engines at or about the time of the fire, with such reasonable latitude, before and after the occurrence, as is sufficient to enable such proofs to be practicable.

Appeal of the Philadelphia and Reading Railroad Company, defendant, from the judgment of the Common Pleas No. 3, of Philadelphia County, in an action of trespass, brought by Henderson, Hull & Co., Limited, to recover damages sustained by the burning of plaintiffs' sash and door mill, at Montgomery, Lycoming County.

Upon the trial, before REED, J., it appeared that plaintiffs' mill was situated between the Pennsylvania Railroad and the Philadelphia and Reading Railroad. The Pennsylvania Railroad passed in front of the mill, and the Reading Railroad passed along the rear of the mill. A fire occurred in what was known as the shaving-pit and ventilator on August 10, 1888. This was a pit into which the shavings and *débris* of the mill were forced and dropped down to the ground. The top of it was wooden slat work

for ventilation. The mill was run by steam, and between this pit and the fire under the boilers was a room about fifteen feet square. The shavings from the pit were used as fuel for the boiler. The ventilator was thirty feet high, and within twenty-two feet of the centre of defendant's track.

Plaintiffs' watchman testified that he came on duty about 5.15 P.M.; the mill shut down at 5.30; and the fire occurred about 6 or 6.15 P.M. Part of his duty was to watch passing trains to see if the engines threw out sparks, and in pursuance of this duty, he went out to watch a coal train going north, but saw nothing unusual in the working of the engine, although he kept his eyes upon the smoke-stack. This engine he could not identify. A quarter of an hour afterwards he went out to see another train go by, and kept his eyes upon the smoke-stack, but saw no sparks. This train he identified as having been drawn by engine No. 72. The reason alleged for not seeing sparks, if there were any, was that it was daylight.

Defendant showed that two other engines drawing passenger trains passed the mill between the passage of the trains mentioned by the watchman. Plaintiffs had no knowledge of this until defendant proved it. There was voluminous testimony on both sides to show how the fire occurred, plaintiffs' evidence tending to show that it was caused by sparks from a passing engine, and defendant contending that the fire originated from a smouldering spark from the mill furnace.

Plaintiffs offered evidence tending to show that engine No. 72, was the source of frequent fires, and habitually threw sparks the size of a hickory nut during the three months immediately preceding the fire in question, together with evidence showing that its spark-arrester had openings in it through which much larger sparks could pass. Witnesses of defendant, who examined the engine the night of the fire, and the morning after, testified that it was in good condition.

Plaintiffs made the following offers of evidence:—

(1) Plaintiffs offer to prove that the property of persons along the line of defendant's road which passed the property of the plaintiffs destroyed by the fire in question on August 10, 1888, and within twelve miles of plaintiffs' said property, was repeatedly set on fire by *unknown and unidentified engines* of the defendant, and that the sparks causing said fires, emitted by the said engines, exceeded a hickory nut in size. To be accompanied by evidence of experts showing that engines throwing sparks of the size of hickory nuts either did not use the most approved spark-arresters in general use, or if they

did, the spark-arresters used were permitted to become defective and out of repair, or were negligently managed by those in charge of them.

(2) Plaintiffs offer to prove that *many* of the locomotive engines of the defendant, which they cannot identify, and which passed the plaintiffs' mill frequently during a period of six months preceding the fire, habitually threw sparks of the size of a hickory nut or larger. That defendant's locomotives during the month of July, 1888, caused a number of fires to property of individuals along the line and bordering on the said railroad of defendant within twelve miles of the plaintiffs' property. That the sparks which caused some of the said fires were collected at the time of same, and are to be offered in evidence, some of them being of the size of hickory nuts. To be accompanied by testimony of experts that the most approved spark-arrester in general use at the time of the fire in question was what is termed the extended smoke-box, and that the defendant company did not use the extended smoke-box spark-arrester, or a spark-arrester of equal efficiency, on most of their engines on the line of their road passing the premises of plaintiffs and property-owners mentioned before and at the time of the firing of the plaintiffs' property. And also by testimony of experts that an engine that threw sparks of the size of hickory nuts, at the period of the said fire and before the said fire, either did not employ the most approved spark-arrester in general use—the extended smoke-box, or one equal to it in efficiency—or the spark-arrester used by them was out of repair and defective, or negligently and improperly used. This to be preceded by additional evidence that we have exhausted every means of ascertaining the number of each of these engines, we having been successful as to one, and unsuccessful as to the other. Objected to. Evidence admitted. Exception. (First assignment of error.)

The following question was asked several of plaintiffs' witnesses: What, if anything, did you see incident to the running of the engines on that road during two or three months preceding the fire in question? Objected to. Evidence admitted. (Second assignment of error.)

The Court charged, *inter alia*, as follows:—

"Now, there is evidence in this case, to which of course, you are bound to give all proper weight and which I have admitted under a ruling of the Supreme Court, that where certain trains are left in uncertainty, the general character of the locomotives and spark-arresters used on that road, and their condition and management, are proper matters of investigation, and in that connection you have a right, and should consider the testimony given by a number of witnesses here as to the large size of certain cinders thrown along this

road on this division by other engines, and the destructive effects of those sparks upon property in the neighborhood. Now, if this was not an unknown engine, or an unknown coal train, or it was not train No. 1 that went up about six minutes after seven; if it was not either one of those trains, then the only other train it could have been was train No. 72. Then the question comes as to the condition of train 72. As to that, one witness for the plaintiffs has testified that he had travelled on No. 72, and that he had seen 72 throw out at different times large sparks. As against that you have the evidence of the witnesses for the defendant, who examined the engine the night of the fire, with the view of seeing whether any sparks could have come out, having their attention directed to that one point, and the second examination by thorough competent people, as the evidence shows, the next day, as to the condition of the spark-arrester, and they testified positively that it was in perfect condition, and that no sparks could have gotten out.

"Now there is another question, as you will remember, in this case, as to whether the spark-arrester exhibited here was the one that really came out of No. 72; and the plaintiffs' witnesses cast a good deal of doubt upon the question as to whether it was really the spark-arrester in No. 72. With a view of ascertaining whether that was so by fitting it into the engine, we had the examination which took place on Thursday. This spark-arrester was fitted into that engine. You will agree with me, I believe, in thinking that, so far as the front part of that spark-arrester was concerned, there did not seem to be even the slightest possibility of any sparks getting out. That is a view which I think you will take, although you are not, of course, obliged to follow any conclusion of mine; but the front part of the spark-arrester was entirely tight, so that no sparks of any unusual size could get out.

"Then comes the question which you must consider on the testimony, which is, whether such openings as we saw in the back part of that spark-arrester were sufficient to give rise to danger of the escape of large sparks, so as to cause fire? Those openings, such as they were, there was one along our right-hand side as we went in the left-hand side of the locomotive, which was large enough to pass a foot-rule, folded up, between; and there were openings around the steam-pipe; by bending the hand and bringing it out again you could bring out the fingers, but I don't think you could do it straight. That is my recollection. The testimony in regard to that is—and even if those holes were large enough to push a spark through, putting in your fingers—that the nature of the draught in that engine was such as to carry that spark past that point." (Third assignment of error.)

Defendant requested the Court to charge, *inter alia*:—

(3) As the only witness who testifies to having seen two engines pass the mill also testifies that he saw no sparks, and that he saw nothing improper or irregular in their handling or action; then, if you believe this witness, it is immaterial what these engines, or any other engines, did at other times, and there is no other evidence of negligence on the part of the defendant company.

Answer. I decline to affirm this point. I will say at this point, that in regard to that part of the plaintiffs' testimony the fact that he saw no sparks, in view of the fact that this was a bright day, as testified to by the witnesses, and that many of the witnesses testified that they could not possibly see sparks in broad daylight; if you find that the light was such that he could not see sparks, then the fact that he saw no spark of itself proves, of course, very little one way or the other. But the witness Staib also said that there was nothing unusual in the acts of the engine; that it was not laboring, or, in other words, not puffing so as to draw an unusual amount of coal out of the fires. He says the same thing, as I recollect, about the coal train which he said was going up. The defendant is entitled to the benefit of that consideration—that these were not, according to the plaintiffs' own testimony, engines that were laboring in an unusual way, so as to cause sparks to go out, which would not ordinarily have gone out; it being admitted, I think, on both sides, that an engine going up a high grade, or pulling a very heavy load, will use its exhaust in such a quick, jerking way that it will drag fire out which would not come out in the ordinary use of a locomotive. There are, therefore, those two points in regard to Staib's testimony. But the point that the defendant asks me to charge here I am obliged to refuse. (Fourth assignment of error.)

(6) The positive affirmative evidence of the defendant's witnesses as to the condition of the spark-arrester of engine 72 just after the fire, based upon an actual physical examination of that appliance, cannot be overthrown by inference or presumption from other testimony not positive and affirmative as to that fact, unless you discredit the witnesses. *Answer.* I can only say that I affirm that point with this modification: that the condition of the engine, as testified to by those witnesses, as I have said to you before, is a matter of opinion and judgment, and while they may be testifying to the truth, so far as they understand it, you have a right to differ from them in their view of the condition of the spark-arrester; but I should say to you that I caution you not to do so, unless you have good reason to think that men who make a business of understanding such a subject as this,

and who are experts, have made a mistake, or are telling some untruth. (Fifth assignment of error.)

Verdict for plaintiffs for \$25,800. A rule for a new trial was discharged, REED, J., saying:—

"The law of the case was considered so fully upon the trial that it is unnecessary to elaborate the discussion at this time. We think that, in view of the proof offered by the plaintiffs of an unidentified train passing their mill just before the fire, the trial Judge was bound, under *Gowen v. Glaser* (3 Central Reporter, 109), to admit the evidence of the general bad condition or bad management of the defendant's locomotives, as indicated by the quantity of large sparks thrown out. The fact that the defendant's evidence went almost conclusively to show that no such train as described could have passed, does not make the previous admission of the plaintiffs' evidence an error. Nor is it sufficient ground for a new trial, inasmuch as two trains, not identified until the defendant's testimony was put in, passed within a time during which a spark might have smoldered and caused the conflagration, and also because there was other evidence adequate to support a verdict for the plaintiff. The testimony of the witness Staib, that he noticed nothing irregular in the action of the engines which passed the mill not long before the time of its destruction, and that he saw no sparks, does not justify the conclusion contended for by the defendant that these engines were harmless, and so shut out proof of a general mismanagement by the defendant of its locomotives in the matter of spark-throwing. The admission of evidence, to the effect that within three months previously, and in the neighborhood of the plaintiffs' mill, locomotive No. 72 had thrown from its stack very large sparks, was, we think, proper, for the reason that the condition of that engine during this entire period was the subject of keen dispute, and the very fact that the defendant's evidence as to the good order of No. 72 was so strong, makes the admission of any countervailing proof all the more fair.

"The case of *Albert v. R. R.* (98 Pa. 318), does not lay down a contrary rule; it merely holds that proof, generally, of what other engines might do would be no evidence 'to show that the spark-arrester on engines 21 and 126 were out of order.'"

Defendant then appealed, assigning error as above.

The case was argued on April 2, 1890, PAXSON, C. J., and McCOLLUM, J., being absent. On January 19, 1891, a reargument was ordered, which was had on April 6, 1891, before a full bench.

Gavin W. Hart, for appellant.

Where the evidence of plaintiff shows that a

person specially hired to look at engines passing a place to see if they threw sparks, does so look, and testifies that he saw nothing irregular in the action of the engines and saw no sparks, it is not competent to prove the action of other engines at other times and in other places to show negligence.

The evidence complained of was introduced under the ruling in—

Gowen v. Glaser, 3 Cent. Rep. 109.

But the offer in that case was to show that the spark-arresters of *all* the locomotives in use upon defendant's road were defective. The offer in this case was to show that *many* of the locomotives threw sparks, in which respect it falls short of that in *Gowen v. Glaser*.

There are many cases upon spark-arresters, which may be divided into those that were given to the jury, or should have been; and those that were taken from the jury, or should have been.

The former class comprises—

Huyett v. Phila. & Reading R. R., 23 Pa. 373.

L. & B. R. R. v. Doak, 52 Id. 379.

F. & B. Turnpike Co. v. Phila. & Trenton R. R., 54 Id. 345.

Penna. R. R. v. Stranahan, 79 Id. 405.

P. & R. R. v. Hendrickson, 80 Id. 182.

Penna. Co. v. Watson, 81* Id. 293.

Penna. & N. Y. Canal & R. R. v. Lacey, 89 Id. 458.

Lehigh Valley R. R. v. McKeen, 90 Id. 122.

P. & R. R. R. v. Schultz, 93 Id. 341.

Albert v. N. C. R. W., 98 Id. 316.

Gowen v. Glaser, *supra*.

Generalizing these decisions, we find that in order that the case may be given to the jury there must appear affirmatively, at least, one of the following facts:—

(1) That the engine attacked threw unusual sparks at time of passing.

(2) If no evidence appears as to its action at time of passing, then such a condition of facts must appear that the only reasonable conclusion is that the engine caused the fire.

(3) Affirmative evidence that the engine had no spark-arrester, or that it was defective, which defect caused the fire.

(4) That there must be not only evidence of a fire, but that said fire was caused by some negligent act, which act must be shown affirmatively, or must be the only reasonable inference.

The evidence of the case in hand when plaintiffs closed was:—

(1) Two engines passing, both of which were seen, not by a casual observer, but by a person specially employed for the purpose, who critically looked at each and saw nothing irregular, and saw no sparks.

(2) A fire in the building, under the boiler and within fifteen feet of the shaving-pit, and the fire that burned the building originating in a part of said pit.

(3) The building and its contents being inflammable and combustible in the highest degree.

(4) That other engines, at other times, under unknown circumstances, threw sparks and caused fires.

It will thus be seen that not a single requisite element was present to bring it within the rulings of these cases.

The following cases were, or should have been, taken from the jury:—

R. R. v. Yeiser, 6 Pa. 366.

P. & R. R. v. Yerger, 73 Id. 121.

Erie Railway Co. v. Decker, 78 Id. 293.

Jennings v. P. R. R., 93 Id. 337.

R. & C. R. R. v. Latshaw, Id. 449.

Albert v. N. C. R. R., 98 Id. 318.

Penna. R. R. v. Page, 21 WEEKLY NOTES, 52.

From the above cases it appears—

(1) Where the engines alleged to be in fault are seen, the inquiry is limited to them, and them alone.

(2) That, if seen, their actions at any other time are immaterial, but must be confined to the time in question.

(3) That even evidence that the spark-arresters are defective is immaterial if there be no evidence that their action caused the fire.

P. F. Rothermel, Jr., for appellees.

Twenty-five cases have been decided by the Supreme Court of this State upon the subject of fires caused by locomotive engines. These cases are thoroughly consistent with each other. No two of them conflict in principle, and they all unite in establishing the following three propositions:—

(1) That negligence in the use of defective spark-arresters may be shown by evidence that the sparks thrown or emitted by the engine or engines were unusually large in size, or were the cause of unusual and frequent fires along the line of the road.

Huyett v. R. R., 23 Pa. 373.

R. R. v. Stranahan, 79 Id. 405.

R. R. v. Hendrickson, 80 Id. 182.

R. R. v. Watson, 81* Id. 293.

R. R. v. Lacey, 89 Id. 458.

R. R. v. McKeen, 90 Id. 122.

R. R. v. Schultz, 93 Id. 341.

Gowen v. Glaser, 3 Central Reporter, 109.

(2) That where the identity of the engine which caused the fire is known to the plaintiff, such evidence of negligent construction or management must be confined to the particular engine in question, and no evidence is admissible as to the construction or management of other engines.

R. R. v. Decker, 78 Pa. 293.

Jennings v. R. R., 93 Id. 337.

Albert v. R. R., 98 Id. 316.

(3) That where the identity of the engine which caused the fire is not known to the plaintiff, and he cannot therefore prove it defective by direct evidence, the negligence of the defendant,

and inferentially the defect of the locomotive causing the fire, may be shown by evidence tending to prove the habitual use of defective spark-arresters on the engines of the defendant road.

R. R. v. Stranahan, 79 Pa. 405.

Gowen v. Glaser, 3 Cent. Rep. 109.

These last two cases are directly in point, and are sustained by rulings in every State where the question has been raised.

Shearman & Redfield Neg. § 675.

Wharton Neg. § 871.

Thompson Neg. 159.

Grand Trunk R. R. Co. v. Richardson, 91 U. S. 454.

There is no case in Pennsylvania which holds that it is not competent evidence when the engines are unknown, those cases in which such evidence was ruled out holding, not that it would not have been competent testimony if the engines causing the fire had not been known and identified, but that in those cases it was incompetent because the engines were identified and known.

R. R. v. Decker, 78 Pa. 293.

Albert v. R. R., 98 Id. 318.

It is impossible to formulate from the decisions cited by counsel for appellant the rules he lays down.

It appears from those cases—

(1) That in all the cases except one, that of R. R. v. Doak, where the evidence was that the engine had no spark-arrester, the evidence of negligence consisted in proof of the throwing of sparks of unusual size, or the causing of unusual fires, either by particular engines where known, or by engines generally where those to which the fire was attributed could not be identified.

(2) That in all cases the reversals of the lower Courts were either because of the failure to prove negligence by showing the throwing of sparks of *unusual size*, or the causing of unusual fires (the throwing of sparks without showing they were of unusual size being invariably held to be insufficient evidence of negligence), or because of the admission of evidence by the lower Court to show habitual negligence by showing the throwing of sparks of unusual size by the engines generally *where the particular engines which caused the fire were known and identified*, and therefore the evidence should have been confined entirely to their conduct.

(3) When the lower Court has been sustained the evidence of negligence has in all cases (except that of R. R. v. Doak, where the evidence of negligence was the engine had no spark-arrester) shown the throwing of sparks of unusual size or the causing of unusual fires by the defendant's locomotives, and evidence of the habitual throwing of sparks by the defendant's engines generally has not been admitted where the engines to which the fire is attributed have been identified and known.

In some of the cases decided there has been

direct evidence, by witnesses who saw the passing locomotives, to the effect that they were throwing out unusual quantities of sparks while passing, and this was held sufficient evidence of defective spark-arresters.

R. R. v. Hendrickson, 30 Sm. 182.

R. R. v. Watson, 32 Id. 293.

R. R. v. Lacey, 8 Nor. 458.

R. R. v. McKeen, 9 Id. 122.

But not one of these cases even suggests that had no one seen the engine throwing sparks while passing that other evidence of negligence would have been excluded.

October 26, 1891. CLARK, J. This action was brought to recover damages for the destruction, by fire, of the plaintiffs' sash and door mill at Montgomery, in Lycoming County. The mill was situate between the Pennsylvania and the Philadelphia & Reading Railroads, the former passing in front and the latter in the rear of the mill. The plaintiffs allege that the fire, which occurred on the 10th day of August, 1888, was communicated from sparks emitted by the defendant's engines. The fire was discovered about 6 or 6.15 o'clock P. M., in the upper part of the ventilator, on the side next the defendant's road; the ventilator was about thirty feet high and was within twenty-two feet of defendant's road.

The watchman testifies that he came on duty that evening about fifteen minutes before shutting-down time, and that the mill shut down at about 5.30 P. M., mill time, or 5.15, railroad time; that after he came on duty and before the fire two trains passed; the first a coal train, going north, drawn by an engine which he could not identify, and, about fifteen minutes later, a freight train, drawn by engine No. 72.

The defendant's evidence, however, showed that two other engines, drawing passenger trains, passed this point, one at 5.21 and the other at 5.22 P. M., neither of which engines was identified; indeed, it would seem that the plaintiffs did not know they had passed the mill until the fact was developed in the defendant's testimony. The watchman testifies further that it was his duty to take notice of the engines as they passed, to see whether they threw fire from the stacks; that he did watch the engine in front of the coal train, and also engine No. 72, and that he saw no sparks, but that, as it was only six o'clock and the sun was shining brightly, there may have been sparks emitted which he did not see. The only engine known and identified was No. 72.

The defendant's contention was that the fire occurred in the pit containing the shavings and *débris* of the mill, which was immediately underneath the ventilator and from which the shavings, etc., were supplied as fuel to the furnace. There is a large volume of testimony bearing upon the

origin and cause of the fire, upon consideration of which the jury found the fire to have been caused by sparks from the defendant's locomotive engines.

The Philadelphia & Reading Railroad Company, at the time of the injury complained of, was an incorporated company, entitled to the right of way for its engines, etc., upon their track as located in the rear of the plaintiffs' mill. The company, in the proper use of its road, was therefore in the lawful pursuit of a legitimate business, and if injury resulted to the plaintiffs it is *damnum absque injuria*; the company cannot be mulcted in damages except upon proof of negligence. (*Turnpike Co. v. Railroad Co.*, 54 Pa. 345; *Railroad Co. v. Hendrickson*, 80 Id. 182.) No person is answerable in damages for the reasonable exercise of a right, when the act is done with a cautious regard for the rights of others, and where there is no ground for the charge of negligence, unskillfulness, or malice. For the ordinary risks, the land-owner is compensated in damages for the right of way; negligence, therefore, is the gist of the action, and the burden of proof is upon the plaintiffs to establish it. And as all engines, whether provided with spark-arresters or not, emit sparks, the mere existence of a fire along the line of the road, caused by sparks from the company's engines, is not enough to fasten upon the company the charge either of negligence or want of skill. (*R. R. Co. v. Yeiser*, 8 Pa. 366.) In *Jennings v. Penna. R. R. Co.* (93 Pa. 340), this Court, in a *per curiam* opinion, said: "To hold that the fact of the fire having taken place was *prima facie* evidence that the spark-arrester was defective, and, therefore, that the case ought to have been submitted to the jury, would be practically to hold railroad companies liable for all fires; for it is notorious that no spark-arrester has yet been invented to prevent all sparks, and a little spark may kindle as large a conflagration as a larger one, it depending very much on the dryness or humidity of the atmosphere whether a spark will go out before reaching the ground, and whether what it reaches is in a condition to be easily ignited." (See also *Railroad Company v. Schultz*, 93 Pa. 344; *Railroad Co. v. Latshaw*, Id. 449.)

Whilst any ordinary fuel may be used in a locomotive engine for the generation of steam, the exercise of this right is subject to the restriction that the latest improvements in its management in general use shall be applied to it. (*Turnpike Co. v. Railroad Co.*, 54 Pa. 345.) It is the duty of the railroad company, in the use of an engine, to use such reasonable precaution as may prevent damage to the property of others; hence, in *Lackawanna and Bloomsburg R. R. Company v. Doak* (52 Id. 379), where, although there was no direct evidence that the building was fired by the

engine, or that sparks were emitted from it at the time, yet the building was near the railroad, and was discovered to be on fire when the train passed, and it was shown that the engine had no spark-arrester, it was held that the question of negligence was properly submitted to the jury. The effect of this ruling was to establish the principle in Pennsylvania, that in case of loss by fire, fairly attributable to sparks from a railroad company's locomotive engine, the absence of a spark-arrester is *prima facie* evidence of negligence on the part of the company. It is the duty of railroad companies to adopt the best precautions against danger in general use, and which experience has shown to be superior and effectual, and to avail themselves of every such known safeguard or generally approved invention to lessen the danger. But mechanical invention and skill have all provided a merely partial protection against the emission of sparks. The mere fact that sparks are thrown from the stack of an engine is not, therefore, evidence in itself of negligence. Where, however, sparks of large size are emitted which, carried to a long distance, set fire to fields, fences, or buildings, it may, in the present condition of this branch of mechanical invention, well be inferred that the engine is not well provided with a sufficient spark-arrester. (*Railroad Company v. Hendrickson*, *supra*; *Pennsylvania Co. v. Watson*, 81* Pa. 293; *Penna. & N. Y. Co. v. Lacey*, 89 Id. 458; *P. & R. Co. v. Schultz*, 93 Id. 341.) Therefore, in an action for the recovery of damages for the destruction of a dwelling, seventy-seven feet distant from the railroad, where it was shown that sparks were seen flying from engines to a distance of more than fifty yards, and fences and fields were set on fire in several places, about the same time, and at considerable distance from the road, the question of negligence, it was held, should have been submitted to the jury. Although the company gave evidence to the effect that their engines were in good order and were all provided with good spark-arresters, the unusual distance to which the sparks were borne, and the numerous fires they created, were held to be such evidence to the contrary effect as to have carried the case to the jury. (*Huyett v. Phila.*, etc., *R. R. Co.*, 23 Pa. 373.)

Where the injury complained of is shown to have been caused, or, in the nature of the case, could only have been caused, by sparks from an engine which is known and identified, the evidence should be confined to the condition of that engine, its management and its practical operation. Evidence tending to prove defects in other engines of the company is irrelevant, and should be excluded. (*Erie Rwy. Co. v. Decker*, 78 Pa. 293.) In the case cited, the house of the plaintiff, which stood near the track of the defendants'

railroad, was destroyed by fire on the 6th of March, 1872; the plaintiff alleged that the fire originated from sparks thrown from locomotive engine No. 458 belonging to the defendants, which passed his house about the time the fire commenced, and that the throwing of the sparks was from the negligence of the defendants not having their apparatus in proper order. Mr. Justice GORDON, in the opinion of the Court, says: "It appears from the evidence, and it was conceded in the argument, that the only locomotive that could have fired the premises in question was that numbered 458, in charge of Alfred Carpenter, as engineer. It follows, therefore, that the condition of this engine and its management were all that were legitimately before the Court. If it was properly constructed as to its furnace and smoke-stack, and was furnished with a spark-arresting grate of the proper character, the company would not be liable, though the building were burned by fire accidentally issuing from it. (*R. R. Co. v. Doak*, 2 P. F. S. 379.) If, then, this engine was in a proper condition, it mattered not that every other engine, owned by the company, was without the proper appliances for preventing the ejection of coals and sparks. On the other hand, if this engine was dangerous, in this respect, it was of no consequence that all others upon the road were safe. Such being the case, it is manifest that all evidence going to prove defects in engines belonging to this company, other than the one alleged to have produced the injury complained of, was irrelevant to the issue pending, and should have been excluded."

So in *Albert v. Railway Company* (98 Pa. 316), where it appeared that the plaintiff's loss, if indeed it was caused at all by the defendant's negligence, was attributable entirely to the escape of sparks, at a particular time, from one of two particular engines, both of which were identified, evidence was held inadmissible on the part of the plaintiff, in order to prove defendant's negligence, to the effect that sparks of unusual size had been emitted for some time prior to the fire by defendant's engines generally. "The evidence below," said our brother PAXSON, in that case, "established the fact that if the plaintiff's property was destroyed by fire communicated by defendant's locomotives, it was done by engine No. 21 or engine No. 126, and by no others. Hence it is entirely clear that evidence that other engines upon some other day threw out an unusual amount of large sparks and live coals was immaterial, and if received could only have confused, and might have misled the jury. Nor would it have been evidence to show that the spark-arresters on engines 21 and 126 were out of order." That is to say—for the last sentence is, perhaps, a little obscure—the fact that other engines, at other times, threw out an unusual

amount of large sparks and live coals, would not have been evidence to show that the spark-arresters on engines 21 and 126 were out of order. To the same effect are *Jennings v. Railroad Company* (*supra*); *Annapolis, etc., R. Co. v. Guvitt* (39 Md. 124), and other cases that might be cited.

Of course the inquiry, in all such cases, is as to the existence or condition of the spark-arrester at the precise time of the injury; but, in order to make this practicable by proof that it was defective, or threw out sparks of unusual size, a reasonable latitude must be allowed to show its management and operation both before and after. The evidence, however, must be confined to its operation at or about the time of the occurrence. In *Phila. and Read. R. R. Co. v. Schultz* (*supra*), it was shown that every day for two weeks a particular engine had been observed to throw out quantities of unusually large sparks, and had fired property along the line of the railroad. In *Albert v. Railway Company* (*supra*), it was shown that both engines in question had done this for some time before the occurrence. To the same effect, also, is *Railroad Company v. McKeen* (90 Pa. 122). Testimony tending to show that other fires were set by the same engine about the same time, however, is the proper rule and is undoubtedly competent. (*Boyer v. Railroad Company*, 43 N. H. 627; *Railroad Company v. Richardson*, 91 U. S. 454.)

But when the loss or injury is shown to have been caused, or, according to the proof, may have been caused, by sparks from an engine unknown and unidentified, or by one of several engines, some of which are unknown and unidentified, then the rule of evidence is necessarily somewhat enlarged. The burden of proof in all such cases, in the first instance, is upon the plaintiff to show that the fire in question was communicated from the defendant's engines. "It devolves upon the plaintiff to prove, by a preponderance of the evidence, that the fire was communicated by sparks or cinders from the railway's engines. It need not be shown that any particular engine was at fault, but it will be sufficient if the fire is proved to have been set by any engine passing over defendant's railway, and the evidence may be wholly circumstantial: as, first, that it was possible for fire to reach the plaintiff's property from the defendant's engines; and, second, facts tending to show that it probably originated from that cause and from no other." (8 Am. & Eng. Ency. of Law, 7.)

And although the rule is otherwise in England and in many of the States, in Pennsylvania, as we have said, the additional burden is upon the plaintiff to prove negligence in the construction or management of the engine. It is not required that the fact be established by direct or positive

proof; it, like any other fact, may be established by circumstantial evidence, and on account of the great difficulty in proving negligence in such cases, any proper evidence from which negligence may be inferred is sufficient to throw the burden on the defendant. "A slight presumption of negligence, however, raised by the plaintiff's case," says Mr. Wharton (in his *Law of Negligence*, section 871), "is sufficient to throw the burden of disproving negligence on the defendant. It is a mistake, as has been elsewhere shown, to suppose that negligence can only be proved by positive and affirmative evidence. There may be no direct proofs of negligence, yet the way in which an injury is done may be such that negligence is the most probable hypothesis by which it can be explained, and when this is so, the defendant must disprove negligence by showing that he exercised care."

In *Thompson on Negligence* (page 159), it is said: "The business of running railroad trains suggests a unity of management, and a general similarity in the construction of the engines. For this reason and on account of the difficulty of proving negligence in these cases, as before pointed out, the admission of evidence as to other and distinct fires from the one alleged to have caused the injury is permitted. The rule is adopted in England and prevails in all the States with one or possibly two exceptions. More particularly, it may be stated as follows: That, in actions for damages caused by the negligent escape of fire from locomotive engines, it is competent for the plaintiff to show, that *about* the time when the fire in question happened, the trains which the company were running past the location of the fire were so managed in their furnaces, as to be likely to set on fire objects in the position of the property burned; or to show the emission of sparks or ignited matter from the engines of the defendant passing the spot upon other occasions, either before or after the damage occurred, without showing they were under the charge of the same driver or were of the same construction as the one occasioning the damage."

The rule is more precisely stated in *Shearman & Redfield on Negligence* (section 675), as follows: "When the particular engine which caused the fire cannot be fully identified, evidence that sparks and burning coals were frequently dropped by engines passing on the same road upon previous occasions is relevant and competent to show habitual negligence, and to make it probable that the plaintiff's injury proceeded from the same quarter. If the engine which emitted the fire is identified, then evidence on either side as to the condition of other engines, and of their causing fires, has been held irrelevant, but not so if it is not fully identified."

In our own case of *Pennsylvania R. R. Co. v.*

Stranahan (79 Pa. 405), the evidence was that, between two and three o'clock in the afternoon, the plaintiff's barn, which was about 150 feet from the railroad, was discovered to be on fire. Two trains had passed about noon. The fire appeared to have commenced at the fence on the road and burned over the field to the barn. The sparks falling set fire in many other places along the road. The engine from which the sparks were alleged to have been thrown was unknown and unidentified, and the plaintiff proposed to show by a witness, who lived nineteen miles distant on the line of the railroad, the extent to which the locomotives on that road going east, on or about the time of the occurrence, threw sparks from the smoke-stacks. The testimony was admitted. The witness testified that it was "a common occurrence for the engines to throw sparks and set fire for rods from the railroad track; they were from a pea to a walnut in size; it appeared worse sometimes than others; they were usually freight trains; sometimes passenger trains," etc. The admission of this testimony was assigned for error here. In a *per curiam* opinion, this Court said: "This was not a case where a certain engine had thrown out the sparks which set fire to the plaintiff's barn, but it was where the engine was unknown, yet the cause of the fire was clearly traced to the railroad track, and left the belief that some one of the engines of the defendants had emitted the coals which set the barn on fire. It, therefore, became necessary to establish the fact by such proof as rendered the belief a certain fact. This could be done, not by the proof that a certain engine emitted sparks incessantly, for *non constat* that this particular engine had passed the plaintiff's premises on that day. Hence it was necessary to permit the party to show that the emitting of coals and sparks in unusual quantities was frequent and permitted to be done by a number of engines." In *Gowen v. Glaser* (3 Cent. Rep. 109), the action was for damages for the destruction by fire of the plaintiff's rags, which were scattered in a field adjoining the defendant's road. The allegation was that they were set on fire by sparks from the defendant's engines, but it was not known by what engine. The offer made was as follows: To show that several engines on this road had insufficient spark-catchers; that the engines of this road had repeatedly set fire to property and to vegetation along that part of the track, very shortly before and very shortly after this occurrence; that sparks as large as a hickory nut escaped in large quantities from the engines, causing these fires; that after this fire, what remained of the rags and what was saved were spread on the field and watched day and night, and that they were set on fire repeatedly by the engines passing on this road. This offer was re-

ceived to show by circumstantial evidence that the damage was done by some engine with an insufficient spark-arrester; the jury were to infer from the fact that many of the company's engines, about the time of this occurrence, shortly before and shortly after, emitted sparks of unusual size and quantity; that they were without sufficient spark-arresters, and that, upon consideration of all the evidence, the injury complained of resulted from some one of the engines thus imperfectly constructed. The offer was subsequently enlarged by adding to it a proposition to prove, not that the whole number of defendant's engines were defective, but that the defendant habitually used engines with defective spark-arresters. The offer, as a whole, was admitted, and, in this Court, was assigned for error. In a *per curiam* opinion, this Court held that there was no error in the admission of this offer. In *Railroad Company v. Page* (21 WEEKLY NOTES, 52), the action was for burning the plaintiff's barn, 150 feet distant from the track. The evidence was that the company's trains had passed the barn shortly before the fire broke out, emitting cinders, smoke, and small sparks about the size of a pea; there was no evidence, direct or circumstantial, to justify the jury in finding that the sparks were of any larger size. It was further shown that the wind was blowing from the track towards the barn, and that sparks had been known to have been blown that distance. It was not shown that any spark-arrester in use could effectually prevent the emission of sparks of this size. Whilst the evidence was, perhaps, sufficient to satisfy the jury that sparks from the engine had caused the fire, there was no proof of any defect in the spark-arresters; on the contrary, it was shown they were in perfect condition; there was, therefore, no proof of negligence or mismanagement, and it was upon this ground that we said it would have been the duty of the Court below, if a proper request had been made, to have instructed the jury to find a verdict for the defendant.

The same rule of evidence is announced in *Grand Trunk R. R. Co. v. Richardson* (91 U. S. 454). The saw-mill, etc., of Richardson, the plaintiff, was burned on the 7th of June, 1870. The evidence tended to show that the fire was communicated from one of two engines belonging to the company; the first, drawing a passenger train westerly, passing the mill about half-past one o'clock in the afternoon; the other, drawing a freight train easterly, passing it about four o'clock the same afternoon. One-half to three-fourths of an hour after the last-mentioned train passed by the mill, the fire was discovered burning on the westerly end of a covered railroad bridge, from which it was communicated to the saw-mill. The evidence of the plaintiff in error tended to show that the fire was not communi-

cated by either of the engines complained of, but, on the contrary, from a constant fire at the end of their tramway, about 163 feet down the stream, on the same bank of the river, maintained at the westerly end of the railroad bridge for the purpose of burning edgings, stickings, slabs, and other waste material from the saw-mill. After the company had rested its case, Richardson was allowed to prove that at various times during the same summer, before this fire occurred, some of the company's locomotives in an unusual manner scattered fire in passing the mill and bridge, without showing either that those which it was claimed communicated the fire in question, were among the number, or that they were similar in their make, state of repair, or management to said locomotives. The engines were unknown and unidentified. Mr. Justice STRONG in ruling upon this question said: "The third assignment of error is, that the plaintiffs were allowed to prove, notwithstanding objection by the defendant, that at various times during the same summer, before the fire occurred, some of defendant's locomotives scattered fire when coming past the mill and bridge, without showing that either of those which the plaintiffs claimed communicated the fire was among the number, and without showing that the locomotives were similar in their make, their state of repair, or management to those claimed to have caused the fire complained of. The evidence was admitted after the defendant's case had closed. But whether it was strictly rebutting or not, if it tended to prove the plaintiffs' case, its admission, as rebutting, was within the discretion of the Court below and not reviewable here. The question, therefore, is whether it tended in any degree to show that the burning of the bridge and the consequent destruction of the plaintiffs' property, were caused by any of defendant's locomotives. The question has often been considered by the Courts in this country and in England, and such evidence has, we think, been generally held admissible as tending to prove the possibility and the consequent probability that some locomotive caused the fire, and as tending to show a negligent habit of the officers and agents of the railroad company." (Citing *Piggot v. R. R. Co.*, 3 M. G. & S. 229; *Sheldon v. R. R. Co.*, 14 N. Y. 218; *Field v. R. R. Co.*, 32 Id. 339; *Webb v. R. R. Co.*, 49 Id. 420; *Cleveland v. R. R. Co.*, 42 Vt. 449; *R. R. Co. v. Williams*, 42 Ill. 358; *Smith v. R. R. Co.*, 10 R. I. 22; *Longabaugh v. R. R. Co.*, 4 Nev. 811.)

In *Sheldon v. Hudson River R. R. Co.* (14 N. Y. 218), the plaintiff gave evidence which tended to show that the engines used by the defendants lacked some apparatus which was in use upon some other locomotive engines, and which rendered the latter less liable to communicate fire

to substances at the side of the road than those which were without that apparatus; that, shortly before the fire, sparks and fire had been thrown from the engines, used by the defendants in running their trains through the witness's premises, a greater distance than this building stood from the track of the railroad, and that he had picked up from the track, after the passage of trains, lighted coals more than two inches in length. It was argued by the defendants' counsel that the evidence was too remote and indefinite, that it did not refer to any particular engine, etc. Chief Justice DENIO, in delivering the opinion of the Court, said: "This argument is not without force, but, at the same time, I think it is met by the peculiar circumstances of this case. These engines run night and day and with such speed that no particular note can be taken of them as they pass. Moreover, there is such a general resemblance among them that a stranger to the business cannot readily distinguish one from another. It will, therefore, generally happen, that when the property of a person is set on fire by an engine, the owner, though he may be perfectly satisfied that it was caused by an engine, and may be able to show facts sufficient, legitimately, to establish it, yet he may be utterly ignorant what particular engine did the mischief. It would be, practically, quite impossible by any inquiries, to find out the offending engine, for a large proportion of those owned by the company are constantly in rapid motion. The business of running the trains on a railroad supposes a unity of management, and a general similarity in the fashion of the engines, and the character of operation. I think, therefore, it is competent, *prima facie* evidence for a person, seeking to establish the responsibility of the company for a burning upon the track of the road, after refuting every other probable cause of the fire, to show that about the time when it happened, the trains, which the company was running past the location of the fire, were so managed in respect to the furnaces as to be likely to set on fire objects not more remote than the property burned. It is presumed to be in the power of the company, which is intimately related with all its engineers and conductors, to controvert the fact sworn to if it is untrue, or, if true in a particular instance, that it was not so in respect to the engines which passed the place at a particular time before the occurrence of the fire. The effect of the evidence would only be to shift the *onus probandi* upon the company, and that, under the circumstances of this case, seems to me to be unavoidable." We may also refer to the case of *Koontz v. The Railway, etc., Co.* (43 Am. & Eng. R. R. Cas. 11), which was an action to recover damages for the destruction of plaintiff's mill by fire falling from one of defendant's locomotives. What

particular engine this was the evidence did not disclose, nor was the plaintiff able to ascertain, to make proof of its identification from other engines of the company; but, to strengthen the inference that the burning of the mill originated in sparks from this engine, and to show habitual negligence of the officers and agents of the railroad company, he introduced evidence to show that other engines, of like appearance and construction, frequently scattered fire in large quantities, and set other fires along the track prior and subsequent to the burning complained of. Mr. Justice LORD, in delivering the opinion of the Court, said: "On account of this difficulty of identifying a passing engine, especially at night time, so as to make direct proof of such negligence, and also for the reason, as stated by Mr. Thompson, that the business of running railroad trains supposes a unity of management and a general similarity in the construction of engines, the admission of evidence as to other and distinct fires from the one alleged to have caused the injury, is permitted. Nor is it requisite that the testimony must also show that the engine, which it is claimed caused the fire, was one of those which had previously or subsequently scattered fire along defendant's track, but it is enough, as was shown, that it is similar in appearance and construction, and under the same general management. Hence, it is quite generally held, that evidence that sparks were frequently ejected from passing engines, causing fire along its track on other occasions is relevant and competent to show habitual negligence, and to strengthen and sustain the inference that the fire originated from the cause alleged. As the plaintiff must proceed with his evidence in the first instance, the fact that the defendant may be able to prove the identity of the engine, cannot have the effect to make the admission of such evidence error." In *Field v. N. Y. C. R. R. Co.* (32 N. Y. 339), the Court, in speaking of this quality of evidence, says: "At all events, it showed that a practice was indulged in on the part of the company, about the time and near the place, which would have injured the plaintiff's property, rendering it probable, to a certain degree, that the injury was attributable to that cause."

We have quoted extensively from these authorities to show that the rule of evidence referred to, although, perhaps, comparatively new in its application in Pennsylvania, is the rule generally recognized in this country, not only by the text-writers, but by the Courts. It may, therefore, be considered as settled in cases of this kind where the offending engine is not clearly or satisfactorily identified that it is competent for the plaintiff to prove that the defendant's locomotives generally, or many of them, at or about the time of the occurrence threw sparks of unusual size

and kindled numerous fires upon that part of their road, to sustain or strengthen the inference that the fire originated from the cause alleged. And as, in the case at bar, it is not definitely ascertained to which of the four engines this fire was attributable, three of them being unknown and unidentified, we cannot see how testimony of this character could be excluded.

But the objective point of the inquiry is the condition of the passing engines at the time of the occurrence. It is a matter of little consequence what may have been their condition ten years, or two years before that, for their precautions against fire, and the management of the engines may have been greatly changed within that period. It does not follow, because the company, in its official management, may have been negligent in this respect at a time so remote, that it still remains so. The habits of individuals may, in some sense, be spoken of as fixed habits; but the official control and management of the affairs of a railroad company, as well as the various devices used as precautions against danger, are liable to frequent and radical changes. The line must be drawn somewhere. This class of testimony is exceptional in character at the best, and is only admissible because the ordinary sources of proof are inaccessible, and direct evidence impracticable. The rule should not, therefore, be carried beyond the necessity which justifies its admission. If, at or about the time when fires are alleged to have been set by locomotive engines, unknown by number or other means of identification, the company is shown to have been habitually negligent in the equipment or management of its engines, or of many of them, this is a circumstance, to be considered in connection with others, not only in determining the origin of the fire, but in deciding whether or not the company was, at the time, in this as in many other instances, negligent in failing to provide suitable precautions against danger. If many of the company's engines, at or about the time, are without sufficient spark-arresters, and frequent fires are kindled in consequence, it may well be inferred, in view of the effectual character of mechanical inventions of this kind, not only that the fire in question originated from this cause, but that it occurred from the habitual negligence of the company in failing to provide sufficient spark-arresters.

Reasonable latitude must, of course, be allowed; the purpose of such proofs would be defeated if they were confined to the exact or precise time of the occurrence. In *Stranahan's Case* the Court admitted proof of the extent to which the various locomotives of the company threw sparks, on or about the 9th (6th) of November, 1867, when the fire occurred. In *Gowen v. Claeser*, the inquiry was as to sparks thrown and fires set very shortly before and very shortly after the occurrence. In *Sheldon v. H. R. R. Co. (supra)*,

the inquiry was restricted to matters occurring about the time, and near the place of the fire. In *Koontz v. Grand Trunk Rwy.*, the offer was somewhat more extended in its effects, but we are of opinion that the rule should not be given greater latitude than we have given it.

In the case at bar, the first offer received, and which is the ground of the first specification of error, was as follows: "Plaintiffs offer to prove, that the property of persons along the line of defendant's road, which passed the property of plaintiffs, destroyed by the fire in question on August 10, 1888, and within ten miles of plaintiffs' said property, was repeatedly set on fire by unknown and unidentified engines of the defendant; and that the sparks causing said fires, emitted by the said engines, exceeded a hickory nut in size, to be accompanied by evidence of experts showing that engines throwing sparks of the size of a hickory nut either did not use the most approved spark-arresters in general use, or, if they did, the spark-arresters used were permitted to become defective and out of repair, or were negligently managed by those in charge of them." This offer, it will be seen, was wholly without limit as to time. The testimony received under it was, in some instances, confined to two or three months, in some to six months, and in some the testimony was general, and in such form as not to indicate to what period of time it referred. The second offer was "to prove that many of the locomotive engines of the defendants, which they cannot identify, and which passed the plaintiffs' mill frequently during the period of six months preceding the fire, habitually threw sparks of the size of a hickory nut or larger," etc. We are of opinion that the admission of these offers was error. The examination should be confined to the negligent operation of the engines of the company at or about the time of the fire, with such reasonable latitude, before and after the occurrence, as is sufficient to enable such proofs to be practicable.

What has been said disposes of the first, second, and third assignments of error; the remaining assignments are without merit and are dismissed.

The judgment is reversed, and a venire facias de novo awarded. H. C. O.

Jan. '91, 233.

April 10, 1891.

Law's Estate.

Guardian and ward—Responsibility of guardian—Deposit of trust funds in bank requiring notice before withdrawal and giving interest on fund—Whether guardian liable where such deposit is lost through failure of the depository.

Executors, trustees, and guardians will not be liable if, in the ordinary discharge of their duties, they deposit the assets temporarily in a bank, though the

bank fail; but if they allow them to lie there by way of investment, they will be liable to make good the loss.

A deposit is where a sum of money is left with a banker for safe keeping subject to order, and payable, not in the specific money deposited, but in an equal sum; it may or may not bear interest, according to agreement.

While the relation between the depositor and his banker is that of debtor and creditor simply, the transaction cannot in any proper sense be regarded as a loan, unless the money is left, not for safe keeping, but for a fixed period at interest.

A guardian deposited funds of his trust in a bank temporarily, while seeking investment, upon an agreement that he was to receive interest at three per cent., and was to give two weeks' notice of his desire to withdraw. Three months later the bank failed and the money was lost:

Held (1) That this was a deposit merely, and in no sense an investment.

(2) That the requirement of two weeks' notice was a reasonable provision, not inconsistent with a bank deposit, and for the benefit not only of the bank but also of its depositors, the reasonableness of the length of notice being for the Court.

(3) That, therefore, the guardian was not responsible for the loss.

Frankenfield's Appeal, 11 WEEKLY NOTES, 373; Baer's Appeal, 127 Pa. 360, distinguished.

Appeal of the Philadelphia Finance Company, surety upon the bond of Henry W. Scott, former guardian of William W. Law, from the decree of the Orphans' Court of Philadelphia County, sustaining the exceptions of the Commonwealth Title Insurance and Trust Company to the adjudication of ASHMAN, J., upon the final account of the said Henry W. Scott.

Before the Auditing Judge it was shown that on January 29, 1890, the accountant received \$3339.12 for his ward, and deposited the same, while seeking an investment, to his credit as guardian, in the Bank of America, which was then in good credit. The bank received a class of deposits upon which it allowed interest, which were subject to check only after two weeks' notice. The deposit in question was received in this way, and the interest allowed was three per cent. On April 30, 1890, the bank failed.

The Commonwealth Title Insurance and Trust Company having been substituted as guardian, sought to have the former guardian surcharged with the amount thus lost. The Auditing Judge refused to make the surcharge, whereupon the substituted guardian filed exceptions which, after argument, were sustained by the Court, ASHMAN, J., dissenting (reported 27 WEEKLY NOTES, 345), and a decree made surcharging the accountant; whereupon the surety of the said accountant appealed, assigning for error this action of the Court.

John Douglass Brown, Jr., (J. Levering Jones and Warren G. Griffith with him), for appellant.

The diligence required of a trustee is only that which a man of ordinary prudence would exercise in his own affairs; he is not an insurer of trust funds against possibility of loss.

Fahnestock's Appeal, 104 Pa. 46.

Fesmire's Estate, 134 Id. 67.

The well-recognized exception to the rule is where the trustee *invests* the trust funds on personal security. The cases of Frankenfield's Appeal (127 Pa. 369), and Salway v. Salway (2 R. & M. 215), relied on by the Court below, were cases within this exception, because the respective trustees "parted with control" of the trust fund; in the former case by substituting for it the bank's obligation payable at a future date, and in the other by agreeing that the withdrawal of the trust fund from the depository should be subject to the veto of a third person. But all that was done in the case at bar was to deposit the fund while awaiting investment—practically on call. The reasonable, thrifty, prudent, and honest act of the guardian should not subject him to liability.

Frank T. Lloyd (Preston K. Erdman with him), for appellee.

This question has been settled in accordance with the ruling of the Court below in—

Frankenfield's Appeal, 127 Pa. 369.

Baer's Appeal, Id. 366.

October 26, 1891. CLARK, J. This is an appeal by the Philadelphia Finance Company, surety upon the guardianship bond of Henry W. Scott, guardian of William W. Law, from the adjudication of the Orphans' Court of Philadelphia County, upon the account of said guardian. On the 29th of January, 1890, Scott received \$3339.12 of the money of his ward, and immediately deposited the same in the Bank of America. The accountant had kept his personal account as a depositor in the same institution for several years, and had been advised by an officer of the Finance Company, which latter company was surety on his bond as guardian, that the Bank of America was entirely solvent and safe. The deposit was in a separate account in the name of the guardian as such. No certificate was issued; the whole transaction was evidenced only by an entry of credit upon the books of the bank in usual form. The accountant was in search of investment, and the deposit was only to remain until he could find one. The bank agreed to allow him three per cent. interest, but he was to give two weeks' notice before withdrawing it. The bank failed on the 30th day of April following. At the time of the deposit the bank was in good repute, and there is no allegation of bad faith or want of due care or diligence. The only question for our consideration is whether or

not, under such circumstances, the trustee is responsible for the amount of the deposit.

As a general rule, the measure of care and diligence required of a trustee is such as would be pursued by a man of ordinary prudence and skill in the management of his own estate. (*Falmestock's Appeal*, 104 Pa. 46.) It is equally well settled, however, that a trustee who invests the funds belonging to a trust on personal security, does so at his own risk. This is so well settled that a citation of authorities is unnecessary.

Trustees are not bound to transact personally such business connected with the trusts as, according to general usage, prudent persons acting for themselves would ordinarily transact through mercantile agents. Upon this principle, it has been held that a trustee investing trust funds is justified in employing a broker to procure securities, authorized by the trust, and in paying the purchase-money to a broker, if he follows the usual and regular course of business adopted by ordinary, prudent men in making such investments. So, also, executors, trustees, or guardians, will not be liable if, in the ordinary discharge of their duty, they deposit the assets temporarily in a bank, although the bank may fail. But the trustee must be careful to make the deposits in the name of the trust estate, and not to his personal credit, and not to mix the trust funds with his own, otherwise he will be liable. (*Commonwealth v. McAlister*, 4 Casey, 486; 2 White & Tindor's Lead. Cas. 986-7.) "If the subject of the trust be money, it may be deposited for temporary purposes in some responsible banking house, but in such a manner that the *cestui que trust* may follow the fund into the hands of the bankers, and it is no objection that the bank allows interest on the deposits. . . . If the trustee put the money to his own credit and not to the separate account of the trust estate, or if he allow the drafts of another person to be honored, who draws upon the account and misapplies the money, the trustee will be personally liable for the consequences." (*Lewin on Trusts*, 417.) Banks of deposit are a recognized necessity in the commercial world; a trustee, who would continuously keep for any considerable length of time a large sum of money about his person or in his house, rather than deposit it for safe keeping in a solvent and reputable bank or trust company, where all the precautions may be exercised for its safety, might justly be regarded as derelict in duty. No one would be accredited with the exercise of common prudence who would keep his own money in this way, and a trustee, as we have said, is held generally for such care and diligence as an ordinarily prudent man would exercise in the conduct and management of his own business. "A trustee will not be liable for the failure of a bank in which trust funds have been deposited, if he has suffered them

to remain there only for a reasonable time; but if he allows them to lie there by way of investment, he will be liable to make good their loss. But he must be careful to make the deposit in the name of the trust estate, and not to his own credit; and not to mix the trust funds with his own, otherwise he will be liable." (*Bisph. Eq. § 139*; *Perry on Trusts*, § 443.) "Of course there is no duty to convert securities if, by the terms of the trust instrument, there is a sufficient indication that the *cestui que trust* was intended to enjoy the interest, income, or dividends of the specific securities." (*Perry on Trusts*, 450; *Hill on Trustees*, 582; *Bispham's Equity*, § 139.)

Was this transaction with the Bank of America a deposit of the money, or was it a loan or investment of it? A deposit is where a sum of money is left with a banker for safe-keeping subject to order, and payable, not in the specific money deposited, but in an equal sum. It may, or may not, bear interest, according to the agreement. Whilst the relation between the depositor and his banker is that of debtor and creditor simply, the transaction cannot in any proper sense be regarded as a loan, unless the money is left, not for safe-keeping, but for a fixed period at interest, in which case the transaction assumes all the characteristics of a loan.

The Orphans' Court decided this case upon the rulings of this Court in *Frankenfield's Appeal* (11 WEEKLY NOTES, 373), and *Baer's Appeal* (127 Pa. 360), but we think these cases are readily distinguishable from the case at bar. In *Frankenfield's Appeal* (*supra*) there was a loan by the trustee of \$2000 of trust funds to the Franklin Savings Bank for three months, with interest at six per cent.; thirty days' notice to be given of the trustee's intention to withdraw the deposits. The bank was in good repute, and there was no evidence of bad faith or want of care on the part of the trustee. Our brother GREEN, in the opinion filed, said: If it had been an ordinary deposit, subject to the check of the depositor from the day it was made, the appellant would probably not have been liable; but it was not a deposit; it was a loan, upon merely personal security, for a fixed period, at interest, and during that period the money, because of the loan, was entirely beyond the trustee's control. The 25th section of the Act of June 12th, 1836, expressly provides that such investments must be made under the direction of the Court of Common Pleas, and only exempts the trustee from liability when he pursues this course in good faith. In *Baer's Appeal* (*supra*), the banker's certificate of deposit was substantially in the same form as in *Frankenfield's Appeal* (*supra*), excepting that there was no stipulation for notice of the withdrawal of the deposit. The transaction possessed all the qualities of a loan of money

for a year, at four per cent. interest. It is of no consequence that the borrower is a bank, for a bank may borrow money. Parties engaged in the banking business, whether as individuals or as members of a partnership or of a corporation, may take a loan of money for a fixed period of time at interest, with like effect as persons engaged in other pursuits. The transaction may be termed a time deposit, but it is none the less a loan, and subjects the lender to that degree of responsibility.

In the present case, the money was placed in the bank, not as an investment for any fixed period, but merely for safe-keeping, and at a small rate of interest, until a suitable investment could be found. This was the express understanding of both parties at the time. The transaction was entered upon the books of the bank as a deposit merely. It was treated as a temporary, provisional, or precautionary arrangement. No person would speak of this as an investment; an investment carries with it a greater or less degree of permanency, which does not characterize this transaction. It is true that two weeks' notice was to be given of the withdrawal of the deposit, but this was a reasonable provision, and not inconsistent with a bank deposit. Almost all savings institutions stipulate for notice of withdrawal with their depositors, and such a stipulation is for the benefit not only of the bank, but also of its depositors; the reasonableness of the time is a question in each case to be determined by the Court. It is said the trustee thereby loses control of the money, but that is not the true test. The depositor always, in a certain sense, loses control of the money when he places it in bank, for the bank may refuse payment of his checks, and as he then has no claim upon the specific money, he stands upon the footing of a creditor merely. It is true a trustee, as a general rule, is not allowed to part with the control of trust money (*Salway v. Salway*, 3 Cl. & Fin. 44), but he may do so by way of precaution against loss, by a deposit in a solvent and reputable bank. A deposit, as we have said, is a temporary disposition of money for safe-keeping, and it is upon this ground alone that the trustee is justified in depositing trust funds in bank, and it is upon the same ground that a deposit is distinguishable from an investment.

We are of opinion, for the reasons stated, that the trustee was not properly chargeable with this loss.

The decree of the Orphans' Court is reversed, and the record remitted, in order that the account may be restated, and a decree entered in accordance with this opinion, the appellee to pay the costs of this appeal.

R. H. N.

Jan. '91, 203.

April 7, 1891.

Martinez v. Earnshaw.

Contracts—Breaches—Guarantees—Affidavit of defence.

In an action to recover damages for breach of a contract, by which the plaintiffs sold and defendant bought "dry iron ore" of usual quality, "guaranteed to contain fifty per cent. of iron in the natural state, with a sliding scale at the rate of three pence per unit additional for every unit over fifty per cent., and with a deduction at the rate of four pence per unit for every unit under fifty per cent.," if the defendant allege in his affidavit of defence that of the first deliveries under the contract one contained 48.747 of metallic iron in the natural state and .038 of phosphorus, and the other contained 49.40 of metallic iron in the natural state and .030 of phosphorus, and that upon the discovery of this he repudiated the contract and refused to accept any more ore under it, judgment cannot be entered against him for want of a sufficient affidavit of defence.

Technically, guarantees demand literal performance. Such is the *prima facies* of the engagement, and it is not for Courts to know, as a matter of law, whether there are or may be considerations extrinsic the written stipulations of the parties which may excuse a literal compliance with them.

The fact that a sliding scale is provided for an allowance for an excess of iron and a diminution for a deficiency, is not controlling. Apparently that provision creates nothing more than an option, but does not mitigate the rigidity upon which the purchaser may insist if he chooses.

A trade-custom, or other legitimate facts, may affect the purchaser's strict right, but these cannot be introduced upon an application for judgment for want of a sufficient affidavit of defence; a literal breach is enough to defeat such an application.

Appeal of Alfred Earnshaw, defendant, from the judgment of the Common Pleas No. 3, of Philadelphia County, in an action of assumpsit brought by De Ramon Martinez, Guillon Juan Martinez y Martinez, Ramon Martinez y Martinez, and Antonio Conesa Garcia, trading as R. Martinez e hijos y Conesa, to recover damages for breach of contract.

The statement filed was as follows:—

"The plaintiffs seek to recover of the defendant the sum of \$3750, with interest thereon, from the first day of January, 1888, for damages suffered by the plaintiffs for breach on the part of the defendant of a certain contract entered into by and between the said plaintiffs and defendant by his agents, Allan, Wrenn & Co., which contract is in the following words and figures:—

Contract made this 28th of March, 1887, between Messrs. R. Martinez e hijos y Conesa, of Cartagena, and Messrs. Allan, Wrenn & Co., of London, acting on behalf and for account of Alfred Earnshaw, Esquire, of Philadelphia, U. S. A.

1. That R. Martinez e hijos y Conesa sell, and Al-

fred Earnshaw purchases, all the dry iron ore of usual quality which sellers can collect from the mine San Aniseto during the rest of this year, up to ten thousand tons or thereabouts, at the price of six shillings per ton of twenty-two hundred and forty pounds, f. o. b. Cartagena guaranteed to contain a yield of fifty per cent. of iron in the natural state, with a sliding scale at the rate of three pence per unit additional for every unit over fifty per cent., and with a deduction at the rate of four pence per unit for every unit under fifty per cent. Final settlements to be made on output weights and assays found at port of discharge.

2. R. Martinez e hijos y Conesa will advise Messrs. Allan, Wrenn & Co., from time to time, about the quantity of mineral they have ready for shipment under this contract, and Messrs. Wrenn & Co. will do the chartering of tonnage required according to these advices.

3. R. Martinez e hijos y Conesa undertake to put the mineral on board steamers at the rate of two hundred and fifty tons per day, weather permitting, Sundays and holidays excepted, being paid for so doing five pence per ton. Any dispatch-money earned in loading steamers at Cartagena to be equally divided between buyers and sellers. Sellers are to pay demurrage incurred at port of loading in the event of not so doing.

4. Alfred Earnshaw has the right of sending sailing vessels to load under this contract, he paying R. Martinez e hijos y Conesa five pence per ton additional price; all other conditions as stated herein, except that the loading will be at the rate of eighty tons per day.

5. On arrival at port of discharge of the cargoes shipped under this contract same shall be sampled and assayed by a chemist of repute, cost being paid jointly by buyers and sellers, and whose decision shall be final and binding on both parties.

6. Payment by sellers' draft on an approved London banker at sixty days for steamer cargoes and ninety days for sailing-ship cargoes for eighty per cent. of the amount of provisional invoice, based on fifty per cent. of iron against bill of lading and consular invoice (if required) and the balance to be sent within fifteen days after output, weight, and assays are ascertained in cash. In the event of loss of any cargo the full amount of provisional invoice shall be paid by buyers.

7. In the event of war, civil commotion, cholera, quarantines, or any other case of force majeure which may hinder the loading or chartering of tonnage in execution of this contract, same shall be suspended during the existence of the producing cause.

(Signed) R. MARTINEZ E HIJOS Y CONESA,

By authority of Alfred Earnshaw.

(Signed) ALLAN, WRENN & CO.,

As agents.

Signed in duplicate.

"And the said plaintiffs aver that they did mine the said ten thousand tons of said ore capable of yielding about 50 per cent of iron in the natural state from the said mine in accordance with the agreement, and notified the said Allan, Wrenn & Co., as well as the said defendant, from time to time, of the quantity of the said ore which they, the said plaintiffs, had ready for shipment and did perform all and everything that they, the plaintiffs, ought to have performed according to

the terms of the said agreement, and that nothing has occurred or has been done which has had the effect to release the said defendant from the terms of the said contract; but that the said defendant, disregarding his promises in his said agreement contained, neglected and refused to charter the tonnage required by the said agreement and advices and has refused to provide means for the shipment of said ore, or any part thereof, and still doth neglect and refuse so to do, and hath hitherto neglected and refused and still doth neglect and refuse to pay for the same, or any part thereof, or to fulfill any part of the said agreement on his part to be fulfilled, and by reason of the premises the said plaintiffs have suffered the said loss of \$3750, as, at the expiration of the said contract, namely, the thirty-first day of December, 1887, and for some considerable time thereafter, the highest and best price that could be obtained for the said ore was four shillings and six pence per ton, the market price of the said ore having declined to that sum.

"The loss thus entailed upon the plaintiffs of about \$3750 was the difference between the contract price of the said ore, in accordance with the said agreement, and the market price of the said ore at the time of the expiration of the said agreement.

"The plaintiffs therefore bring this suit."

The affidavit of defence was as follows:—

"Alfred Earnshaw, being duly sworn, says he has a legal defence to the plaintiffs' suit, viz:—

"Before the making of the contract, a copy of which is set forth in the plaintiffs' statement, the defendant when negotiating with the plaintiffs for dealing in the ore, which is the subject of the contract, examined the mines, and received from the plaintiffs certain representations as to the qualities of the ore, which led him to request samples should be sent with a view of purchasing. A sample was forwarded and analyzed, showing the ore contained 59.586 of metallic iron and .025 of phosphorus after drying the ore at two hundred and twelve degrees. A second sample was sent him by the plaintiffs, accompanied with a letter of August 31, 1886, a copy of which is annexed. This sample showed 53.598 of metallic iron and .026 of phosphorus after drying the ore at one hundred and twelve degrees.

"Having received this letter and the samples, and having procured the analysis thereof, the defendant authorized shipments to be made—and two were made—one by the steamship 'Lorain' and one by the bark 'Simpatia.' Before the arrival of these vessels, relying on the samples and letter, the defendant authorized a contract to be made for future shipments, and the contract set out in the statement was made. After this the vessels arrived and their cargoes were delivered and sent to the furnaces. These ores were

then tested and ascertained not to accord with the samples or the guarantee in the contract, the analysis showing that the cargo of the 'Lorain' contained 48.747 of metallic iron in the natural state and .038 of phosphorus, and the cargo of the 'Simpatia' contained 49.40 of metallic iron in the natural state and .030 of phosphorus.

"The defendant did not discover these facts until after the iron had been delivered at the furnaces, and it had become impracticable to reject and return the ores, nor could he, in the usual course of business of this kind, have discovered the fact sooner.

"Immediately upon ascertaining the fact that the ores shipped did not correspond to the quality guaranteed, the defendant repudiated the contract that had been made and refused to receive any more ore under it.

"As respects the averment that the plaintiffs have fulfilled their part of the contract, and were ready and willing to perform the same by loading ore of the kind stipulated for by the contract, the defendant believes this is not true, and expects to be able on the trial to prove that the ore that was sold by the plaintiffs, and for the loss on which they claim to recover, was not of the quality that the defendant was bound to accept if the contract had continued to be in force.

"He is advised, also, that he cannot be required to aver anything by way of defence to a claim of that character other than ignorance of the fact, inasmuch as it is a matter wholly within the knowledge of the plaintiffs as respects their readiness and willingness to deliver and the relative value of the ores they were ready to deliver and the ores they agreed to deliver, and he avers that he has no knowledge of the fact alleged and no means of obtaining such knowledge, while he believes the averment is untrue.

"He is also advised and insists that he was entitled to repudiate the contract upon ascertaining the quality of the ore that had been shipped to him by the plaintiffs, and its non-correspondence either with the samples or the quality guaranteed."

The Court made absolute a rule for judgment for want of a sufficient affidavit of defence; whereupon defendant took this appeal, assigning for error this entry of judgment.

Richard C. McMurtrie, for appellant.

Isaac S. Sharp (S. H. Alleman with him), for appellees.

October 5, 1891. GREEN, J. In this case judgment was entered against the defendant for want of a sufficient affidavit of defence. The facts set forth in the affidavit are to be taken as verity, and we have nothing before us but the

plaintiffs' statement and the defendant's affidavit. The statement contains the contract upon which the action is founded. By the explicit terms of the contract the plaintiffs sold and the defendant bought "dry iron ore" of usual quality, "guaranteed to contain fifty per cent. of iron in the natural state, with a sliding scale at the rate of three pence per unit additional for every unit over fifty per cent., and with a deduction at the rate of four pence per unit for every unit under fifty per cent." The affidavit alleges that the first deliveries under the contract contained, one of them, 48.747 of metallic iron in the natural state and .038 of phosphorus, and the other contained 49.40 of metallic iron in the natural state and .030 of phosphorus, and that as soon as this was discovered the defendant repudiated the contract and refused to receive any more ore under it. As to all other matters contained either in the statement or affidavit, some of which involve considerations of fact and may possibly on a trial control the result, we can have nothing to say and of course cannot determine either positively or inferentially. As the affidavit contains a positive averment that the ore delivered did not contain fifty per cent. of metallic iron in its natural state, a breach of the guaranty is asserted. This breach may or may not be vital to the plaintiffs' right of recovery. Possibly the variation from the percentage of metallic iron required by the contract may be so slight as that the ore delivered may be a substantial compliance with the contract, or a compliance which the law, when better informed by testimony, may regard as adequate. But we cannot know that now, and we can only deal with the breach of a condition which the purchaser required by the terms of his obligation. Technically, guarantees demand literal performance. Such is the *prima facies* of the engagement. It is not for Courts to know, as matter of law, whether there are, or may be, considerations extrinsic the written stipulations of the parties which may excuse a literal compliance with them. It is enough for present purposes to say that we do not find any matter in the contract itself which necessarily has that effect. The suggestion that a sliding scale is provided for an allowance for an excess of iron and a diminution for a deficiency, is not controlling. Apparently that provision creates nothing more than an option, but does not mitigate the rigidity upon which the purchaser may insist if he choose. Possibly a trade custom, or other legitimate facts, may affect the determination of the purchaser's strict right. But we cannot either hear or decide them now. We know at this time only that a literal breach by the plaintiffs is alleged and claimed, and a literal breach is

enough to defeat a compulsory judgment without a hearing. It seems to us that if the defendant proves the facts set out in his affidavit, the burden will be cast upon the plaintiffs to relieve themselves from the imputation of a breach, and that consideration is enough to carry the case to a jury.

Judgment reversed, and procedendo awarded.

H. S. P. N.

Jan. '91, 430.

June 4, 1891.

Commonwealth v. Ribert.

Notes of testimony—Criminal law—Evidence.

When the bill of exceptions is incomplete, there being no notes of testimony except the abbreviated notes taken by the Judge for his own use, assignments of error as to evidence or comments thereon by the Judge will be disregarded.

Where a defendant in a criminal action offers to prove a contract with his employers by which he was to have the exclusive use of the room in which he worked, and one of his employers, the one upon whom an assault was made, was not to enter it, the evidence should be admitted. The contract might be improbable, but the defendant has a right to ask the jury to believe it; and if they do believe it, it might justify the prisoner in attempting to eject the prosecutor forcibly from the room.

Appeal of Jose M. Ribert, defendant, from the judgment of the Quarter Sessions of Lancaster County upon an indictment for felonious assault and battery.

The following facts appeared on the trial: The prisoner was employed by Osborne and Hartman. On July 15, 1890, H. E. Osborne, the prosecutor, and a member of the firm of Osborne and Hartman, went into the room where Ribert was working, and while there was assaulted by him. Defendant alleged that he had the sole right to use the room in which he was working, and the prosecutor had no right to enter it.

The following offers of testimony were made by defendant:—

Defendant offers to prove by the defendant himself, that he had, by a verbal agreement with Osborne and Hartman, the sole right to use and occupy the premises in which the alleged assault was committed by the defendant upon H. E. Osborne, who was one of the parties to the agreement, that he, Osborne, should not, under any circumstances, enter upon the said premises so rented to this witness. Objected to. Offer refused. (Second assignment of error.)

The defendant claiming to have the exclusive right of possession of the room in which the

alleged assault was committed, offers to prove by the defendant himself that he, the defendant, had agreed to finish his contract, amounting to \$600 worth of goods, in this room, to be set apart exclusively for the defendant, and into which room it was expressly agreed by Hartman & Osborne, that this prosecutor, H. E. Osborne, should not be allowed to enter. Objected to. Offer overruled. (Third assignment of error.)

The remaining assignments of error related to the evidence and the comments thereon by the Court, but no notes being taken, except the short notes taken by the Judge for his own use, these assignments were not regarded by the Supreme Court.

Verdict, guilty, and sentence thereon; whereupon defendant took this appeal, assigning as error, *inter alia*, the refusal of the foregoing offers of testimony.

B. Frank Eshleman and *Benjamin F. Davis* (*A. H. Fritchey* with them), for appellant.

A. C. Reinhoehl, district attorney (*J. Hay Brown* and *W. U. Hensel* with him), for Commonwealth.

October 5, 1891. MITCHELL, J. The bill of exceptions is extremely imperfect, no notes of the testimony apparently having been taken except those by the Judge, which were merely for his own use, and much abbreviated and incomplete. The first, fourth, and sixth assignments of error must, therefore, be disregarded, as the record affords us no way of determining whether or not they are well founded.

The second and third assignments are to the refusal to allow the prisoner to show that by special contract with his employers he was entitled to the exclusive possession of the room where the assault took place, and particularly that the prosecutor, Osborne, was not to enter it. Such an arrangement was unusual, perhaps improbable, but the appellant had a right to give it in evidence and ask the jury to believe it, and if they did so, it would put the occurrence in a different light, perhaps even to the extent of justifying the prisoner in attempting to eject Osborne forcibly. The question for the jury then would be, not whether this was a wanton and unprovoked attack, but whether more violence was used than the occasion justified. The evidence, therefore, was material to the appellant's case, and should have been admitted.

Judgment reversed, and a venire de novo awarded.

H. S. P. N.

WEEKLY NOTES OF CASES.

VOL. XXVIII.] FRIDAY, NOV. 13, 1891. [No. 30.]

Supreme Court.

July '90, 119.

March 23, 1891.

Commonwealth v. McManus.

Murder—Evidence—When evidence of conduct of accused some time previous to the act is admissible—Practice—Points—Review of the history of the functions of a jury in criminal cases.

In a murder trial where the theory of the Commonwealth was that the killing was done from motives of jealousy, evidence of the conduct of the prisoner an hour previous to the killing that has a bearing upon the supposed motive for the killing, is admissible to show such motive.

This Court will not reverse a verdict on account of immaterial inaccuracies in statements of fact contained in the charge to the jury.

Points, even though taken *verbatim* from the decisions of this Court, cannot always properly be answered by a simple affirmative; when applied to different circumstances they may convey erroneous ideas.

The prisoner has not the right to have answers given in a set form to any point he may present; the Act of March 31, 1860, only provides that the Court shall answer the same fully.

It is not error for a trial Judge to refuse to simply affirm a point that "the jury are the judges of the law as well as the facts, and may upon the whole case determine the grade of the offence."

Per MITCHELL, J. I regard the doctrine that the jury are judges of the law as well as the facts, as unsound in every point of view, historical, logical, or technical.

Appeal of John McManus, defendant, from the judgment of the Oyer and Terminer of Philadelphia County, upon an indictment charging him with the murder of Eugene McGinnis.

The facts, as they appeared on the trial, before HARE, P. J., are fully set out in the charge, *infra*.

On the trial, the district attorney offered to show by William J. Koch, a witness called in behalf of the Commonwealth, "what took place between McManus, the prisoner, and Amanda Cross at nine o'clock, or thereabouts, on the night of the 21st, as bearing upon the question of motive, to be followed up by what took place about an hour later—about ten o'clock—when the same McManus and the same woman, Amanda Cross, and McGinnis were present at the time of

the shooting, the theory of the Commonwealth being that this prisoner was jealous of this woman and of McGinnis, and that he killed McGinnis because of that jealousy." Objected to. Objection overruled and offer admitted. Exception. (First assignment of error.)

The Court charged the jury as follows:—

"This case stands somewhat apart in some particulars, because it is not a case in which there is any denial that death was inflicted by a deadly weapon, nor that it was from the prisoner's hand that the blow came. And the questions in dispute, it has been so stated by the defendant's counsel this morning, are: first, whether there was such provocation as reduced the offence to manslaughter—a question which does not arise except upon the testimony of the defendant himself and Amanda Cross; and, second, supposing that there was no such provocation as the law can consider or allow, whether there is sufficient evidence to show not merely that the prisoner acted with an intent to kill, but that the intention with which he acted was wilful, premeditated, and deliberate.

"Now, before proceeding to consider these questions, it is convenient that I should review the evidence; and, for a very considerable distance, there is no divergence from the point at which I shall enter upon it to relate the story. There is, as far as acts are concerned, for a considerable distance no material divergence that I can recall between the witnesses for the Commonwealth and the witnesses for the defence. After that there is divergence and, finally, contradiction. I must, therefore, in stating the case to the jury, follow it as it is shown by the Commonwealth's witnesses, and then take up the story as it is told by the witnesses for the defence.

"It appears that about seven o'clock on the evening of the 21st of February the defendant, McManus, went to the house of Cora Campbell, which was then the scene of a merry-making that contrasts strangely enough with what was to follow in the course of a few hours. The persons gathered there were drinking and singing and, as the prisoner says, dancing. He, however, took no part in this—at least at that time. He found the keeper of the house, Cora Campbell, in considerable distress of mind. She was complaining of the noise—crying—not merely because it prevented her from sleeping, but because she feared that it would destroy the character of her house, and she declared her intention of going away and not returning; upon which the prisoner, kindly enough, said, 'Come around to my house;' and, accordingly, a few minutes after his entrance he went out with her and proceeded to his own dwelling. It was a house in which he lived with a witness, who had been called on his behalf—Amanda Cross—as man and wife, although they

were not married. After remaining some time in the house, Cora Campbell became uneasy as to what was going on in her house, which was, you recollect, the second house on the right-hand side as you go down Stamper Alley, below Third Street—the second house, counting the barber's at the corner as the first; and the prisoner, rather glad to escape, according to his own statement, and get where perhaps he could be a little more amused than he was in Lombard Street, went, at Cora's bidding, to her abode; entered it, and remained there for something like half an hour. I do not pretend to be accurate as to minutes, nor does it seem to me that it is material. He may have been there a half or three-quarters of an hour. While there he drank a certain amount of beer; how much is for the jury to say. We have no measure here in Court, and if we had it would not be very easy to apply to the divergent testimony of the witnesses; but [according to Troyard, there were but two gallons of beer brought to the house while McManus was there, and of those he had only his share, amounting in all to something over a tumbler, or perhaps a tumbler and a half, which was drunk, if I am not mistaken, out of teneups—all of the glasses in the house having been broken in the course of that afternoon or evening."] (Second assignment of error.) "While he was there Amanda Cross made her appearance at the door, coming from her house and inquiring for him; and when he went to the door, in answer to the summons, and asked why he should come home, she gave as a reason that Cora Campbell was sick, in the literal acceptance of the term, and wanted to see him. To this he responded kindly and sensibly and reasonably, let it make either in his favor or against him that he obeyed such a summons, and proceeded down Third Street as far as Lombard [where he bethought himself that there might, in view of the condition of the person at his home, be need of a little whiskey for this woman, as I understand it."] (Third assignment of error.) "He, accordingly, went to the nearest place and bought a half pint of whiskey which he took to the house, found Cora very sick, and as soon, I suppose, as she was in a condition to swallow, gave her some of the whiskey, and, as Amanda Cross says, drank the rest.

"There is, however, an incident which I have passed over, on the way home, coming, not from the mouth either of Amanda or of the defendant, but from the statement of the barber, Koch, who heard the shot, at the corner of Stamper Street and Third Street. He says that a man and woman passed by his door. He heard the woman crying. The shutter windows were still open, and, attracted by the noise, he went to the door, opened it, and looked down after them. They were still near at hand, and he saw the prisoner

take his revolver out of his pocket; the prisoner, who was reproaching or quarrelling with Amanda, though he could not make out the words, took a revolver out of his pocket and held it to her head, upon which she put up her hand with a gesture of more or less alarm, and said, 'oh don't'; and he then returned the pistol to the other hand, and put it in the pocket of his pantaloons, where it was found subsequently, after the struggle with the officer.

"We have now, however, you remember, brought McManus back to his house. He there took off his shoes and his stockings, and threw himself on the bed. It is much to be regretted that he did not remain there. If he had, in all probability the death which we have to consider would not have occurred, murder would not have been committed on that evening, even if there was that in the relations of the parties which might have brought about some such event at a subsequent period.

"Cora Campbell became again uneasy as to what was going on in her house and requested Amanda to go there with her. Amanda was ready to go and McManus determined to accompany her. I do not distinctly recollect whether he volunteered or whether he was requested; it does not appear, however, that he made any considerable demur. The three, the trio, proceeded to Cora Campbell's house. I now recollect what it was I intended to state. It was that when he brought Cora Campbell home on the former trip she gave him her money to take care of, which money he showed as money in his possession, to be so guarded, at the house, when he reached it, and, subsequently, most properly, showing that there is good in all men, that he was not insensible to a trust reposed, stated it to be her money when he was searched at the station-house later on in the evening.

"When they reached the door an event occurred which certainly seems to have some significance. Cora Campbell went in first, McManus followed, but when Amanda Cross attempted to enter, according to her own statement and the statement of Troyard, she did not get further than the door, for McManus barred the way and peremptorily told her to return home. It seems, however, that he either did not immediately accompany her or that she did not immediately obey, for he found time to take another half tumbler of beer, which was given him by Cora Campbell. He then went out of the side-door into the yard, where Amanda had preceded him, and we have no direct proof of where they went afterwards, or when. I did not quite understand whether the side-door of the house led into a small alley between the barber shop and that house, but it seems that the door opened into a yard.

"How they got out of the yard we do not know, except that as they did not return to the house, whenever they did go out they must have gone out through the gate. Some of the witnesses in the house, one at any rate, said that McGinnis went out with them, all three talking together, and so the defendant declares, and so says Amanda Cross; but Troyard, who seemed to me to be a very truthful, consistent, and fair witness, declared positively that McGinnis was not in that room, and did not go out with them, but was in the front room, and if he did go out did not go through the yard, he, Troyard, having been, if I recollect aright, at the steps into the yard for some little time. I am not sure about that; but at all events his testimony is that McGinnis did not come out of that room or go out into the side yard.

"Here there begins not merely divergence but contradiction. Agreeably to the Commonwealth's evidence Amanda is found alone in Third Street immediately after this occurrence. I mean to say without McManus. She was found on Third Street with a man in her company, who was McGinnis, he being within the line of view. This is all for the jury, and I merely state what the witnesses said on either side, and what seem to be the necessary inferences, and it is for the jury to say whether they believe the witnesses who state those facts, and whether they draw the inferences which those facts seem to warrant. Amanda is found on Third Street, some thirty or forty feet from the corner, in company with McGinnis, McManus not being there, and they were talking pleasantly enough, except that, according to Mannen's statement, who overheard the conversation, or something of it rather—he did not hear all, as they were talking in rather a low tone—he said, 'You are a liar.' Mannen opened the window to listen, and they then moved further towards Stamper Street, from which they were not separated by any great distance, probably by some sixty feet, and moved on and on until they came to the pavement of, as it is called, the candy store, which was in the same house as the barber shop, and finally reached a large tree on the curbstone in front of the barber shop, and still proceeding further, went northward along the line of Third Street, until they came within three feet of Stamper Alley or Stamper Street, which, you recollect, continued to be Stamper Street after it crossed the line of the pavement of Third Street, so that Stamper Street had a right to this corner, small street though it was, as much as Third Street. There was a corner there, so it might be called on the corner of Stamper Street, as it might be called the corner of Third Street, as that corner was one and the same corner. The cartway of Stamper Street traversed the pavement of Third

Street, and reached the point which was the corner of both streets—the corner where both streets met.

"There, says Mannen, they disappeared from my view, and the next thing he saw was the woman going up Third Street, when she came into sight again, and also McManus coming upon the scene, and also McGinnis, who had reappeared. That is to say, Mannen did not say he reappeared, but he says in the course of his examination that he went out of view, and that he was again in view.

"Now, it is easy to perceive that McManus might have shifted his position a little during the time that intervened, when Mannen speaks of having seen him, and the time when Mannen speaks of his having reappeared, because during that time occurred the flight of Amanda and the high words which led to the shooting, and his departure after Amanda and his return. So that on that small pavement, twelve feet wide by five or six in length across, these men no doubt shifted their position this way and that. He saw then McGinnis on this pavement, and he saw McManus on this pavement, and he saw McManus fire at McGinnis, and he saw McGinnis retreat a few feet, until coming behind the line of the houses he spoke of, he could no longer be seen—and there his testimony closed.

"Now, as it seems to me in proof of this, there is a contemporaneous witness, the barber Koch, who chronologically comes next to the front. He heard the loud words—the angry words between McManus and McGinnis, of which we have no definite account—which aroused his interest, and he climbed on the hydrant and looked over the fence, and there he saw McManus and McGinnis; McGinnis, as he says, on the southeast corner, and McManus on the northeast corner. He (Koch) says on the southeast corner of Stamper Alley, and McManus on the northeast corner of Third Street; but the southeast corner of Stamper Alley, as I have already said, is also the corner of Third Street, because the two streets coincide there and form an angle. He therefore places definitely McManus on the north side of the street, and McGinnis on the south side of the street, with the alley between them, or the street between them; I mean Stamper Street, except that McManus by this time was leaving McGinnis and going across the street to the north, with the design of proceeding up Third Street towards Pine.

"Now, it is said that there is a material discrepancy between Mannen's statement and Koch's statement. It is certain that in many respects they coincide. They coincide that McManus and McGinnis were there together; visible or invisible, Mannen is not wrong when he says that McManus and McGinnis were there together.

They do not differ in Amanda being with McGinnis, and they agree as to the shots, which is a capital fact, though of course not necessarily conclusive; that they were fired by McManus at McGinnis, and that the result was the infliction of the wound which appears to have been mortal. But it is said that they differ as to place, and that they differ as to the possibility of McGinnis being where he could be seen by Mannen at the time of the shooting. At first I was inclined to think that such must be the case. It is for the jury to say whether it is so or not. But when I came to look closely at the evidence and to see that Mannen places Amanda and McGinnis three feet from Stamper Alley, from the corner of Stamper Alley and Third Street, and what Koch says is that it was on his corner, it did not appear to me that that was necessarily a contradiction, because the corner from his point of view was Stamper Street, and from the other man's point of view it would be Third Street, but those two corners would be one and the same place. And though it is true that when McGinnis fell, retreating to this position, falling back, he was three feet, half the length of a man or a little more than half the length of a man inside of Stamper Street, yet it might still be that when he was shot at he was sufficiently far out, half away cross twelve feet, or nine feet from where he finally lay, and so within the view of Mannen. The jury will judge whether those statements corroborate or contradict each other. As to some of the points I think it is not denied that there is corroboration and agreement." (Fourth assignment of error.)

"Another witness now makes her appearance—Mrs. Fisher. Mrs. Fisher has heard angry voices in the street; she has heard two shots fired; she leaves her bed, raises the window, which is partly open, and looks out, and she sees McManus standing on the opposite side of Stamper Street, and McGinnis lying upon her side, and she sees McManus threatening McGinnis; or, I will not say threatening, but taunting him—saying something in a taunting tone; that something sounds to her as, 'Now, arrest me if you can!' [It is not necessarily safe to gather from an answer what the remark was, but it did strike me that if McManus at that moment of emotion found a ready taunt of 'Now, arrest me if you can,' that something must have been said about arresting him if he did not mend his manners or did not cease to give cause for fear, or some such remark as that. I do not well see why one man should have said, 'Now, arrest me if you can,' unless the other had said something like, 'If you do not desist, I will have you arrested.'"] (Fifth assignment of error.)

"I forgot to state, however, and it was a very considerable omission on my part, what Koch narrated of the words and acts that immediately preceded the shooting. When Koch first looked out, McManus, who had apparently been on the same side of the street as McGinnis—and I believe it is not denied that they were—was crossing the alley to go away. Koch had heard the woman scream, and we know from another witness that this woman was Amanda, and that she fled—'flew wildly,' to use Mr. Naulty's words, up the street, as if afraid of being pursued, and we know from Naulty, as well as from Koch, that McManus made a move after her; before he got half across the street—more than half across the street—with this purpose apparently in his mind, he is accosted by McGinnis, who says to him—you recollect the words, 'Come back to me, Johnny;' 'Come back to me, Johnny,' and as McManus still went away, 'Damn it, Johnny, come back to me;' and then McManus halted and wheeled around, and did come back to McGinnis. Why he did I do not know. It may be simply because McGinnis asked him; it may be because he saw that Amanda had gone too far to be easily overtaken; it may be because—and little things will sometimes determine a man even at critical moments—because he was in his bare feet, and it was not pleasant on that February night to run at anything like speed up the street without shoes and stockings. From whatever cause, he did turn around and go back towards McGinnis, and that in no very pleasant frame of mind, for the first words he spoke were words of great bitterness when viewed in the light of what followed. He said, 'You will fool with my girl, will you?' [and repeated the remark, thus showing the motive that was actuating him, the motive being, apparently, jealousy of this woman with whom he lived, and that he believed McGinnis was, or was endeavoring to be, too intimate with her."] (Sixth assignment of error.) "Then followed the threat, or, what was something more than a threat, for, as the result showed, it was the declaration of a purpose. 'I will settle you,' or 'I will fix you,' and then finally came the shot, which may or may not have taken effect, and the second shot. But whether the first had taken effect or not, it showed that the purpose with which he shot was persistent, and gave emphasis to the natural inference that in shooting he meant to kill. These shots were both seen from up the street by Mr. Naulty, and I believe there is no denial of them, nor would it be easy to contest the natural inference to be drawn from that of a persistent intention to take life.

"There is still another witness, who adds perhaps only one material circumstance, but one that is more or less material—who is the fourth

witness in point of time—that is Mr. Joseph McManus. He, you remember, was coming down Lombard Street in one of the street cars—had not heard the shots, being too far off—and who, having farther to go, even if he set out at the same time that Mrs. Fisher opened her window, would naturally arrive latest of all at the scene of action, and when he got there McManus was still standing, still vengeful, and saying to McGinnis, ‘I’ll fix you for interfering in my affairs.’ What those affairs were, on the mere face of the phrase, would not be easy to determine. It might possibly have been because he had undertaken to call him back from following Amanda; but when he coupled that with the declaration about fooling with his girl, the sort of interference which he had in his mind (a sort of interference which may have been existing on McGinnis’s part) would seem to be sufficiently plain.

[“Now, there is very little to add except that McManus then proceeded to go up the street with his shoes off, endeavoring to put them on as he walked, and in so doing necessarily somewhat halted.

“I shall now have to revert to that in order, if possible, to find the explanation why he who had his shoes on, who came out clothed if not in all respects in his right mind to Cora Campbell’s house, was now in the street with his shoes in his hand; and the question naturally arises, how did that happen? Moreover, according to the Commonwealth’s witnesses, he is found there with his shoes in hand; not with Amanda as one going with her as her companion, but as following her, she having had time to go around the corner and have a little talk with McGinnis.”] (Seventh assignment of error.)

“Now, how did it happen that McManus took his shoes off, and was found with them in his hand. The conjecture, the inference of the Commonwealth is—and it is for the jury to say whether it is of any value—that he remained behind in the yard of the house for the purpose of seeing whether Amanda would obey him. He had forbidden her to go to this house. When she came there to ask for him in the first instance, he had his suspicions of what brought her—whether she came to find that he was there, or that he was not there; and, consequently, when he left the house he reproached her, as the barber says he did, and threatened her, as the barber says he saw him threaten, by putting the pistol to her head; that when she came with him the third time he forbade her enter, and told her to go home; that he saw her go out of the gate, and he remained behind as if to enter the house, which he did not; but, having waited for a short time until she would be, if she meant it, well on her way home, took his shoes off his feet,

came as quietly as might be to where he would have an opportunity of seeing, and there found his suspicion verified, and this woman—in whom he could not perhaps place entire confidence—in close confabulation with McGinnis; and then it was that his anger, which was terrible to face—especially, at all events, when he had a loaded pistol with him—broke forth; that she screamed and fled in terror of her life; that he pursued her, and, finding it was not comfortable to follow—having had a few hot words with McGinnis—came back at McGinnis’s instance; that the wrath which he had been nursing in his bosom, which he had evinced by producing the pistol already—and perhaps was intended for her—was now turned on McGinnis, and that he approached McGinnis with the menacing words related by the witnesses, and finally declaring his purpose to fix or settle him—held forth the pistol. There was still a little time in which he might have changed his mind and given this man his life; and he asked for it, or said, ‘Don’t give it to me—don’t give it to me;’ then came the shots.

“This is the Commonwealth’s version of the case, and it is for the jury to say, both as to the facts and as to the inferences, how far it deserves their acceptance; how far it is sustained; what basis it offers for their verdict, and what verdict they ought to render.

“I ought to state, I do state, and I should be sorry if I did not state the evidence on the other side. As I have already told you, that evidence is that McGinnis, McManus, and Amanda went out together; that he did not remain behind—that is what impliedly they say; they say that which could not be if the other was true. She could not have been around the corner talking with McGinnis. They say that as they went along, all talking together, McGinnis made the remark, in connection with McManus repeating the order to her to go home, of ‘Send that bitch home,’ upon which McManus took up her defence, and said that she did not deserve that name. Then McGinnis replied that she was something that was still more definite, and something worse, in which he was contradicted by McManus, and then, without further offence, without anything further having been said by McManus to excite his ire except the simple contradiction of the opprobrious remark addressed to this woman, McGinnis, this friend who had been on such good terms all along, with whom he had never had any quarrel, raised his fist and felled him to the ground. He allows him, however, Amanda helping to raise him, to get on his feet, and then there having been nothing, except, to be sure, the hard words, with nothing in them of dread or danger to her, she flies, runs away, and McManus remains, smarting under the blow, and angered beyond endurance by this

abuse, and this most undeserved chastisement, levels his pistol, and kills McGinnis.

"Now, gentlemen, you have the two stories, each contradictory of the other. The witnesses for the Commonwealth expressly or impliedly contradict these two people who come forward for the defence, and, on the other hand, [if their testimony is true, this story of Koch is not true; it becomes incredible,]" (eighth assignment of error) "and, of course, as in every instance where there is a conflict of testimony, the jury are to say which should be believed, which is probable. Is it probable that McGinnis would so assault McManus, or is it more likely that the story told by the other side is correct, and that McManus attacked McGinnis in consequence of this suspicion of the girl's fidelity, and of McGinnis's conduct with her?"

"It will be for you, from these facts, to draw your conclusions. It seems to me that the jury should first find which of these stories is to be believed, and then to draw their conclusions from the story which they accept as the truth. If you believe the story told by Amanda and by McManus, the question may arise whether this offence rises higher than manslaughter; nay, more, I will say it does arise, because while it is entirely true that to exonerate a man from the charge of murder there must be not only passion on his part, anger, but provocation, and such provocation as the law will recognize as adequate; yet, if there is both passion and provocation, and, in hot blood, the person who is so assailed shoots, while under that influence, the jury may find that his shooting was not malicious, and should find him guilty simply of manslaughter; but it is also necessary that there should be no sufficient time to cool; the mere fact of provocation and consequent hot blood, is not enough if the man who is thus provoked has an opportunity to come to his senses or to regain control over his passions, so that even if the jury believe the story exactly as McManus and Amanda tell it, it will be for them to say whether there was not cooling time. For you will recollect that after the blow there is no allegation of anything being done by McGinnis; he allows Amanda to help McManus to his feet, and, according to the testimony of the Commonwealth's witnesses—unless you reject that altogether, and believe it to be a mere fabrication and tissue of perjuries—not only was McManus again on his feet and apparently out of danger, but he had time to walk across the street and go fourteen or fifteen feet up towards Pine Street, and come back and abuse McGinnis, and to hear McGinnis plead for his life, and denying mercy, to kill him. All of which would be such evidence of an opportunity to regain possession of his senses as ought, according to the principles of law, to be a reason which should weigh with the

jury in determining—first, whether there was provocation; next, was there hot blood; then, finally, did the hot blood continue and ought to have continued. That is the question presented upon the testimony for the defence.

"Now the question presented by the Commonwealth, and the inference, is of a very different kind—and, before I approach that, perhaps I ought to say, and indeed it is my duty to state the general principles which govern the law of homicide.

"These are that murder is a malicious taking of life. In general terms a malicious taking of human life is murder. [Murder in the first degree is a malicious taking of human life with an intent to kill.]" (Ninth assignment of error.)

"Murder in the second degree is the malicious taking of human life without an intent to kill, and finally, manslaughter, as I have already told you, is the taking of human life where, owing to the provocation arising, and the hot blood produced, the presumption of malice is repudiated and the man is supposed to be acting under the influence of passion, which temporarily displaces his judgment and leaves him a mere slave of impulse, and where, though still criminal, he is not to be taxed with murder.

"Now the Commonwealth, rejecting as it does utterly the testimony of McManus and the woman, presents the case to you as to the inference which you should draw with reference to the death of McGinnis, on the supposition that the Commonwealth witnesses are true and tell the story truly. And before proceeding to that, I will read what I have written here, because I wish to be sure that I express myself accurately.

"To constitute murder in the first degree there must be a deliberate, wilful, and premeditated intent to kill. The accused must have formed the design to take life before firing the shot which caused death. I speak of the case before you. It is not, however, requisite that the homicidal purpose shall have existed for weeks, for days, or even for hours, before it was carried into effect. If a man resolves to take life and accomplishes the design with a blow or pistol shot, he may be a murderer in the first degree however brief the interval between the resolve and the act by which it is carried into effect. It has been justly said that thought is swift, and that a vindictive man may require little time to form a design to take life and less to execute his purpose. But it is also true that the shortness of the time is an argument against premeditation, and should be considered in determining whether the crime was premeditated. I will add to this one other principle and then I think I shall have covered the ground, and that is while taking life with a deadly weapon is evidence of an intent to kill, and gives rise to the

natural inference that the man designed to accomplish the act, it is not enough to constitute murder in the first degree unless there are other circumstances in the case besides the mere act of killing to justify the belief that the intent to kill was premeditated and deliberate. There must be in the evidence before the jury, from whichever side it may come, enough to show the premeditation and the deliberate intent—not merely that it was there at the time the shot was fired, but that it was there previously; that the accused formed the intent and then carried it into execution.

“Now the question is on the case as presented by the Commonwealth, and I have stated it to you—what inferences you are to draw. There is certainly evidence before the jury for their consideration, of the highest offence, the offence of murder in the first degree. It is not for me to say it is sufficient. The question of its sufficiency is for the jury. What I say is that it is there for your consideration, and for you to take the responsibility of saying aye or no, remembering that the responsibility for saying no, for men who have sworn to try the case upon evidence, may be as great as the responsibility of saying yes. What the Commonwealth relies upon is this, first, that this man had a motive to kill, as evidenced by his declaration, ‘you are fooling with my girl;’ next, that so far as Amanda was concerned, this motive had taken form and shape nearly an hour beforehand. I will not say form and shape; I ought not to say so much. That it was in his mind and sufficiently predominant to induce him to take his pistol out and hold it to her head, an act which might seem as light as such an act can be at the time, but which, viewed in the light of the subsequent event, has a very grave significance, and fully explains her fright and flying in apparently deadly fear. That having this motive in his mind, or this suspicion, he waited behind, as the Commonwealth contends—whether he did so or not is for you—until she had gone around the corner; found her together with McGinnis, and surprising them with those angry words, and exactly what they were does not appear, Amanda fled and was followed by him in the first instance; and the Commonwealth contend that, being in great apprehension, she fled away from home to which he had sent her, and not towards it; that then he desisted from following her, and McGinnis called him back, and the wrath which was in his mind towards Amanda was turned upon the deceased; that he then declared his motive by saying, ‘you are fooling with my girl,’ that this is evidence for the jury of a hostile intent in the man’s mind; that when he again went on to say, ‘I will fix you,’ or ‘I will settle you,’ his purpose was formed; and that this is

the more plain because McGinnis’s entreaty had no weight with him, but that he persisted and finally closed and fired the second time; and that his passion was not cooled or slackened by the sight of what he had done, but that he remained there to taunt McGinnis, as Mrs. Fisher says she heard it, and as Joseph McManus declares he did, by repeating the words which he had used previously, ‘I will settle you,’ or ‘fix you, for interfering with my affairs.’ From all this the Commonwealth contends the jury may find that the defendant had a premeditated purpose to do that which he did, and carried it into execution subsequently by appropriate means, which things, taken together, constitute murder in the first degree. It is for you to say whether the evidence does or does not satisfy your mind. Unless you are satisfied beyond reasonable doubt the accused is entitled to the benefit of that doubt, and an acquittal. If you are satisfied beyond reasonable doubt that such a purpose existed, and was carried into effect, then obviously your verdict should be that for which the Commonwealth argues.

“There is another point in this case which, as the defendant contends, even if you would find the defendant guilty of murder in the first degree on other grounds, should reduce the verdict to murder in the second degree, and that is the alleged intoxication of McManus, which the defendant’s counsel would have you believe had existed in a greater or less degree for several days, and attained its height on the evening of the murder, so that in their view he was no longer a man capable of acting or thinking deliberately, or of coming to any fixed conclusion or resolve.

“Intoxication is not a justification or excuse for crime, but may sometimes be taken into view in determining whether crime exists and the grade of the offence. To constitute murder in the first degree there must be a deliberate purpose to kill, and hence if a man is so drunk as to be unable to form a deliberate purpose of any kind, he cannot be guilty of murder in the first degree. To reduce murder to the second degree, when it would otherwise be a capital offence, the intoxication must be such as to cloud the intellect and disable the judgment; in other words, the accused must not only have been drinking, he must be drunk, in the sense of the term which implies that the mind is affected as well as the body.

“The question is not as to his body, but as to his mind, and the condition of the body is not material except as indicating the condition of the mind. If a man is sufficiently master of himself to know what he is doing, and the consequences of his act, to form a deliberate resolve to kill and to carry it into execution, he may be guilty

of murder in the first degree, although he has been drinking hard and is in one sense of the term intoxicated. Otherwise the restraint imposed by the fear of capital punishment, the dread of the rope, would be removed from those who need it most, the men who habitually drink to excess or are frequently under the influence of liquor.

"It follows that there are two or three things for you to consider in this connection. How much had McManus been drinking? What was the effect upon his mind, supposing that he had taken as much as the defence would wish you to believe? And, finally, what judgment will you form, not merely from what he has said to have swallowed, but from what he was on that eventful evening; what he did; how he talked; how he walked; what sort of judgment he had; for the question is not necessarily how many glasses of liquor he had taken, but whether he had control of himself, or had taken so much that he no longer could form a judgment.

"On the first of those points you have heard a great deal of testimony, and the defence called witnesses to prove previous instances of drinking, which of course are only material so far as they may show the disordered condition of his mind on that day. They have called witnesses to prove that McManus had, with seven or eight other people, spent hours in Viereck's saloon, and there had swallowed quite an inordinate quantity of liquor of different kinds. It is for you to say whether you believe those witnesses, or whether you believe the keeper of the saloon and the bartender, who swore that McManus and the other men were not present, or that McManus and Stely, the shoemaker, were the only men there, and that they had each one drink only. If you disbelieve them and believe the other witnesses, then of course you will find that McManus drank a good deal of liquor on that day. If you believe the saloon-keeper and bartender, then you will of course believe that they did not drink much liquor on that occasion, and as the witnesses who testified so falsely in that respect cannot be entirely confided in in other respects, it may become doubtful how much liquor they did drink at any particular time.

"If you find that McManus had taken a good deal of liquor, another question may arise: What was the effect on him? The effect of liquor depends, in many instances, upon the man who drinks. [A man who is accustomed to swill beer may no doubt take more glasses than the man who hardly ever touches that article, so with liquor of any other kind. But taking McManus's account of what he drank on election day, I would not suppose that there could be much difficulty as to which category he should be placed in, for he said that on that day six boxes of beer,

containing two dozen bottles each, one hundred and forty-four bottles in all, had been disposed of in a few hours by himself and seven or eight others. When further interrogated he said twelve or fourteen. He finally said, as I recollect, between eight and fourteen; he declined, however, to be at all precise. He said this had not interfered with his electioneering or disturbed materially his head; that he drank afterwards in various places in the Fifth Ward, and finally wound up at another club; and when asked as to the effect upon himself, as I understood his answer, either then or at any other time, he said as to that time that he was intoxicated and avoided the use of the word 'drunk.' He did not say what might easily have been said, that he was carried home or could not walk home, or that he was in the condition that such an enormous quantity of liquor might be supposed to produce. It seems to me that there is some reason for supposing that McManus is one of those men whom a certain amount, even of hard drinking, will not necessarily incapacitate or disable."] (Tenth assignment of error.)

"But finally, there is in this matter something which, as I have already intimated, perhaps deserves the attention of the jury more than any number or kinds of glasses of liquor taken, and that is what is the general impression left on your mind as to McManus's conduct that afternoon and evening, and whether he was measurably master of himself. I have no doubt that he was under the influence of liquor more or less—perhaps that might be true of many evenings in his life; some we certainly know, but whether he was in the full sense of the term 'drunk,' and so drunk that his mind was no longer capable of acting consciously or regulating the actions of his body—whether anything which he did amiss, and he certainly did a deed that was amiss, was due to a disorder of the mind produced by liquor, or was produced by his own vindictiveness arising under what he felt as gross provocation. That seems to me to be a test which the jury may fairly apply and one of which he could not complain. It is for you, upon the whole matter, to say, in view of what I have said to you, whether you will find that there was such intoxication, such drunkenness on his part, and such disability of the mind as well of the body as to stand here as a reason for an acquittal of the gravest offence, supposing under the evidence you would otherwise convict him.

"I now have rather a difficult duty to perform. Thirty-three points have been presented to me containing a statement of the law of murder in a great variety of forms, almost like the shifting of the kaleidoscope which though the beads are the same at each turn presents a different aspect, and where it is rather difficult to know, precisely,

or to recollect what the impression is. If I should read these all over to you and affirm them all I do not know whether they would leave on your minds a series of ideas that would form a consistent whole; not that I find the least fault with the counsel who displayed a great deal of ability and ingenuity in framing them, but it makes my task correspondingly difficult. I shall have to do the best I can. You will recollect, however, that what I now say is to be taken in connection with what I have already said; not to be understood as displacing it or contradicting it, but as supplementing it and to be supplemented by it.

"I am asked to charge first:—

"(1) The presumption of law does not raise a killing with a deadly weapon above murder of the second degree; the burthen is upon the Commonwealth to raise it to murder of the first degree; and to do so it is incumbent upon her to prove every element of that degree beyond a reasonable doubt.

"The reply is if all that is before the jury is a killing with a deadly weapon with an intent to kill, the jury are not warranted in finding a verdict of murder in the first degree. In order to justify such a verdict the Commonwealth must be able to point to something in the evidence that shows that there was a premeditated design to kill, a purpose formed before it was executed. Whether such is the case or not in this instance is for the jury, as I have already told you. I have called particular attention to the circumstances from which the Commonwealth argues premeditation.

"(2) To constitute murder of the first degree there must be a deliberate and settled purpose to take life, and this purpose must be proved according to law, beyond all reasonable doubt, otherwise the killing shall be deemed murder of the second degree.

"I affirm that point.

"(3) The duty of fixing the degree or grade of murder belongs exclusively to the jury, and where the jury, upon the whole evidence, have doubts into which of two grades or degrees a case falls they must find a milder one.

"I do not know whether it is desired that I should by that convey the idea to the jury that they can, irrespective of the principles of law which I have stated on my own authority and of those which I am stating here at the request of the counsel for the prisoner at the bar, disregard the instructions which point out what necessarily creates murder of the first degree and find it murder of the second degree. In that sense I would not be willing to say it was exclusively for the jury. I do say, however, that the duty and responsibility will rest with you, no one being able to interfere with you on that question, to decide whether it is murder of the first or second degree, and, in doing so, if there is reasonable

doubt, not a mere possibility, whether the defendant is guilty of murder in the first degree, your verdict should be in favor of murder in the second degree.

"The fourth point is declined. I will not read it." [The point was as follows: (4) Before the jury in this case can convict of murder of the first degree they must find that the prisoner acted upon as clear and premeditated a motive as he who kills by poison or by lying in wait, and the intent must be proven beyond all reasonable doubt.] (Eleventh assignment of error.)

"The fifth point is: (5) The jury must find the actual intent, that is to say, the fully formed purpose to kill, with so much for deliberation and premeditation as to convince them that this purpose was not the immediate offspring of rashness and impetuous temper, and that the mind had become fully conscious of its design before they can say that this is murder in the first degree.

"You have heard what I have already said on that, and I decline to give this in the terms in which it is set out. I refer you to what I have already said as to what constitutes murder in the first degree." (Twelfth assignment of error.)

"I decline the sixth point." [This point was as follows: (6) That the suddenness of the act of killing in this case is opposed to premeditation, and the jury must be fully convinced upon the whole evidence that there was time for the prisoner to deliberate and premeditate, and that his mind was clear as to the purpose and design, before they can find him guilty of murder in the first degree.] (Thirteenth assignment of error.)

"I decline the seventh point, not that I negative it, but because, as far as it is true, I have already instructed you on the subject, and you will be guided by what I have already said." [This point was as follows: (7) If the prisoner in the suddenness of the occasion and impetuosity of his temper, not deliberating on his act, fired the fatal shot, then it would be murder of the second degree and not murder of the first degree.] (Fourteenth assignment of error.)

"The eighth point is: (8) Malice may be inferred from the use of a weapon likely to kill, but, without more, this would be murder of the second degree only; there must be the deliberate purpose." I affirm that.

"In answer to the ninth point I say: 'Whatever negatives the existence of deliberation or when not clearly shown to be present, or reasonable doubts of its presence remain, or it does not appear whether life was not taken in passion and tumult, under all such circumstances the grade is fixed by the presumption of law as of the second degree.'

"To the extent that I have read that point I affirm it." [The remainder of the point was as follows: "The operation of the mind gives the

capital quality alone to murder. Mind exists in both grades, but it deliberates and purposes in the one—acts impulsively in the other. Passion from great provocation mitigates the grade, because of the inference from it negating deliberation.” (Fifteenth assignment of error.)

“I decline the tenth point, except as already covered in my charge.” [This point was as follows: “(10) Drunkenness, when made out, is equally as obnoxious to deliberation as passion, and requires as careful consideration in the judicial investigation. It does not excuse crime, but if its existence is incompatible with the ingredients constituting crime of a particular grade, then it cannot be of that grade; it must belong to a lower one, if the law so provides.”] (Sixteenth assignment of error.)

“The eleventh point is: ‘(11) Should the jury find from the evidence that the mind of the prisoner, from intoxication or any other cause, was deprived of its power to form a design with deliberation and premeditation, they must find him guilty of murder of the second degree, and not murder of the first degree.’ I so instruct you.

“I decline the twelfth point, except as covered by my charge already.” [This point was as follows: “(12) If the jury find that the prisoner fired the fatal shot under a sudden gust of passion (superinduced by drink), urging him on to a rash and thoughtless deed, and his mind was in such a state as to preclude the forming of a deliberate purpose to take life, then it would be murder of the second degree, and not murder of the first degree.”] (Seventeenth assignment of error.)

“(13) If, upon the question of drunkenness, the jury are fairly in doubt as to whether the prisoner was so drunk as to deprive his mind of the power of forming a deliberate design to kill the deceased, Eugene McGinnis, then he is entitled to the benefit of that doubt, the same as he is to any other legal doubts arising from the evidence.”

“I say, in answer to the thirteenth point, that if, upon the question of drunkenness, the jury have a reasonable doubt, on a review of the evidence, whether the prisoner retained the power of forming a deliberate design to kill the deceased, then he is entitled to the benefit of that doubt, the same as he is to any other legal doubt arising from the evidence. If the jury have a reasonable doubt, under a review of the evidence, whether the prisoner was so drunk as to deprive his mind of the power of forming a deliberate design to kill the deceased, Eugene McGinnis, then he is entitled to the benefit of that doubt.

“I decline the fourteenth point.” [This point was as follows: “(14) If the prisoner, either from sudden and impetuous passion, from a reck-

less disregard of human life, or consequences superinduced by drink, or from deep intoxication, leading him to magnify inadequate provocation into great provocation, and, without any connected or settled purpose to kill, fired the fatal shot, then it would be murder of the second degree only.”] (Eighteenth assignment of error.)

“The fifteenth point is: (15) If a preponderance of the evidence shows that the prisoner was under the influence of liquor, and to such an extent as to prevent him from clearly and consciously forming premeditated design to kill, then his act would be murder of the second degree, and not murder of the first degree. I affirm that point.

“The sixteenth point is: (16) Whilst drunkenness is no excuse for crime, it is nevertheless sufficient to prevent the formation in the mind of that deliberate intent to kill which is of the essence of murder of the first degree, and if the jury find that the prisoner was so far under the influence of liquor as to deprive the mind of the power to think and weigh the nature of the act clearly and prevent the formation of a deliberate intent to kill; or, if they have any doubt upon the question of such intoxication, then they must find a verdict of murder of the second degree.

“What I say to the jury is, that while drunkenness is no excuse for crime, it may, nevertheless, be sufficient to prevent the formation in the mind of that deliberate intent to kill which is of the essence of murder in the first degree, and if the jury find the prisoner was so far under the influence of liquor as to deprive his mind of the power to form a deliberate intent to kill, they should find that the murder is of the second degree. But I refuse to instruct the jury that drunkenness is sufficient to prevent the formation in the mind of a deliberate intent to kill. It depends on how far the man is drunk, whether his mind is besotted with liquor, whether he retains the power to think and deliberate. If he has that power, then no matter how drunk he may be in other ways, he is just as sound a man for the purpose of being tried and punished as if he had never put a glass of liquor to his mouth.

“(17) The evidence to prove drunkenness sufficient to reduce the grade of murder need not be proven beyond a doubt. It is sufficient if the weight of the testimony be with the prisoner. I affirm that point.

“(18) In cases of conflicting testimony regarding the state of a defendant's mind the preponderance must govern, and this applies to the question of drunkenness in this case.

“I might refuse that proposition altogether if it makes me instruct the jury on the question of fact that the drunkenness in this case was such, or that the testimony in this case preponderates on the side of the prisoner being drunk. The

question on which side the testimony preponderates is for the jury, and if they find that it preponderates for the defendant, then, of course, they will decide in his favor.

"(19) If the prisoner entertained no previous purpose of killing McGinnis, or of doing him great bodily harm, and if, under the influence of passion, caused by blows or other assault upon his person by McGinnis, and arising when they were inflicted, the prisoner fired the fatal shot without malice, he is guilty of manslaughter only, even though on the instant and at the suddenness of the provocation he intended to kill McGinnis.

"I have already told you that if the provocation was a blow, if it created such hot blood as suspended the judgment and will of McManus, and deprived him of the power to act as a reasonable man, and while that hot blood continued he inflicted a mortal wound, then he would be guilty of manslaughter only, but that would not be the case if no blow was struck; that outside of the testimony of Amanda and himself, there is no testimony in the case to show such provocation as the law requires, and that even if such provocation existed, still if there was cooling time, time for the prisoner to regain his senses and for his conscience to operate, that then the circumstance that a blow had been struck would not reduce the offence from murder to manslaughter." (Nineteenth assignment of error.)

"(20) If the jury believe from the evidence that the defendant had no premeditated intention to take the life of the deceased; that he was provoked to passion by liquor and a blow, and that he shot the deceased before this passion had cooled and reason interposed, the offence is manslaughter. I so instruct you.

"I decline the twenty-first point, except in as far as I have already stated. I have already stated it, and there is no use in going over it again." [This point was as follows: (21) That the prisoner charged with the crime of murder is presumed to be innocent of that crime; if you believe this presumption is overcome, and it is made clear from the evidence that murder has been committed by the prisoner, the presumption remains that the crime is murder of the second degree, and not of the first.]

"I decline the twenty-second point, except in as far as I have already stated." [This point was as follows: (22) A killing in hot blood, without premeditation, is manslaughter.] (Twentieth assignment of error.)

"I decline the twenty-third point." [This point was as follows: (23) Before defendant can be convicted of murder of the first degree the evidence should show that he possessed, when the shooting of McGinnis by him was contrived and executed, that self-determining power which in a

sane mind renders it conscious of the real nature of its own purposes and capable of resisting wrong impulses.] (Twenty-first assignment of error.)

"(24) If this self-governing power was wanting in defendant, whether it was caused by gross intoxication, or other controlling influence, it cannot be said truthfully that his mind was fully conscious of its own purpose, and deliberated or premeditated in the sense of the Act describing murder in the first degree.

"I say in answer to the twenty-fourth point: This point errs in this, that it would have the Court say to you that if the self-determining power was wanting, either from gross intoxication or other controlling influence he is not responsible, because there are many influences which it is the duty of a man to resist. He cannot say in every case there was this, that, or the other which exonerated me from responsibility. There are only certain grounds on which a man is allowed to make such an excuse; but I will say here, which is all that the evidence calls for, that if the self-determining power was wanting in the defendant from intoxication or a blow, it cannot be said that the mind was conscious of its own purposes in the sense of the Act defining murder in the first degree. I know myself of no other controlling influence brought to bear on this man, except that he says that he was drunk, and that Amanda corroborates, as far as she can corroborate it, and there is evidence brought here to show that he was intoxicated to the extreme. If that was the case, and if this great intoxication deprived him of the power to govern himself, then that is ground on which the jury may find him guilty of murder of the second degree only.

"(25) To constitute murder in the first degree there must be a design and intention to kill at the time the homicidal act is committed, and this intention must be a fully formed purpose to kill with deliberation and premeditation as to convince the jury that this purpose is not the immediate result of rashness and impetuous temper.

"There is no time necessarily set down for the formation of a purpose to kill. The first part of the point is correct: 'To constitute murder in the first degree there must be a design and intention to kill at the time the homicidal act is committed.' And it is also true that it must appear to the jury that the intention to kill existed before the killing—a deliberate and premeditated intention, but as I have already said it is unnecessary that there should be any given amount of time. Time may enter into the question whether the intent was there. If it was there, although it was but a brief period of time before the act was committed, it may still be murder in the first degree.

"I decline the twenty-sixth point." [This point was as follows: (26) If the jury believe from the evidence that the killing occurred while

the prisoner was in the heat of passion produced by the threatening actions and language of deceased towards the prisoner, then, if guilty at all, he could only be convicted of manslaughter.] (Twenty-second assignment of error.)

"I decline the twenty-seventh point." [This point was as follows: (27) Should the jury doubt as to whether the prisoner is guilty of murder of the first degree, second degree, or manslaughter, they are bound to acquit of the higher grade and convict only of manslaughter.] (Twenty-third assignment of error.)

"(28) The jury are judges of the law as well as of the facts, and may upon the whole case determine the grade of the offence.

"I do not know whether that means that if you should be of opinion that the law which I have stated to you is not the law, you might with propriety find this man guilty of murder of the first degree, although the principles which I have stated to you as applied to the evidence would show that it was only murder of the second degree. I will say this: that you have been sworn to decide this case on the law and the evidence; that the statement of the law by the Court is the best evidence within your reach of the law, and that, therefore, in view of that evidence, and viewing it as evidence only, you are to be guided by what the Court has said with reference to the law. But if upon the whole matter, when you come to make up your minds, you are not satisfied beyond reasonable doubt that this man was guilty, then you are to acquit him." (Twenty-fourth assignment of error.)

"With regard to the twenty-ninth point, I will simply repeat what I have already said. It relates to the question of reasonable doubt. If, when the jury come to form their verdict, they have reasonable doubt of the prisoner's guilt, arising on any material part of the evidence, then you should give him the benefit of that doubt and acquit him." [This point was as follows: "(29) Whatever doubt the jury may entertain upon any material part of the case belongs exclusively to the prisoner, and he must receive the full benefit of that doubt at the hands of the jury."]

Verdict, guilty of murder in the first degree, judgment thereon, and sentence accordingly.

Defendant appealed, specifying for error, (1) the admission of the testimony of Koch, as above noted; (2 to 10 inclusive) the portions of the charge in brackets; (11 to 24 inclusive) the answers to defendant's points, and (25) the Court erred in the whole charge.

Maxwell Stevenson (James L. Stanton with him), for appellant.

George S. Graham, district attorney, for the Commonwealth.

June 5, 1891. *PAXSON, C. J.* The first assignment of error is to the admission of the conduct of the prisoner and the woman Cross an hour before the murder. It was an undisputed fact that the prisoner, the same woman Cross, and the deceased, were together when the killing took place, or immediately before, even if the woman did, as she testified, run away before the shot was actually fired. Both the prisoner and the woman, as well as some other witnesses, testified that the quarrel was about the woman, though the exact cause of it is differently related. The theory of the Commonwealth was that the killing was done from jealousy, and under these circumstances the conduct of the prisoner an hour previous in putting a pistol to her head had a bearing on his state of mind towards her, and therefore on the existence of the supposed motive for the killing. For such purpose it was clearly admissible.

The second to eighth assignments inclusive, and the tenth, may be grouped together. They are minute criticisms on the language of the charge. Thus, the second is based on the statement of the Judge of the quantity of beer, as two gallons instead of two kettles, an inaccuracy not material to the point of the case, and so far as it had any bearing, not unfavorable to the prisoner. The evidence as to the history of the transaction was, as the learned Judge said, at first harmonious, then divergent, and finally contradictory. The jury, as has been often said, were bound to reconcile the discrepancies if it could reasonably be done, and the Judge aided them in the performance of that duty by a review of the evidence in general terms, and with substantial accuracy, making suggestions, fairly warranted by the evidence, to show the jury how it might be reconciled in some parts, and the difficulty of doing so in others. Nothing but hypercriticism can find any error in this part of the charge.

The ninth assignment we understand to be abandoned. Even if correctly reported, the omission of the element of premeditation in the first general description of murder of the first degree, was immediately cured by the full, explicit, and accurate definition given in connection with the facts of the case in hand.

The eleventh to the twenty-third assignments may be taken together and disposed of by saying that so far as they were correct and pertinent statements of the law they were affirmed in the charge. Points, even though taken *verbatim* from the decision of this Court, cannot always properly be answered by a simple affirmation. However accurately and carefully stated in their connection, and applied to the case under discussion, they may, when taken as detached sentences, and applied to different circumstances,

convey erroneous ideas, especially to unlearned jurors. For example, the prisoner's fourth point was that "before the jury in this case can convict of murder of the first degree they must find that the prisoner acted upon as clear and premeditated a motive as he who kills by poison or by lying in wait." This is said to be taken from the language of this Court, though the case is not given, which is a very unsatisfactory mode of citing authority. It may be there are cases in which this would be a correct statement of the law, but separated from its context, and applied to the present case of shooting at a street corner, and answered by a simple affirmation, it would be dangerously liable to convey to the jury the idea that a prolonged premeditation, such as is necessarily involved in killing by poison or lying in wait, was essential to the case they had in hand. The learned Judge told the jury that the design and the resolve to kill must be formed before the shot was fired; that no specific time was requisite to make premeditation; the time might be short, but that shortness of time was an argument against premeditation, and that the jury must be satisfied from the evidence that premeditation and the deliberate intent were there not merely when the shot was fired, but were there previously. This was all the prisoner was entitled to ask. He had no right to dictate the language of the Court. To convey the proper ideas to the jury, language often must vary with the circumstances of the particular case. Neither under the Act of March 31st, 1860, nor otherwise, has the prisoner a right to have answers to his points in any set form. The statute (section 58), provides that "it shall be the duty of the Court to answer the same fully," and this is the measure not only of the Court's duty, but the prisoner's right. If the law applicable to his case is plainly, fully, and accurately stated, he has no cause of complaint though the Judge choose to express it in his own words.

There remains only the twenty-fourth assignment that the Judge erred in his answer to the point, that "the jury are judges of the law as well as of the facts, and may upon the whole case determine the grade of the offence." The learned Judge answered this point by saying, that the jury had been sworn to decide the case on the law and the evidence; that the statement of the law by the Court was the best evidence of the law, within the jury's reach, and that, therefore, in view of that evidence, and viewing it as evidence only, the jury was to be guided by what the Court had said with reference to the law. This was an accurate and carefully considered answer to the point, and is entirely in harmony with *Kane v. Com'th* (89 Pa. 522). It left the jury to decide the whole case upon the law and the evidence—not upon the law as distinct from

the evidence—and they were instructed as to what was the best evidence of the law. That is to say, in the language of the Constitution, they were to determine "the law and the facts as in other cases," under the advice and direction of the Court; they were to look to the Court for the best evidence of the law, just as they look to the witnesses for the best evidence of the facts. Thus interpreted and thus administered, this seeming paradox in our criminal law becomes intelligible. A Judge who instructs a jury in a criminal case that they may disregard the law as laid down by the Court errs as widely as the Judge who gives them a binding instruction upon the law. It is the duty of the jury to take the best evidence of the law as it is to take the best evidence of the facts. When they refuse to do either they disregard their duty and their oaths.

The judgment is affirmed, and it is ordered that the record be remitted to the Oyer and Terminer for the purpose of execution.

October 5, 1891. MITCHELL, J. I concur in affirming this judgment and in the reasons given, but upon one point I would go further, and put an end once for all to a doctrine that I regard as unsound in every point of view—historical, logical, or technical. The prisoner at the trial requested the Judge to charge the jury that they were "judges of the law as well as of the facts." The learned Judge feeling himself bound by the language of *Kane v. Com'th* (89 Penna. 522), answered that the jury had been sworn to decide the case on the law and the evidence; that the statement of the law by the Court was the best evidence of the law within the jury's reach, and that therefore, in view of that evidence, and viewing it as evidence only, the jury was to be guided by what the Court had said with reference to the law. The point should, in my opinion, have been answered with an unqualified negative. The jury are not judges of the law in any case, civil or criminal. Neither at common law nor under the Constitution of Pennsylvania is the determination of the law any part of their duty or their right. The notion is of modern growth, and arises undoubtedly from a perversion of the history and results of the celebrated contest over the right to return a general verdict, especially in cases of libel, which ended in Fox's bill (32 Geo. III., c. 60).

In the early days of jury trials, issues that went to the country were usually simple, and were probably submitted to the jury without much separation of law and fact by the Judge, and in that sense juries decided the law. But the distinction between questions of law and fact, and the tribunals for their decision respectively, lies at the foundation of our judicial system, and there was no time when it did not exist. The

rule *ad questionem facti non respondent iudices, ad questionem juris non respondent juratores*, was an ancient maxim in the days of Coke (Coke Litt. 155, a.; 8 Rep. 155, a.; 9 Id. 13, a.); and Mr. Bigelow treating of the class of cases raising questions of law or some question of fact properly belonging to the Court to decide, quotes the case of the Archbishop of Canterbury v. Abbot of Battel Abbey (1 Rotul. 143), tempore Stephen, which "turned upon a question of law and was decided (without appointment of a trial term) just as a modern case of the kind would be decided, by a submission of the point of law in the question to the determination of the Court, and not to some test imposed by the parties." (Hist. of Procedure in England during the Norman Period, by M. M. Bigelow, p. 286.) Nor was there any distinction in respect to the merely incidental way in which juries passed upon matters of law, between civil and criminal cases. They might return a general or a special verdict in either, but they early sought to escape the obligation of giving a general verdict because it subjected them to the risk of an attainr, and Coke says, "some justices did rule over the recognitors to give a precise or direct verdict without finding the special matter." (2 Inst. 422.) To relieve juries from the burden, the statute of Westminster 2, c. 30, enacted "*quod Justiciarii ad assisas capiend assignati, non compellant juratores dicere precise si sit disseisina vel non, dummodo dicere voluerint veritatem facti, et petere auxilium Justicie*;" and commenting upon this section, Coke says, "In the end it hath been resolved that in all actions, real, personal, and mixed, and upon all issues joined, general or special, the jury might find the matter of fact pertinent . . . and thereupon pray the discretion of the Court for the law; and this the jurors might do at the common law, not only in cases between party and party whereof this Act putteth an example of the assise, but also in pleas of the crown." (2 Inst. 425.) It is a striking illustration of the uniformity of human motives at all periods, that while the attainr remained as a remedy for perversity or favoritism the struggle of juries was to escape the obligation of general verdicts and to maintain the right of special findings of fact, but when the decline and final disuse of the attainr rendered them practically irresponsible, the struggle was reversed and juries asserted stoutly the right to give general verdicts, while the tendency of lawyers and Judges was to confine them to special findings of fact and to have the Court pronounce the result as a matter of law. The period of transition was long and changes slow. It was clearly and justly felt that juries as judges of the law in any but an incidental way were an anomaly in the system, and perhaps those who endeavored to do

away with it claimed too much. Safety was thought to reside in the retention by juries of the right to give general verdicts. In view of the constant and notorious failure of justice in certain classes of cases, by the occasional perversity and the frequent cowardice of juries, it may be doubted whether it would not have produced better results to have enlarged the power of Judges to compel special verdicts. But however this may be, the right of juries to give general verdicts, especially in criminal cases, has been maintained, and the last contest made on it was in regard to libel. The exact line between law and fact, not always easy to draw, presented in the case of libel some special difficulties, technical and other. The alleged libel being in writing, its terms were not in dispute and naturally fell to the Court to pass upon as other writings did, and the intent, libellous, or otherwise being claimed as a legal inference, there was nothing left in dispute but the fact of publication and the truth of the innuendo. Accordingly the juries in *The Dean of St. Asoph's Case*, and *The King v. Withers* (3 Term Rep. 428), were confined to these two points, and it was to counteract these rulings of BULLER and MANSFIELD and KENYON (though it cannot be disputed that they were in accordance with long settled practice) and to secure, in libel as in other cases, the right of the jury to find a general verdict upon the whole matter in issue, that the Act of 32 Geo. III., c. 60, was passed. The text of that famous statute is worth quoting to show how little foundation it affords for the superstructure that is sought to be built upon it. It is entitled "An Act to remove doubts respecting the functions of juries in cases of libel," and its language is, "Whereas doubts have arisen whether on the trial of an indictment . . . for the making or publishing any libel, where an issue is joined . . . on the plea of not guilty pleaded, it be competent to the jury impanelled to try the same, to give their verdict upon the whole matter in issue. Be it therefore declared . . . that, on every such trial, the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information; and shall not be required or directed by the Court or Judge before whom such indictment or information shall be tried, to find the defendant or defendants guilty, merely on the proof of the publication by such defendant or defendants of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information.

"Provided always, that, on every such trial, the Court or Judge before whom such indictment or information shall be tried shall, according to their or his discretion, give their or his opinion and directions to the jury on the matter

in issue between the king and the defendant or defendants, in like manner as in other criminal cases.

"Provided, also, that nothing herein contained shall extend, or be construed to extend, to prevent the jury from finding a special verdict, in their discretion, as in other criminal cases.

"Provided, also, that in case the jury shall find the defendant or defendants guilty, it shall and may be lawful for the said defendant or defendants to move in arrest of judgment, on such ground and in such manner as by law he or they might have done before the passing of this Act; anything herein contained to the contrary notwithstanding."

Nothing can be clearer than the care with which this Act was directed to the exact point in the controversy, the right to render a general verdict of guilty or not guilty upon the whole issue in case of libel, and the equal care with which the right of the Court to pass finally upon the questions of law, was preserved by the provisos that the Judge should give the jury his "opinion and directions," and that a verdict should still not be conclusive of the law against a defendant, but he should have his right to an arrest of judgment as theretofore enjoyed. The claim that juries were to be judges of the law, was thus intentionally and carefully excluded.

The Constitution of Pennsylvania was made in 1790, two years before Fox's Libel Act. The controversy was then at its height, and the subject commanded popular attention. In fact, Pennsylvania had borne rather a distinguished part in the discussion, and the speech of Andrew Hamilton in the trial of John Peter Zenger was regarded as the vindication of popular rights, and not only quoted as such by Erskine, but referred to among other authorities by Hargrave (Coke Litt., 155 b.) "No lawyer," says Mr. Binney, "can read that argument without perceiving that while it was a spirited and vigorous, though rather overbearing harangue, which carried the jury away from the instruction of the Court, and from the established law of both the colony and the mother country, he argued elaborately what was not law anywhere, with the same confidence as he did the better points of his case. It is, however, worth remembering, and to his honor, that he was half a century before Mr. Erskine, and the Declaratory Act of Mr. Fox, in asserting the right of the jury to give a general verdict in libel as much as in murder." (Lenders of the Old Bar of Philadelphia, p. 15.) The members of our Convention of 1790 were familiar with the subject, and the minutes show that much care was given to framing the clause in the Declaration of Rights which refers to it. Section 7 of Article IX., relating to liberty of the press, was originally reported to the Convention by the

committee to draft a proposed Constitution, on December 21, 1789, in the following form: "That the printing presses shall be free to every person who undertakes to examine the proceedings of the Legislature or any branch of the government, and no law shall ever be made restraining the right thereof. The free communication of thoughts and opinions is one of the most invaluable rights of man, and every citizen may freely speak, write, and print, being responsible for the abuse of that liberty." (Proceedings of the Convention, p. 162, Harrisburg, 1825.) This was reported from committee on the whole on February 5, 1790, in the same form (dropping only the word "most" before the word "invaluable"), but with the addition, "But upon indictments for the publication of papers investigating the conduct of individuals in their public capacity, or of those applying or canvassing for office, the truth of the facts may be given in evidence in justification upon the general issue." (Id. 174.) On February 22d, this section being under consideration, Mr. Addison offered as a substitute for the sentence last quoted, "In prosecutions for libels, their truth or design may be given in evidence on the general issue, and their nature and tendency, whether proper for public information or only for private ridicule or malice, be determined by the jury." To this an amendment offered by Mr. McKean, to add "under the directions of the Court as in other cases," was adopted almost unanimously, the vote being 56 to 3, but the substitute itself received a bare majority, 32 to 27, the strong minority being in favor of restricting the truth as a justification, to cases of publications upon the conduct of persons in their public capacity, or of candidates for office. (Id. 220-222.) The Convention having ordered the proposed Constitution to be published for the consideration of the citizens, adjourned on February 26th to the following August. On reconvening the instrument was again taken up for discussion, section by section, and the minority made strenuous efforts to restrict the justification to cases of public officers, at one time failing only by the close vote of 30 to 32. During the progress of the debate, an amendment offered by Mr. Lewis and seconded by Mr. McKean, that "the jury shall have the same right to determine the law and the facts, under the direction of the Court as in other cases," was carried, and the clause finally adopted in the form, "In prosecutions for the publication of papers investigating the official conduct of officers or men in a public capacity, or where the matter published is necessary or proper for public information, the truth thereof may be given in evidence; and in all indictments for libels, the jury shall have a right to determine the law and the facts under the directions of the Court, as in

other cases." (Id. 274-279.) It is impossible to read these various steps in the formulation of our fundamental law, without seeing that there was never at any time the intention to make or to consider juries as in any sense judges of the law. No such possible construction seems to have been apprehended until suggested by McKean, and the practically unanimous vote on his motion to add "under the direction of the Court as in other cases," shows the feeling of the Convention on this subject. McKean was at that time one of the foremost personages of the Commonwealth, perhaps its best trained lawyer. He had studied in the Temple, and was familiar with the details of the legal controversy between Buller and Mansfield on the one side and Erskine on the other, before Fox took it up, as a matter of politics, and he knew, as Lewis and Wilson, and Ross and Sitgreaves, and Addison and Findley, and other leaders of the Convention knew, that the contest was not for any control by the jury as judges of the law, even Junius hardly ventured to put his denunciations of Mansfield in that form, but for the right of applying the law to the facts and pronouncing the result by a general verdict. And such was the understanding of the Convention as it was of Parliament two years later, and such the natural meaning of the language on which they finally settled to express their purpose. It puts beyond question the right to return a general verdict, nothing more. To cut the sentence in two and say the jury are "to determine the law," is not only to prevent the meaning, but to nullify the other command that they are to determine "under the direction of the Court." What they are to determine is "the law and the facts as in other cases," that is the law as given to them by the Court, and the facts as shown by the evidence. They are bound to take the law from the Court, but so taking it they have the right to apply it to the facts as they may find them to be proved, and to announce the result of the whole by a general verdict of guilty or not guilty. Any other construction would be totally at variance with the fundamental principles of our system of jurisprudence and with our settled and uncontested practice. It has never been claimed that the jury are to determine what evidence is admissible or what witness competent, yet if they are judges of the law they should decide these often most important law points in a case. So as to the sufficiency of an indictment. Again, the jury have a right to return a special verdict even in a criminal case. (Dowman's Case, 9 Coke Rep. 126; 2 Inst. 425; Hargrave's Note to Coke Litt., 155 b.) It is admitted that they must decide the facts, and if they are judges of the law then it is their duty to decide it, and they cannot transfer that duty to the Court. The prisoner might demand his

right that they should exercise their full functions. But all the authorities are to the contrary, and if the finding of facts can be separated from the conclusion of law, the latter will be decided by the Judges by their own views. "When a jury find the matter committed to their charge at large, and further conclude against law, the verdict is good and the conclusion ill." (Heydon's Case, 4 Coke, 42 b.) "The office of twelve men is no other than to inquire of matters of fact and not to adjudge what the law is, for that is the office of the Court and not of the jury, and if they find the matter of fact at large and further say that thereupon the law is so, where in truth the law is not so; the Judges shall adjudge according to the matter of fact, and not according to the conclusion of the jury. (Townsend's Case, Ployden, 114 b. And see 2 Hale, Pleas of the Crown, 302; 1 Chitty Criminal Law, 645.)

Much misunderstanding has, in my judgment, been caused in this State by the case of Kane v. Commonwealth (89 Pa. 522). In that case the point was put to the Court below that "the jury are the judges of the law and the fact," and all that this Court decided was, that the point should have been affirmed. The language of Chief Justice SHARSWOOD was, however, less guarded than was usual with that eminent jurist, and following State v. Croteau (23 Vt. 14), he dismisses the perfectly clear and substantial distinction between power and right with a brevity that is scarcely consistent with the weight of the subject. "The distinction between power and right," he says, "whatever may be its value in ethics, in law is very shadowy and unsubstantial. He who has legal power to do anything has the legal right. No Court should give a binding instruction to a jury which they are powerless to enforce by granting a new trial if it should be disregarded." It is somewhat remarkable that the Chief Justice should assume, as is so commonly done by counsel, that the jury will construe the law more favorably for the prisoner than the Court would. It is only such a construction, too favorable to the prisoner, that the Court is powerless to remedy by a new trial, and that lack of power arises not because the jury's legal power is the same as a legal right, but because for reasons of general policy one verdict of acquittal is a final and irreversible termination of the case. If legal power means legal right, then a jury has a right to acquit any prisoner without regard to either law or evidence, for their power to do so is beyond question, and they cannot be held to any accountability, though they follow the maxim of Lynch law that the murdered man deserved to die anyhow, and therefore his murderer should not be punished, even though he no longer seeks refuge behind the

thin veil of transitory insanity that began when the shot was fired, and ended when it had killed its man. Whether the distinction between power and right be shadowy and unsubstantial in practice or not, it is clear and vital, and I must repudiate such a confusion of logical as well as moral ideas. A jury may disregard the evidence, but no Judge has ever said it had the legal right to do so, and if the disregard is of the weight of the evidence favorable to the prisoner, the Court sets aside the verdict without hesitation, and even this Court, though it does not pass upon the weight of evidence, does examine its sufficiency, and may on that ground reverse without a new venire. *Comm. v. Fleming* (130 Pa. 163); *Comm. v. Knarr* (135 Id. 47); *Comm. v. Railroad Co.* (Id. 256); *Comm. v. Brown* (138 Id. 452); *Com. v. Ruddle* (142 Id. 144), are a few recent instances of the exercise of this power.

So the jury may disregard the law favorable to the prisoner. As was suggested by the learned Judge at the trial of the case in hand, the jury had the legal power to find murder of the first degree, without regard to the element of premeditation, but no Judge would contend that they had the legal right to do so, and if the evidence of premeditation was below the legal standard, determined by the Court as matter of law, not only would the trial Court set aside the verdict, but this Court would be bound to review the evidence and determine if the legal elements of murder of the first degree existed in the case. Such powers and such duties in the Courts are absolutely inconsistent with the right of the jury to be in any sense judges of the law.

This is not new doctrine, but long-established law of the State. Alexander Addison was one of the staunchest asserters of the rights of juries in the Constitutional Convention, and was one of the minority of three who voted against McKean's amendment to insert the words "under the direction of the Court as in other cases," but when, three years later, he presided in the Oyer and Terminer of Washington County, he laid down the law in these precise and forcible terms, "Whether the facts are so or so, it lies with you to determine, according as you believe the testimony. Supposing them so or so; whether they amount to murder or manslaughter, is a question of law for the Court to determine. You may find, according as you believe or disbelieve the facts, and comparing the facts with the rules of law, that the prisoner is guilty or not guilty (of murder), or guilty of manslaughter; or you may find the facts specially without drawing any conclusion of guilt or innocence; leaving it to the Court to pronounce the construction which the law puts on the facts found; but you cannot, but at the peril of violation of duty, believing the

facts, say that they are not what the law declares them to be, for this would be taking upon you to make the law, which is the province of the Legislature, or to construe the law, which is the province of the Court." (*Penna. v. Bell*, Add. 160.) And in *Com. v. Sherry*, an indictment for murder growing out of the riots of 1844 removed by certiorari from the Quarter Sessions of Philadelphia and tried in the Nisi Prius in April, 1845, Justice ROGERS charged the jury as follows: "You are, it is true, judges in a criminal case in one sense of both law and fact, for your verdict, as in civil cases, must pass on law and fact together. If you acquit, you interpose a final bar to a second prosecution. . . . The popular impression is that this power . . . arises from a right on the jury's part to decide the law, as well as the facts, according to their own sense of right. But it arises from no such thing. It rests upon a fundamental principle of the common law that no man can twice be put in jeopardy for the same offence. . . . It is important for you to keep this distinction in mind, remembering that while you have the physical power by an acquittal to discharge a defendant from further prosecution, you have no moral power to do so against the law laid down by the Court. The sanctity of your conclusions in case of an acquittal arises, not from any inherent dominion on your part over the law, but from the principle that no man shall be twice put in jeopardy for the same offence—a principle that attaches equal sanctity to an acquittal produced by a blunder of the clerk, or an error of the attorney-general. . . . You will see from these considerations the great importance of the preservation, in criminal as well as in civil cases, of the maxim that the law belongs to the Court, and the facts to the jury. My duty is, therefore, to charge you, that while you will in this case form your own judgment of the facts, you will receive the law as it is given to you by the Court." (*Wharton on Homicide*, Append. 721.) To the same effect, though less explicitly developed, are the rulings by SERGEANT, J., of this Court, in *Com. v. Van Sickle* (*Brightly*, 73); and by GIBSON, C. J., in *Com. v. Harman* (4 Pa. 269). And this also seems to have been the later and better considered opinion of Judge BALDWIN, whose charge, in *U. S. v. Wilson* (*Bald.* 99), is commonly quoted as authority on the other side. (See his charge in *U. S. v. Shive*, *Bald.* 512.) I do not understand that the case of *Kane v. Com.* was intended to overrule or conflict with these decisions, and notwithstanding the latitude of the language of the opinion, the real point decided did not go beyond the affirmation of the right to an instruction that "the jury are the judges of the law and the facts." In the present case, it will be observed that the instruction asked was that

the jury are "judges of the law *as well as* of the fact"—that is, of each, not merely of the joint result of both. For myself, I think even the formula that the jury are judges of the law and the facts objectionable, as tending to convey to the jury a wrong idea. The language of the Constitution is, that the jury shall have the right to determine the law and the facts under the direction of the Court. This is the accurate formula, and it means only that they have the right to determine the joint result of the law and the facts by a general verdict. This is the form which ought to be used when instruction on the subject is asked, and it ought to be accompanied by explicit instruction that the jury are not judges of the law, in all cases where there is any apparent danger that the jury will arrogate to themselves such function.

My conclusions on the general subject therefore are:—

1. That the jury never were judges of the law in any case, civil or criminal, except incidentally as involved in the mixed determination of law and fact by a general verdict.

2. Even if it could be conceded that they may have been so in primitive times, their right certainly ceased after the introduction of bills of exception and the granting of new trials, and admittedly has not existed in civil cases for centuries.

3. That there was not originally, nor is now, any distinction in this respect between civil and criminal cases, the true rule as to both being that "the immediate and direct right of deciding upon questions of law is entrusted to the Judges; in a jury, it is only incidental" (Hargrave's Note to Coke upon Littleton, 155 b). The idea of a difference in the rights and functions of juries in civil and criminal cases as to the determination of the law arose from a misconception of the controversy over the right to give a general verdict and was an error for which there is no respectable English authority, and which the best American authorities have overwhelmingly disapproved.

That even if the jury had originally had such right in criminal cases, it was an anomaly, belonging to the period when jurors were selected from the vicinage because of their knowledge of the case, and, like its congener, has changed and disappeared, because totally inconsistent with the functions of Courts and juries as now understood, with sound reason and with common sense. And such change, if change it be, has the sanction of the constitutional provision that the jury shall determine, "under the direction of the Court," of the legislative provisions for bills of exception, the review of the evidence in cases of murder, etc. etc., and of the long-settled and incontestable power of Courts to decide questions of evidence, to set aside verdicts, and grant new trials, without limit, except when controlled by the ancient maxim of the common law, embodied in our

constitutional declaration of rights, that no man shall be twice vexed for the same offence.

This whole subject is discussed with exhaustive learning and ability in *State v. Croteau* (23 Vt. 14). The opinion of the Court, by HALL, J., is the only serious attempt that I have been able to find to support the dogma for which it is now mainly responsible, and, with great respect for that eminent jurist, it appears to me that his whole argument is based on the confusion of the right to determine the law with the right to render a general verdict. A careful examination of all the authorities cited by him (and they include everything which the most learned and diligent research could discover) shows that they only go so far as to sustain the right of the jury not to be judges of, or to determine, the law, but only to *apply* it through a general verdict. The dissenting opinion of BENNETT, J., in the same case, displays equal learning and sounder reasoning. It is a storehouse of information on the subject, and has anticipated everything that can be said upon it. A masterly analysis and review by Chief Justice SHAW will also be found in *Com. v. Authes* (5 Gray, 185). There are less elaborate, but equally clear and forcible, statements of the argument by STORY, J., in *U. S. v. Battiste* (2 Sumner, 240); by B. R. CURTIS, in *U. S. v. Morris* (1 Curt. C. C. 23, 49); by GILCHRIST, J., in *Pierce v. State* (13 N. H. 536); and by SHAW, C. J., in *Com. v. Porter* (10 Metc. (Mass.) 263). See also *Montgomery v. State* (11 Ohio, 427); *Montee v. Com.* (3 J. J. Marshall, 149); *Townsend v. State* (2 Blackf. 151); but see *Armstrong v. State* (4 Blackf. 247); *Pierson v. State* (12 Ala. 153); *Hardy v. State* (7 Mo. 607); *Nels v. State* (2 Tex. 280); *Brown v. Com.* (10 So. East. Rep. 745, Ct. of App. of Va., 1890); a very able and compendious statement of the controversy in England, while still raging, before the passage of the Libel Act, by Mr. Hargrave, in his note to Coke Litt. 155 b; an article by C. J. WADE, of Montana, in 3 *Criminal Law Mag.* 484; and one by the late Dr. Francis Wharton, in 5 *So. Law Rev.* N. S. 352 (reprinted in 36 *Legal Intell.* 405, and 1 *Crim. Law Mag.* 47); 7 *Dane's Abridg.* 381-3; 2 *Boston Law Rep.* 187; 15 *Id.* i; and 13 *Am. Law Reg.* N. S. 355.

As already said, there is not a single respectable English authority for the doctrine in question, and against the foregoing solid phalanx of the best American judicial and professional opinion I have not been able to find a single well-considered case, except *State v. Croteau*, which, as already seen, was by a divided Court. Under these circumstances, whether the doctrine be of much practical importance or not, I cannot help thinking it a matter of regret that any vestige of it should be left in Pennsylvania.

W. M. S., JR.

May '91, 24.

June 2, 1891.

Commonwealth v. Central District and Printing Telegraph Co.

Corporations—Capital stock—Taxation of—Lease of right to use patented articles—Patent rights—Definition of—Revenue Acts of June 7, 1879, and June 1, 1889.

A Pennsylvania corporation, whose business was to supply telephonic communication in certain counties of Pennsylvania, Ohio, and West Virginia, and which owned poles, lines, bells, switches, etc., for the purpose, by agreement with a Massachusetts corporation, which was the owner of telephones and telephonic apparatus manufactured by it under certain patents owned and controlled by it, obtained the use, for a certain period in the counties above referred to, and for certain royalties, of the telephones and other apparatus manufactured by the latter corporation, which retained the ownership thereof. The original stock of the Pennsylvania company was \$500,000. The agreement between the companies provided that at the end of ten years the Pennsylvania company should increase its capital stock to the extent of fifty per cent. and issue and deliver the same to the Massachusetts company, who, in consideration thereof, would extend the agreement for the further period of 90 years. This stock was accordingly issued:

Held, that the additional issue of stock was not an investment in patent rights, or in a license to use patent rights, and that it was taxable under the Revenue Acts of June 7, 1879 (P. L. 112), and June 1, 1889 (P. L. 420).

A "patent right" is the right, protected by letters patent, to use the process, combination, or appliance, discovered by the patentee, for the production of a certain result. It is an incorporeal right conferred by the government by way of encouragement to, and compensation for, the employment of time and labor and money in the discovery of new and useful things to minister to the comfort, and aid in the progress of the public.

The article or machine made under the letters patent is not a "patent right," but is the property of the maker, in the same way, and with the same attributes, that any other article made or grown by him is his property.

Appeal of the Commonwealth of Pennsylvania, plaintiff, from the judgment of the Common Pleas of Dauphin County, upon an appeal by the Central District and Printing Telegraph Company, defendant, from an account settled by the auditor-general and State treasurer for tax on capital stock *per* Acts of June 7, 1879, and June 1, 1889, for the year ending the first Monday in November, 1889.

The case was tried without a jury before McPHERSON, J., who found the facts to be as follows:—

"(1) The defendant was originally a New York corporation, but became a corporation of this State by accepting a charter under the Act of June 9, 1881 (P. L. 89). Its business is the

supply to the public of telephonic communication in certain counties of Pennsylvania, Ohio, and West Virginia.

"(2) During the tax year ending the first Monday of November, 1889, its capital stock was \$500,000.00, before the 22d day of August, upon which date it was increased to \$750,000.00. The increase of \$250,000.00 was issued and paid to the American Bell Telephone Company of Massachusetts, under the seventeenth section of an agreement made November 28, 1879, which agreement is made a part of this finding.

"(3) During the said tax year the defendant declared dividends amounting to fifteen per cent. upon \$500,000.00 and three per cent. upon \$750,000.00. This settlement taxes the defendant's capital in Pennsylvania under the Revenue Acts of 1879 (P. L. 112), and 1889 (P. L. 420) and includes therein the said sum of \$250,000.00. The Commonwealth's claim is \$3617.14, of which amount the defendant has paid to the state treasurer \$3242.14, leaving in dispute the sum of \$375 tax at the rate of one and one-half mills upon the said \$250,000.00.

"(4) The stock thus issued to the American Bell Telephone Company was in payment for a license to use the patents now owned or hereafter to be owned by said telephone company during a period of ninety years from August 23, 1889. Without this license the defendant could not use the telephones connected with its plant or carry on its corporate business.

"(5) We find as a fact that said license was fairly worth the price paid for it, and in 1889 constituted in actual value not less than one-third of all the property and assets represented by the defendant's capital stock. The rest of said capital stock is invested in poles, wires, bells, switches, and apparatus necessary to operate telephone exchanges, to the value of \$700,000.00, and in real estate to the value of \$150,000.00; but the value of the telephone plant is largely dependent upon the right to use said patents, and without this right it would not exceed about \$250,000.00. The defendant does not own the telephones which it uses, but rents the same from the American Bell Telephone Company, paying an annual royalty on each instrument.

"CONCLUSION OF LAW.

"Agreements similar to the one above referred to were construed by the Supreme Court in *Com. v. Am. Bell Tel. Co.* (129 Pa. 217), and were there held (p. 228) to constitute a leasing of patented telephones to Pennsylvania corporations with a license to use the same. Following this construction the question now involved appears to be whether capital stock of a domestic corporation invested in such a license is taxable by the

State. We have already decided this question in *Com. v. United Gas Im. Co.* (7 Pa. C. C. Rep. 116), *Com. v. Brush E. L. Co.* (Nos. 195 September Term, 1889 [reported *post*, p. 527], and 443 September Term, 1890, Dauphin C. P.), and in several other cases which we need not specify. Without further discussion, therefore, we refer to the opinions filed in the cases named for the reasoning which supports the following conclusion:—

“(1) Defendant is not taxable upon so much of its capital stock (\$250,000.00) as is invested in the license or right to use the patents above referred to; and the settlement appealed from is erroneous so far as it taxes said portion of the defendant's capital stock.

“The prothonotary is directed to enter judgment for the defendant, if exceptions are not filed according to law.”

By the first section of the agreement mentioned, the telephone company licensed the defendant—

to use and to let for use, telephones manufactured under the patents granted to Alexander Graham Bell, and dated the 7th day of March, 1876, and the 30th day of January, 1877, and under any other patents now held, or which may hereafter be held, by said party of the first part, in the following described territory, to wit: . . . such right to continue for ten years from the 23d of August, 1879, and for a further period thereafter as hereinafter provided. Said party of the first part further agrees that it will not, during the continuance of this agreement, license any other parties to use or solet for use telephones or telephonic apparatus in said territory.

Section seventeenth provided:—

And it is further hereby expressly covenanted and agreed, by and between the parties hereto, that at the expiration of the ten years herein limited as the life of this contract, said party of the second part shall, in such manner as may be in accordance with law, increase its capital stock to the extent of 50 per cent., and shall issue and deliver such increase to said party of the first part, who, in return shall, in consideration therefor, extend this agreement for the further period of ninety (90) years from said date.

Other material portions of the contract are sufficiently indicated in the opinion of the Supreme Court.

The Commonwealth excepted to the 2d, 3d, 4th, and 5th findings of fact, and to the conclusion of law. These exceptions were overruled by the Court, and judgment entered for defendant.

Whereupon the Commonwealth appealed, assigning the dismissal of its exceptions for error.

James A. Stranahan, deputy attorney-general (*William U. Hensel*, attorney-general, with him), for appellant.

There is no assignment by the telephone company of its patent rights; but it granted the right to use telephones manufactured under certain

patents which were manufactured and furnished by the telephone company, the title to which remained in it. Possession and control of telephones and telephonic apparatus passed by this agreement, and these telephones and apparatus were tangible personal property. It is contended that the capital stock of the defendant company is therefore a proper subject of taxation. These instruments are the production or fruit of the patent rights, and are altogether distinct from the invention or discovery, or of the patent right itself.

Patterson v. Kentucky, 97 U. S. 501.

Webber v. Virginia, 103 Id. 344.

People v. American Bell Telephone Co., 29 Am. & Eng. Corporation Cases, 616.

Com. v. American Bell Telephone Co., 129 Pa. 217.

M. E. Olmsted, for appellee.

The Commonwealth has no power to tax patents granted by the United States to inventors, or, what amounts to the same thing, licenses granted by patentees to others to use the invention covered by the patent.

The tax upon capital stock is a tax upon the assets and property of the company taxed.

Com. v. Standard Oil Co., 101 Pa. 119.

The Commonwealth, therefore, in taxing the capital of this company invested in the license granted to it by the telephone company under the telephone patents, is taxing the license itself.

Curtis's Law of Patents (4th ed.), xix., xxii., xxiii.

McClulloch v. Maryland, 4 Wheat. 316.

California v. Central Pacific R. R. Co., 127 U. S. 1.

Com. v. United Gas Imp. Co., 7 Pa. C. C. Rep.

116.

Com. v. Brush Electric Light Co., 195 Sept. T.

1889, C. P. Dauphin Co. [reported *post*, p. 527].

October 5, 1891. WILLIAMS, J. This case was tried without a jury, and the facts appear fully in the findings of the learned trial Judge. From these we learn that the American Bell Telephone Company is a Massachusetts corporation, owning the patents under which the instruments for transmitting or reproducing sound are made, and controlling absolutely the manufacture and use of them. It does not sell any interest in the patent, or any territory, or even a single instrument made by it, but by leasing the instruments for a term of years at a rental it maintains its exclusive ownership and control over this mode of communicating messages, and levies such exactions upon the public as it pleases. Having no office and doing no business in this State it escapes taxation altogether. (*Commonwealth v. Am. Bell Tel. Co.*, 129 Pa. 217.) The mode of doing business in this State is by the organization of subordinate companies, which erect the poles, put the wires upon them, build or rent offices and exchanges, and fit them out with all the appliances necessary except the in-

struments manufactured by the Massachusetts company. These are leased, to be used only within a certain district, and by the subordinate company or its customers. The appellee, the Central District and Printing Telegraph Company, is one of these subordinate companies. It is doing business in this State, under the authority of a charter granted here. Its business is the transmission of messages over its lines. It owns the entire plant used in its business, or has an exclusive control of it under a lease, and its system covers about fifty contiguous counties in Pennsylvania, West Virginia, and Ohio. The instruments used by customers and at the several offices or exchanges are the property of the Massachusetts Company. The appellee has no ownership in them. It cannot make them. It cannot sell them. It cannot use them outside the enumerated counties. It cannot so much as control the price that shall be charged for the use of them by their customers. The State has levied a tax upon the capital stock of the appellee. This was originally five hundred thousand dollars, but the contract with the Massachusetts Company required it to issue, at the end of ten years, a quarter of a million of dollars of additional stock and deliver the same to that company. This has been done. The contention of the appellee, which was sustained in the Court below, is that the stock issued in pursuance of the contract to the Massachusetts Company is not liable to this tax, because it is invested in patent rights.

Our first question is, what is a patent right? We reply negatively that it is not the article or machine made under the letters-patent. That is the property of the maker in the same way and with the same attributes as any other article made or grown by him is his property. The only difference is, that while unpatented articles made by him may be imitated by others, this may not be so long as the letters-patent are in force, without his license or consent. The article so made is the fruit of the combination or appliance that has been patented, but is not the patent right. It will be best to adopt in this connection the exact words of the Supreme Court of the United States in *Patterson v. Kentucky* (97 U. S. 501). "The right of property in the physical substance, which is the fruit of the discovery, is altogether distinct from the right in the discovery itself, just as the property in the instruments or plate by which copies of a map are multiplied is distinct from the copyright of the map itself." In support of this proposition, the case of *Stephens v. Cady* (14 How. 528), was cited. Answering affirmatively, I would say that a "patent right" is the right, protected by letters-patent, to use the process, combination, or appliance discovered by the patentee, for the production of a certain result. It is an incorporeal right, conferred by

the government, by way of encouragement to and as compensation for the employment of time and labor and money in the discovery of new and useful things to minister to the comfort and aid in the progress of the public. So long as the given result can be reached only by means of the process, combination, or appliance covered by the letters-patent, the patentee has an exclusive control of the result. When some other inventor reaches the same result by another and better process discovered by him, he is not interfered with by the letters-patent to his predecessor so long as he does not infringe upon the invention they cover, but may by the use of his own superior methods supersede it, and drive it from the market. An inventor, by an ingenious combination of wheels, levers, knives, and bars produces a mowing-machine, and obtains a patent therefor. This does not interfere with the cutting of grass or grain in any other way, nor with the use of mowing-machines that do not employ the peculiar process, combination, or appliance covered by the patent. The patent therefore gives to the inventor no control over the result, the cutting of grass or grain, except in so far as it is sought to be done by the use of his device. It gives him no control over the instruments by which the cutting is done, except they employ the particular process, combination, or appliance to which he, as the inventor, has the exclusive right. This right, which is his by discovery, and which has been protected by the Act of the government in forbidding others to employ it without his consent, is the "patent right."

Our next question is whether the appellee has invested any portion of its stock in the patent rights under which the Bell Telephone instruments are manufactured. This question is fully answered by the contract, to which we have already referred. It will not be pretended that it acquired any interest in the letters-patent as owner of a practical part of the title conferred by them, nor as the owner of the right to make and vend, in any given subdivision of the territory covered by them; nor yet as owner of a single instrument, the fruit of the patent right owned by the Mass. Company. It is as to this part of the plant employed in its business, a lessee. It hires the manufactured instruments, as a farmer might hire a mowing machine, and acquires no more interest in the patent right held by its lessor than would the farmer. It is quite common for manufacturers to lease instruments made by them under protection of letters-patent. Printing presses, pianos, mill gearing, portable saw mills, and other articles, are thus leased, but it has never been suggested that the lessees become truly owners of, or investors in, the patent rights under which the articles in their possession were made. On the other hand, those articles remain

the property of the lessors, who part with nothing but the possession, for which they are paid the agreed rent, or, in default of such payment, they may take the article from the lessee and resume possession by virtue of their absolute ownership. It is not important to inquire whether the stock issued to the Mass. Company was a bonus or a method of securing an additional rent, since it is not pretended the appellee received any consideration for it beyond that which appears in the contract, which was the right to use manufactured instruments as a lessee. This was, therefore, not an investment in the patent rights, but in manufactured instruments and appliances made under the protection of the patents. The first is an incorporeal right which owners refuse to sell, in whole or in part. The other is its corporeal embodiment in a manufactured article prepared for market, or, in the language of the Supreme Court of the United States, its "fruits." The first is the right of the inventor to the "child of his brain." The other is the personal property of the maker, wrought into shape for the market by his hands, and distinguished from other personal property only in this, that the process of manufacture is protected by the letters-patent.

But let us look at the practical operation of the rule laid down in the Court below. We will suppose, for this purpose, that the corporation owning the rights secured by letters-patent is a Pennsylvania corporation, and that its capital stock, to the amount of one million dollars, is invested in the patents. This would be exempt from taxation by the State because invested in incorporeal rights secured by the grant of the government of the United States, and evidenced by letters-patent. We will suppose further that our corporation, like the Mass. corporation, in this case retains an exclusive control over the manufacture of the instruments to which its patents relate, and produces them in great numbers. Within the State we will suppose there are ten local companies like that now before us, with their wires, stations, and exchanges, ready to enter upon the business of transmitting messages by telephone, with a capital stock, like that of the Central Co., of seven hundred and fifty thousand dollars each. They apply to our corporation for several thousand of its manufactured instruments with which to complete their plants and enter upon their business; and are told that the instruments are not for sale, but can be had only at a rental, amounting to several times their value, annually. They accordingly take, upon lease, the machines they need, and pay, as in this case, in addition to the annual rental, in cash, one-third of their capital stock in block, as a bonus, or as an additional rent. Our corporation now owns two and one-half millions of the stock of the local companies, which represents the use or rent

of its manufactured goods. If the stocks are also exempt, then on an actual investment of one million of dollars in patents, we have three and a half millions of stock exempt from taxation. The same rule applied in the other States might result in the exemption throughout the country of fifty or one hundred millions of dollars of stock from State taxation, on an actual investment in patents of but one million. The trouble with this rule is that it overlooks the distinction between the incorporeal right secured by letters-patent and the tangible commodity of finished product, which is its fruit. This finished product, or fruit of the right secured by letters-patent, is merchandise, whether it takes the form of a patent reaper, a power printing press, a fountain pen, a pencil sharpener, or an instrument called a telephone. If the manufacturer sells his product, the right to use it is an implied term of the contract of sale. If he leases it, the same is true. Whether he sells or leases, he deals not in a patent right, but in manufactured goods. The buyer or lessee gets no right under the letters-patent except that which follows as a necessary incident from his purchase or hiring, viz., the right to use the article bought or hired, without other liability than that which his contract provides for.

We are clearly of the opinion that the stock paid the Mass. Company, under the contract by which the defendant company secured the telephonic instruments needed in its business, was not an investment in patent rights, but in instruments that enter into and form part of its plant, as truly as the poles, or wires, or switch boards, used by it.

The judgment is, therefore, reversed, and judgment is now entered in favor of the Commonwealth for the balance of the tax as adjusted by the taxing officers of the Commonwealth, with interest and costs.

Balance of tax on cap. stock, \$375.00

Interest at 12 per cent.,

Att'y-Gen'l's com.,

Total,

[See next case.]

H. C. O.

Jan '91, 25.

June 2, 1891.

Commonwealth v. Philadelphia Company.

*Corporations—Capital stock—Taxation of—
Lease of right to use patented articles—Patent
rights—Definition of—Revenue Acts of June
7, 1879, and June 1, 1889.*

A corporation engaged in the production, transportation, and sale to customers of natural gas in Allegheny

County, obtained from W. a "grant of license" of certain patented inventions, enumerated therein, for use in its business to whatsoever extent the company might require them. The right thus secured to the company was to be exclusive in Allegheny County, W. retaining his patents, the right to manufacture or control the manufacture of the machines used by the company, and his original exclusive right to make, sell, or use them outside of Allegheny County. The consideration was the issue to W. by the company of shares of its capital stock of the face value of one million dollars:

Held, that the issue of this stock was not an investment in patent rights, or in a license to use patent rights, and that the stock was taxable under the Revenue Acts of June 7, 1879 (P. L. 112), and June 1, 1889 (P. L. 420).

Appeal of the Commonwealth of Pennsylvania, plaintiff, from the judgment of the Common Pleas of Dauphin County, upon an appeal by the Philadelphia Company, defendant, from an account settled by the auditor-general and state treasurer for tax on capital stock per Acts of June 7, 1879, and June 1, 1889, for the year ending the first Monday in November, 1889.

The case was tried without a jury before McPHERSON, J., who found the facts to be as follows:—

"(1) The defendant is a Pennsylvania corporation. Its charter was not given in evidence, and we are not able, therefore, to find specifically what are its corporate powers. It appears, however, that its principal place of business is in the county of Allegheny; that it is engaged in the business of furnishing natural gas, to those who may desire it; and that it was organized as a corporation before July, 1885.

"(2) Its capital stock is \$7,500,000, and of this amount two-fifteenths, or \$1,000,000 thereof was issued in payment for certain rights under letters-patent granted by the United States, which rights were transferred to it by three several agreements dated July 31, 1885, October 8, 1888, and October 10, 1888. These agreements are made part of this finding.

"(3) At the time of their purchase the rights under said patents were, and still are, necessary for the actual corporate purposes of said company, to enable it to successfully conduct the said business of furnishing natural gas to those who may desire it. They were, and are, fairly worth the said price paid for them, and constitute in actual value not less than two-fifteenths of all the property and assets represented by the entire capital stock of the defendant.

"(4) During the tax year ending the first Monday of November, 1889, the defendant declared dividends amounting to ten per cent. upon the capital stock of \$7,500,000. This settlement taxes the whole capital stock at the rate of five mills under the Revenue Acts of June 7, 1879 (P. L. 112), and June 1, 1889 (P. L. 420).

"(5) The defendant has paid to the State treasurer the sum of \$32,500 on account of said tax, leaving in dispute the sum of \$5000, being the tax upon the capital stock invested as above stated in the said rights under the said letters-patent.

"CONCLUSION OF LAW.

"The question here raised has been already decided by this Court. In *Comm'th v. United Gas Improvement Company* (7 Pa. C. C. R. 116), we held that capital stock invested in patents granted by the United States was not taxable by this State; and in *Comm'th v. Brush Electric Light Company* (Nos. 195 September Term, 1889 [reported *post*, p. 527], and 443, September Term, 1890, Dauphin Common Pleas), that capital stock invested in territorial rights under such letters-patent was similarly exempt. We refer to these cases for the reasoning which supports the following conclusion:—

"(1) The capital stock of defendant, viz., \$1,000,000, invested in the said rights under said letters-patent, is not taxable by the said Revenue Acts of 1879 and 1889.

"The prothonotary is directed to enter judgment in favor of the defendant, if exceptions are not filed according to law."

From the agreements referred to it appears that the Philadelphia Company acquired from George Westinghouse, Jr., the right to make and use in their said business, the product or application of patented discoveries in Allegheny County, owned or controlled by him in Allegheny County, or along any line or lines of pipe which it or its successors or assigns may operate, leading from any natural gas-well or other source of gas supply outside of the said county of Allegheny into Allegheny County, for supplying either natural or manufactured gas to consumers or users thereof in said Allegheny County. The ownership of the patents remains in George Westinghouse, Jr. The consideration of the agreement, dated July 31, 1885, is "One million dollars of the capital stock of the said Philadelphia Company, to be delivered to the said George Westinghouse, Jr., on the execution and delivery hereof, and the issue, payment, and delivery to the said George Westinghouse, Jr., of paid up certificates of said capital stock, and the amount of one million dollars par value shall be a full consideration of the grant of license herein made." The plant for the application and operation of these patented discoveries belongs to the defendant company.

The Commonwealth excepted to the second and third findings of fact, and to the conclusion of law. These exceptions were overruled by the Court and judgment entered for defendant. Whereupon the Commonwealth appealed, assigning the dismissal of its exceptions for error.

The arguments of counsel were substantially the same as in the case of the Commonwealth v. The Central District and Printing Telegraph Co. (*ante*, p. 516).

James A. Stranahan, deputy attorney-general (William C. Hensel, attorney-general, with him), for appellant.

M. E. Olmsted, for appellee.

October 5, 1891. WILLIAMS, J. The business of the appellee is the production, transportation, and sale to customers of natural gas in Allegheny County, with its office in the city of Pittsburgh.

George Westinghouse, Jr., was the inventor of certain appliances to regulate and facilitate the transportation, supply, and combustion of gas which the appellee desired to make use of in its business. It accordingly entered into an agreement with Mr. Westinghouse for what is described in the agreement as a "grant of license" for the exclusive use of his patents in the county of Allegheny, in consideration for which it agreed to give him shares of its capital stock amounting, at the face value, to one million of dollars. This exclusive "grant of license" was upon certain conditions that limited the operation of the grant. Among these was one prohibiting the grant under it of any right outside of Allegheny County. Another reserved to Mr. Westinghouse, his representatives and assigns, the right "to make or procure the making of any or all the patented apparatus" to be used under the grant. Stripped of its verbiage the agreement required Mr. Westinghouse to furnish the Philadelphia Company his inventions, enumerated therein, for use in their business to whatsoever extent the company might require them. It required him to refuse them to all other persons or companies doing business in Allegheny County. The company thus secured the exclusive use of the manufactured apparatus or machines in that county. Mr. Westinghouse retained his patents, the right to manufacture or control the manufacture of the machines used by the Philadelphia Company, and his original exclusive right to make, sell, or use outside of Allegheny County.

The question raised on these facts is whether the stock used instead of money to pay for the right to use, by themselves, their lessees, or vendees, the manufactured apparatus made under protection of the enumerated patents, in the county of Allegheny, was invested in patent rights, and therefore exempt from the capital stock tax imposed by the Commonwealth.

It will be seen, by reference to the contract and the findings of the Court below, that the subject-matter of the sale or license by Westinghouse was not his patents, but his machines or apparatus, manufactured and ready for the trade.

He did not sell his right as an inventor, but his goods as a manufacturer and owner, finished and ready for use. True, he agreed to sell to no one else in the county, and to allow the company to control the sale within the county lines, just as a manufacturer of a particular brand of cloth or leather might agree to do with a customer in the same county who wished to control the trade therein; but this was an agreement about goods and nothing more.

This case is ruled by the Commonwealth of Penna. v. The Central District and Printing Telegraph Co. [*ante*, p. 515], in which an opinion is this day filed. It is unnecessary to repeat what was there said upon the questions involved. We adopt the reasons given for the decision in that case as part of this opinion.

The judgment is reversed, and judgment is now entered in favor of the Commonwealth against the Philadelphia Company for the sum of five thousand dollars, with interest.

[See preceding case.]

H. C. O.

May '89, 43.

June 1, 1891

Commonwealth v. Northern Electric Light and Power Co.

Corporations—Taxation—Act of June 30, 1885—Manufacturing companies—Electric light companies.

A company that produces electricity and sells it to customers for the generation of light, heat, or power, is not a manufacturing company within the meaning of the Act of June 30, 1885 (P. L. 193), exempting the capital stock of manufacturing companies from taxation.

Appeal of the Northern Electric Light and Power Company, defendant, from the judgment of the Common Pleas of Dauphin County, upon an account settled by the auditor-general for tax on capital stock, for the tax year 1886, under § 4 of the Act of June 7, 1879.

The case was, by agreement of counsel, tried by the Court without a jury, and the facts as found by SIMONSON, P. J., were as follows:—

"(1) Defendant is a Pennsylvania corporation, chartered under the provisions of the Corporation Act of 1874 (P. L. 73), and its several supplements, for the purpose, as stated in the application for a charter, of 'carrying on the business of manufacturing, procuring, owning, and operating various and different kinds of apparatus and machinery used in producing light, heat, or power by electricity, and to establish, put up, and run circuits; to use electricity in lighting streets and buildings, or to furnish it for heat or power, and to construct, erect, or set up all kinds and

character of machinery and supplies used directly or indirectly as a part or in connection with or incidental to an electric plant for the arc or incandescent light, and necessary for the establishment, maintaining, and running of such a plant.' The business in which defendant is actually engaged is in furnishing light by electricity by the Thomson-Houston system only, to customers at an agreed price.

"(2) Defendant made a report for the year embraced in the settlement, as required by the Act of 1879, appraising its capital stock, upon which a dividend for a less amount than six per cent. had been made during the tax year, at \$100,000, and on January 31, 1888, the auditor-general settled an account against it for tax on capital stock, in accordance with said report, amounting to \$300, under section 4 of the Act of 1879 (P. L. 114), and this is an appeal from said settlement.

"(3) The report, containing the appraisement, was made under protest, defendant claiming to be exempt from taxation, because it is, as it avers, a manufacturing corporation, and, therefore, within the terms of section 20, of the supplement to the Act of June 7, 1879, passed June 30, 1885, which repeals the revenue laws of this Commonwealth so far as they apply to manufacturing corporations. (P. L. 1885, p. 194.)

"(4) Defendant claims, in its specifications of appeal, that a considerable portion of its capital stock is invested in, and represents patent rights granted by the government of the United States, and that the portion of its stock so invested is not taxable. But no evidence was given on the trial to establish this allegation, or which tended to show that the value of any patent rights was included in the appraisement, or that any capital invested in patent rights is taxed by the settlement appealed from. On the contrary, the proof showed, and we find as a fact, that the patent rights are worthless, and that the said settlement does not tax any capital so invested.

"(5) In addition to the foregoing facts we adopt the facts found in the opinion filed herewith in the case of the Commonwealth v. United States Electric Lighting Co. (427 June Term, 1888), taken from the testimony of Prof. Henry Morton, as fully as if set out at length herein; this testimony being, by agreement of counsel, considered as taken in this case also.

"For the reasons given in the opinion just cited, which we adopt as if filed in this case, we find the following

"CONCLUSIONS OF LAW.

"*First.* Defendant is not a manufacturing corporation, and is not exempt from taxation on its capital stock by section 20 of the Act of June 30, 1885, but is subject to the tax on capital

stock imposed by section 4, of the Act of June 7, 1879.

"*Second.* The 4th section of the Act of June 7, 1879, is not unconstitutional because in conflict with section 1, of Article IX., of the Constitution of Pennsylvania.

"*Third.* Said section is not unconstitutional and void because in conflict with section 1, of Article XIV., of the Amendments to the Constitution of the United States.

"*Fourth.* Defendant is not taxable upon so much of its capital stock as is invested in patent rights, and the appraisement made by the officers of defendant does not include any valuation upon said rights, nor is any capital invested in them taxed or intended to be by the judgment directed to be entered in this case.

"*Fifth.* The Commonwealth is entitled to judgment as follows:—

Tax at three mills on \$100,000,	\$300 00
Interest at 12 per cent. from April 27, 1888,	36 60
Attorney-General's commission,	15 00
Total,	\$351 60

"For which amount judgment is directed to be entered against defendant if exceptions be not filed within the time limited by law."

The opinion of SIMONSON, P. J., in Commonwealth v. United States Electric Lighting Co., adopted as part of the finding and opinion of SIMONSON, P. J., in the present case, is as follows:—

COM'N v. U. S. ELECTRIC LIGHTING CO.

"This case was, by agreement of the parties, tried by the Court without a jury. The following are the

"FINDINGS OF FACT.

"(1) Defendant is a Pennsylvania corporation, chartered under the provisions of the Corporation Act of 1874 (P. L. 73), and its several supplements, and is engaged, in Philadelphia, in the business of furnishing light to customers by electricity through the medium of the arc electric lamp, for which the customers pay a fixed rate per day. The manner in which the light is produced is stated as follows, in his testimony by Prof. Henry Morton, president of the Stevens Institute of Technology, Hoboken, New Jersey, an expert in electricity and electric science, of very great experience: 'The coal is burned in a furnace under a steam boiler; the steam is used in a steam engine to produce motion—produce power, as we call it, and the power is used to rotate the armature in a certain relation with what we call the magnetic field. Now, when the armature turns around in the presence of the magnetism of the magnetic field, currents are produced in the wires of which the armature consists, and those currents are carried along the wire, and

affect the lamps when they reach them. And it is by that means that the electric force, or electricity, or electric power, is generated; and generated, you see, in consequence of the operation of those instrumentalities, the source being the coal burned under the boiler, and the result being those various transformations by which we finally reach the current which passes into the lamp, and is then again transformed into light.

"The electricity, which furnishes the light, does not exist until the armature revolves. The revolution of the armature brings into being something that did not exist before—that is, this electric energy, or energy in this electric form. When the motion begins, in most machines it begins by development from a minute quantity. From that minute and insignificant quantity the revolution of the apparatus causes a development and the accumulation of the fluid, and accumulating as the result of that, and developing the current of electricity; and then this passes out and on to the wires, and there is the moment of creation—we may say its creation. But its source in the philosophic sense is the latent energy of the coal. If the coal is not burned we cannot have the engine moved, nor the dynamo, and therefore we cannot get the electricity; and the electricity is derived, at its prime origin, from the coal; but not, however, extracted from the coal—it was not there, but created by utilizing the latent energy of the coal.

"The electricity which is created and gathered passes into the wire, and clear through the wire. A dynamo machine may be likened—as being perfectly analogous, in one sense—to a pump, which pumps something through a series of pumps; and when we want to explain and work out problems on this subject of electricity, it is common for every one to turn from books, and to take the pumping of water through pipes as an analogy, and better than books.

"In the arc system, light is thus produced: The two points in the ordinary lamp—the two poles of the current, or the two carbon rods, which are suspended in it, are first brought in contact, so as to allow the electricity to gain a full, abundant play through their points. Being in connection, the electricity begins to flow. Having established this flow, the points are slowly separated by a slight interval. As they are separated, the distance being infinitesimal, and very slowly, the energy of the current enables it to spring across the minute interval, and when it does so it produces a great heat, both at the point which it leaps from, and which it leaps to, and it vaporizes the carbon, and also, by special electric action through the points, and tearing through the particles of carbon, it evolves gas; and so the space between the poles, as they are slowly drawn apart, is filled with an amount

of gas vapor, and the vapor becomes intensely hot by the action of the current upon it, and also the carbon, a very combustible body in the presence of air, burns—and that is the true flame of gas, different only in degree in the candle—the solid matter of the gas is first burned in the vapor, and this burns—and that is the burning of the candle.

"In the case of the electric light, we have some combustion, or a portion of the combustion, by the carbons themselves, which burning, forms carbonic acid, and that gives a part of the light; but only a portion. Considerably the larger proportion of the light developed in the arc, as we call it, is the light produced by the passage of electricity through that vapor; but the light so developed has its origin—the energy which there becomes light has its origin—in the burning of coal under the boiler of the engine."

"The secretary and treasurer of defendant made a report to the auditor-general, as required by law, of its capital stock for the year embraced in the settlement, showing that during the year one dividend of two and one half per cent. on the capital stock of \$1,000,000 had been paid, and appraised the capital stock at \$100,000. The auditor-general was not satisfied with this appraisement, but without asking the officers of the company defendant to make any other, he valued the capital stock in the settlement at \$416,666.66 $\frac{2}{3}$, and settled the tax upon that amount. The basis upon which this valuation was made by the auditor-general, was the assumption that a capital stock of one million dollars paying a dividend of two and one-half per cent. was worth the amount at which he valued it. The testimony shows, however, and we find as a fact, that this dividend of 2 $\frac{1}{2}$ per cent. was not earned during the year, but if earned at all was the result of the operations of the company from its organization in September, 1881, up to 1885. We further find as a fact, that a large part of the capital of the company was, at and soon after its organization, invested in the purchase of patent rights, which at the time of the report and appraisement, made by the secretary and treasurer of the company, had become worthless, and that the appraisement made by the officers of the company was correct and represented the full value of the stock at that time. In making this appraisement they did not put any value upon the patent rights. No testimony was given on behalf of the Commonwealth on the trial to show that the capital stock of the defendant was, at the time the report and appraisement were made, of any greater value than \$100,000, the sum at which it was appraised.

"The return and appraisement spoken of above was made under protest, defendant claiming that the character of the business of the company,

to wit: engaging in and carrying on the business of buying, manufacturing, and selling machinery for the production and distribution of electricity, and of producing electricity and of selling and furnishing the same for light, heat, and power or for any other purpose, entitled it to exemption from taxation as a manufacturing corporation.' But no evidence was given upon the trial to show that the company was in any way engaged in manufacturing machinery of any kind.

"By section 4 of the Act of June 7, 1879 (P. L. 112), all corporations with certain exceptions that could not include the corporation defendant, were made liable to a tax on capital stock. Sec. 20 of the Act of June 30, 1885 (P. L. 193), which is a further supplement to the Act of 1879, enacts: 'That the tax laid upon manufacturing corporations by and under the revenue laws of this Commonwealth be and the same are hereby abolished as to such corporations, and the laws under which such taxes are laid and collected be and the same are hereby repealed so far and so far only as they apply to and affect manufacturing corporations;' with certain provisos, which cannot affect this case.

"Defendant claims that it is a manufacturing corporation and is exempted from the tax on capital stock by this section of the Act of 1885.

"It is a well-settled principle that when a tax is claimed, a clear warrant of law for its imposition must be shown before it can be collected. And it is equally well settled that when a tax is clearly imposed by general Act, any one claiming exemption must show clearly that such exemption exists. The principle, as stated in *Cooley on Taxation*, 146, is: 'The intention to exempt must in any case be expressed in clear and unambiguous terms; taxation is the rule, exemption is the exception. All exemptions are to be strictly construed. They embrace only what is within their terms.'

"To the same effect is *Academy of Fine Arts v. Philadelphia County* (22 Pa. 496), where it is said: 'No interests, falling within the general description of taxable property, can claim exemption from bearing their just proportion of public charges, unless the exemption be so clearly expressed in the statute as to admit of no other construction. It is never to be presumed that the Legislature intend to lay unequal burdens upon the people; and their enactments are not to be construed so as to produce that result, unless the intent is so plainly expressed as to render it unavoidable.'

"Defendant is clearly included in section 4 of the Act of 1879; it must, therefore, to be relieved, show that it is unmistakably included in the exemption provided for in section 20 of the Act of 1885. In other words, it must show clearly that it is a manufacturing corporation.

"We have not been referred to, nor have we been able to find, any definition of the terms 'manufacture' or 'manufacturing,' that do not limit them to the production of material substances. In *Brande's Encyclopædia*, 'manufacture' is defined: 'The term employed to designate the changes or modifications made by art or industry in the form or substance of material articles, in the view of rendering them capable of satisfying some want or desire of man; and "manufacturing industry" consists in the application of art, science, or labor to bring about certain changes or modifications of already existing materials.' Webster defines manufacture to be 'the operation of making wares of any kind, the process of reducing raw materials to a form suitable for use, by the hands, by art, or by machinery;' and a manufactured article to be 'anything made from raw materials by the hand, by machinery, or by art;' and practically the same definition is given by Worcester, who, explaining merchandise, goods, ware, and produce as synonyms, says that 'wares are manufactured and may be goods or merchandise.'

"In an extended note to *Engle v. Sohn* (52 Am. Rep. 103), reference is made to a large number of cases in which the question arose what was a manufacture or who was a manufacturer. And in every case in which it was held that either term applied, it was assumed that the articles produced must be material substances.

"Whatever electricity may be, it is manifestly and admittedly not a material substance, and whatever electric light companies do, they do not, in generating or evolving electricity 'make changes or modifications by art or industry in the form or substance of material articles.' They do not make 'wares of any kind,' nor 'reduce raw materials to a form fit for use.'

"Because of the novelty of the subject, and of our desire to do justice to the defendant, we have adopted the language of its expert witness at considerable length in the finding of facts; but when all has been heard that can be said on the subject, nothing has been said to lead to the belief that electricity is a material substance, nor is it claimed by any one so to be; therefore, its production or generation or evolution does not come within the authoritative lexicographic, scientific, or legal definition of the terms 'manufacture' or 'manufacturing;' and hence we cannot say that defendant manufactures electricity. It is, however, strenuously contended by defendant's counsel, that, even if it does not manufacture electricity, it does manufacture and sell light, and for that reason is a manufacturing company. But what is light? In *XIV. Encyc. Brit.*, 576, it is said: 'Sound may be defined as any effect on the sense of hearing; and in the same way

light may be defined as any effect on the sense of sight.' And in the same authority (VIII., 569), in the article 'Ether,' it is said: 'That light is not itself a substance may be proved from the phenomenon of interference. A beam of light from a single source is divided by certain optical methods into two parts, and these, after travelling by different paths, are made to reunite and fall upon a screen. If either half of the beam is stopped, the other falls on the screen and illuminates it, but if both are allowed to pass, the screen in certain places becomes dark, and thus shows that the two portions of light have destroyed each other. Now, we cannot suppose that two bodies when put together can annihilate each other; therefore light cannot be a substance.'

"So far as is at present known, it is the undulations of that which, because they do not know what it is, scientists call the 'luminiferous ether' which produce, 'on the sense of sight,' the effect of light. But the undulations are no more material substances than the light itself. They are to the ether what waves are to water, successive motion of different 'particles. Another analogy is the undulations in the air, which produce the 'effect on the sense of hearing' which we call sound. These undulations with the telephone by electricity produce the effect of sound at great distances, and if we might judge by analogy we should be inclined to say that it is the undulations of the 'luminiferous ether,' which, by the use of electricity, by means of electric wires, are induced and extended to the lamps and 'produce the effect of light.' And that it might, with the same reason, be said, that in the use of the telephone sound is manufactured, as that in the use of the electric lighting apparatus there is a manufacture of light.

"Without enlarging further upon a subject of which we confessedly know very little, we content ourselves with saying that defendant has not, in our opinion, so clearly shown itself to be a manufacturing corporation as to warrant us in holding that it is exempt from taxation upon its capital stock.

"We do not overlook the argument of counsel, based upon the language used by the Legislature in the Corporation Act of 1874, which in section 34, provided, among other things, that gas companies, or companies for the supply of light and heat, may erect and maintain 'the necessary buildings, machinery, and apparatus for "manufacturing" gas, heat, or light from coal or other material, and distributing the same;' and in the supplement thereto, of June 2, 1887, that: 'Where any such company shall be incorporated for the supply of heat, light, and fuel, or any of them, by any process of "manufacture," it shall have authority,' etc.; but we understand that, in these Acts, the term manufacture is used in the

sense of producing or furnishing, and as a convenient single term sufficient for the purpose in view, but not intended as a legal definition or extension of the terms 'manufacture' or 'manufacturing.'

"The same argument is made from the language of Mr. Justice GREEN, in *Emerson v. Commonwealth* (108 Pa. 111), in which he says: 'Neither light nor heat can be produced by any human agency except by some species of manufacture. If either is the result of the mere combustion of natural substances, that very combustion is a method of manufacture.' But it is manifest that the term 'manufacture' is here used in its widest sense, as the antithesis to production by natural causes, and that it does not and was not intended to furnish any authority or criterion for the construction of section 20 of the Act of 1885.

"We do not think that corporations of the kind to which defendant belongs come within the policy of the Legislature in enacting sec. 20, which we understand to be the proposed encouragement to manufacturing corporations to establish themselves and carry on their operations within the limits of the Commonwealth rather than beyond its borders; a policy which could apply only to manufacturing of such a nature that they might be located in one place or another as interest and preference might dictate. But electric light companies, if they exist at all, must exist in the towns and cities to be supplied with light, and cannot choose whether they will carry on their operations within or without the Commonwealth. Therefore, exempting them from taxation would probably not bring capital into the State, and taxing them would certainly not drive it out.

"We have recently decided that capital stock invested in patent rights is not taxable, and if the evidence showed that any part of the amount of the appraisal represented the value of patent rights and was taxed in the settlement, we would say that, to that extent, the settlement was erroneous (*Commonwealth v. United Gas Improvement Company*, Dauphin County Common Pleas). [7 Pa. C. C. Rep. 116.]

"But as we hold that the tax must be calculated upon the amount of the appraisal as made by defendant's officers, and as this does not include the valuation of any patent rights, the tax must be calculated upon the whole amount of the appraisal.

"Defendant specifies, as objections to the settlement, in its appeal, that the 4th sec. of the Act of June 7, 1879, is unconstitutional and void, because in conflict with sec. 1, Article IX., of the Constitution of Pennsylvania, which requires that all taxes shall be uniform upon the same class of subjects within the territorial limits of

the authority levying the same, and also because it is in conflict with sec. 1, of Article XIV., of the Amendments to the Constitution of the United States, which provides that no State shall make or enforce any law which shall abridge the privileges or immunities of the citizens, etc. We do not think that either of these objections can be sustained.

"We have, therefore, arrived at the following—

"CONCLUSIONS OF LAW.

"(1) Defendant is not a manufacturing corporation, and is not exempt from taxation on its capital stock by section 20 of the Act of June 30, 1885, but is subject to the tax on capital stock imposed by section 4 of the Act of June 7, 1879.

"(2) The 4th section of the Act of June 7, 1879, is not unconstitutional, because in conflict with section 1, of Article IX., of the Constitution of Pennsylvania.

"(3) Said section is not unconstitutional and void because in conflict with section 1, Article XIV., of the Amendments to the Constitution of the United States.

"(4) The settlement appealed from in this case is erroneous, so far as the capital stock of defendant is taxed upon a valuation other or greater than that fixed in the report and appraisement made by the secretary and treasurer of defendant.

"(5) Defendant is not taxable upon so much of its capital stock as is invested in patent rights, and the appraisement made by the officers of defendant does not include any valuation upon said rights, nor is any capital invested in them taxed or intended to be by the judgment directed to be entered in this case.

"(6) The Commonwealth is entitled to judgment as follows:—

Tax at three mills on \$100,000	\$300 00
Interest at 12 per cent. from April 27, 1888,	36 60
Attorney-General's commission,	15 00
Total,	\$351 60

for which amount judgment is directed to be entered against defendant if exceptions be not filed within the time limited by law."

From the judgment, as stated *ante*, p. 521, the Northern Electric Light and Power Co. appealed, specifying for error that the Court erred (1) in the first conclusion of law; (2) in directing judgment to be entered in favor of the Commonwealth, and (3) in not directing judgment to be entered for defendant.

M. E. Olmsted (with him Charles E. Morgan, Jr., and Francis D. Lewis), for appellant.

William U. Hensel, attorney-general (with him James A. Stranahan, deputy attorney-general), for appellee.

October 5, 1891. WILLIAMS, J. This case presents a new and an interesting question, viz., is a company that produces electricity, and sells it to customers for the generation of light, heat, or power, a manufacturing company within the meaning of the Act of 1885, excepting the capital stock of manufacturing companies from taxation?

This case was tried without a jury, and the facts upon which the judgment was based appear in the findings of the Court below. One of these which was based upon the opinion, and largely expressed in the words of an expert electrician who was called as a witness, asserts that the electricity sold by the company was created by the process adopted by the company. The learned Judge says: "The electricity which furnishes the light does not exist until the armature revolves. The revolution of the armature brings into being something that did not exist before—that is, this electric energy, or energy in this electric form."

In the same finding he described the process by which this product is evolved or created, as follows: "Coal is burned under the boilers producing heat. The heat generates steam in the boilers which moves the engine. The engine supplies the power by which the armature is made to revolve. The revolution of the armature produces electric currents where they did not exist before. The electricity thus generated is carried over wires provided by the company and delivered to its customers, where it is used to produce light. The process by which electricity is made to furnish light is found to consist of the movement of an electric current from one carbon point to another, which are made part of its circuit. In leaping from one point to another great heat is developed by the energy of the current. This heat liberates or evolves from the carbons a gas which it burns. The light is thus found to be due partly to the passage of the electric current between the carbon points and partly to the combustion of the gas furnished by the heated carbons."

Notwithstanding these findings, which showed a creation, or "bringing into being where it did not exist before," of the electricity sold by the company, the learned Judge held as a matter of law that the process was not one of manufacture, because the product was not a material substance. Conceding that the thing sold was "brought into being," made, manufactured, in the common use of that word, he denied that such making was in a legal sense a manufacture, because it did not appear affirmatively of what the mysterious product was made, and that it was material as matter is now defined. This conclusion appears to have been drawn from the derivation and definition of the word manufacture, and is forcibly presented

in a learned opinion in which lexicons and books of reference are largely drawn upon. It is very clear that the word originally meant hand made. It is equally clear in the light of the definitions collated by the learned Judge, that its meaning has expanded with the advance of the arts and sciences until it has come to mean, as a verb, the making of anything by human art or skill (Burrell's Law Dict.), and as a noun, anything made by art or skill (Rap. & Lawrence Law Dic.). The mere appropriation of an article which is furnished by nature, is not a manufacture. Thus, the liberation of natural gas or oil from the earth and its transportation to consumers, is not a manufacture; but the production of illuminating gas is. (*Nassau Gas-Light Co. v. Brooklyn*, 89 N. Y. 409; also *Emerson v. The Commonwealth*, 108 Pa. 111.) The collection, storage, preparation for market, and transportation of ice, is not a manufacture, but the production of ice by artificial means is. (*People v. Knickerbocker Ice Co.*, 99 N. Y. 181.) A telegraph company produces electricity by artificial means, but it uses it in its own business as a carrier of messages for the public; so does a telephone company. Both receive messages for carriage and deliver them at the point of destination. They transport for their customers. This company, whose character we are considering, sells the electricity it makes, or "brings into being," as a commodity. It provides the lamps or appliances for the use of its customers, by means of which the light is produced; it sells them the electricity, measures it as it is delivered, and is paid according to the quantity furnished. Whatever electricity may be, it seems to be absolutely within the power and under the control of the company that brings it into being. It is compelled by the process employed to come into being. It is secured, stored, poured out, or liberated at will. Its manifestations are both seen and felt. It moves with incredible velocity and power. It carries the tones and inflections of the human voice, or moves loaded cars, depending on the volume of the current and the manner of its application. It may be, in the hands of the physician, a soothing remedial agent; and in the hands of the law, an instrument of execution swifter and surer than the headsman's axe. It may be too early to say just what it is. The scientist, whose views the learned Judge adopted, may be right or wrong. We have no need to decide that question.

Laws are written ordinarily in the language of the people and not in that of science; and if this case depended on the question on which it turned in the Court below, we should be led by the findings of fact to a different conclusion of law from that which was there reached, and hold that this company was a manufacturing company. But we think the controlling question in this case is

that of the sense in which the words "manufacturing companies" are used in the statute under consideration. It provides that the taxes laid on corporations by the revenue laws of the Commonwealth are repealed or abolished as to manufacturing corporations. Now if there were a class of corporations existing at that date known by the name of manufacturing companies or corporations, we must assume that the Legislature intended that class when it used the name by which the class had been known in previous legislation; and we need go no farther than the statute book to determine the legislative intent in the Act of 1885.

The Act of 1879, imposed a capital stock tax on all corporations alike, so that we get no help from it. Looking back to the laws under which corporations have been created we find that in 1836 an Act was passed providing for the organization of corporations for the manufacture of iron, from the ore, with coke or mineral coal, which was subsequently extended so as to include companies using charcoal. This was followed in 1849 by a law which provided for the organization of "manufacturing companies" as a class of corporations. It included the manufacture of woolen, cotton, flax, or silk goods, of iron, paper, lumber or salt. In 1850 it was extended so as to include the manufacture of glass. In 1851 printing and publishing were taken into the class. In 1852 the making of mineral paints and artificial slate was included. In 1853 quarrying and mining. In 1859 the manufacture of leather and leather goods, mineral and carbon oils were included by a series of Acts passed in 1856, 1859, and 1850. It will thus be seen that the words "manufacturing corporations" had been employed as the name of a definite class of corporations for many years; and that the kinds of manufacture embraced within the class were not left to be settled by conjecture, or by reasoning built upon definitions, but had been settled by actual enumeration in the statutes referred to and some others. When the Constitution of 1873 was adopted, and then the general corporation Act of 1874 was passed in obedience to its requirements, manufacturing corporations as a class were provided for, and the kinds of manufacture included made certain by a long series of statutes. The Act of 1874 provided a uniform mode for the incorporation of companies formed for profit, describing them as corporations of the second class, while corporations not for profit composed the first class. In the second class were included, among others, companies formed for "carrying on of any mechanical, mining, quarrying, or manufacturing business, including all of the purposes covered by the provisions of the Act of the General Assembly, entitled, An Act to encourage manufacturing operations in this Commonwealth, approved April

7, 1849," and its several supplements. Thereafter any company formed for the prosecution of the objects enumerated in the Act of 1849 and its supplements, entered the class of manufacturing corporations through the gate opened by the Act of 1874 instead of through previous legislation. But whether they came in the one way or the other, if they were within the class as the Legislature had made it, the Act of 1885 relieved them from the tax imposed by the Act of 1879. A company supplying illuminating gas is in the general sense of the word, a manufacturing company (*Nassau Gas-Light Co. v. Brooklyn, supra*), but it is not a member of the statutory class built up under the Act of 1849, nor is any corporation engaged in the service of its customers in a quasi public capacity. A municipality may furnish water or light to its citizens. A company performing this service may be said to perform a quasi public or municipal function, which the municipality may disturb at its pleasure or supersede altogether. Such companies have never been included in any of the legislation provided for the encouragement and protection of manufacturing corporations and have no right to share in the benefits of such legislation. They really form a class by themselves. When the Act of 1885 was passed laws had been made in adjoining States which gave encouragement to the establishment of factories by exempting them from certain forms of taxation. The mischief to be remedied was the danger that such legislation might lead to the removal of capital and labor from this State to others, to the detriment of the business and prosperity of our own. The remedy provided was the removal of the tax imposed by the Act of 1879 so as to remove the inducement to leave the State. It was as broad as the mischief which it was intended to meet, and made applicable to the class which since 1836 it had been the policy of the State to encourage, viz., "manufacturing corporations." It did not reach financial corporations, like banks and insurance companies; nor transportation companies, nor companies performing functions partaking of a municipal character; but that class of productive industries which the Legislature had sought to encourage as a means of bringing and keeping within our borders capital and labor, to be employed in the development of our mineral wealth, and in the production of the staples of commerce.

We think the learned Judge reached a correct conclusion in this case. The appellant is not within the exemption or immunity provided by the Act of 1885; but we prefer to rest our judgment on the definition of "manufacturing corporations" which the Legislature has adopted and adhered to for more than half a century, rather

than upon the meaning of the word "manufacture," as it is given by lexicographers.

The judgment is affirmed.

[See next case.]

W. M. S., Jr.

May '91, 33.

June 3, 1891.

Commonwealth v. Brush Electric Light Co.

Corporations—Taxation—Acts of June 7, 1879, and June 30, 1885—Electric light companies—Capital stock paid for the use of appliances not exempt from taxation—Patent rights.

A company that produces electricity and sells it to customers for the generation of light, heat, or power, is not a manufacturing company within the meaning of the Act of June 30, 1885 (P. L. 193), exempting the capital stock of manufacturing companies from taxation.

The capital stock of an electric light company used to pay for the use of appliances from a parent company to enable it to enter upon its business, is not invested in patent rights so as to relieve it from the operation of the tax laws of the State.

The fourth section of the Act of June 7, 1879, regulating the method of fixing the taxation on the capital stock of corporations is not in conflict with either section 1, Article IX., of the Constitution of Pennsylvania, or section 1, Article XIV. of the Amendments to the Federal Constitution.

Appeal of the Brush Electric Light Company, defendant, from the judgment of the Common Pleas of Dauphin County, upon an account settled by the auditor-general for tax on capital stock, for the tax years 1886 and 1887.

The case was, by agreement of the parties, tried by SIMONTON, P. J., without a jury, and the facts as found by him were as follows:—

"(1) Defendant is a Pennsylvania corporation, chartered March 31, 1881, under the provisions of the Corporation Act of 1874 (P. L. 73), and its several supplements, for the purpose of carrying on the business of manufacturing, procuring, owning, and operating the various apparatus used in producing light, heat, or power by electricity or used in lighting buildings, with the right to acquire, hold, manufacture, and manage such property, real, personal, and mixed, as may be deemed necessary or advisable to use in connection therewith, and with such other rights as are provided for in the Act of Assembly, entitled 'An Act to provide for the incorporation and regulation of certain corporations,' approved April 29, 1874, and its several supplements; the defendant subsequently accepted the provisions of the Act of May 8, 1889 (P. L. 136), by filing such acceptance in the office of the secretary of the Commonwealth.

"(2) On the trial of a former case, Professor Henry Morton, president of the Stevens Institute of Technology, Hoboken, New Jersey, an expert in electricity and electric science, of great experience, testified, and it was agreed on the trial of this case that if called on would now testify, that the manner in which light is produced by electricity is as follows: [Here follows the testimony that appears in the opinion in the case of Commonwealth v. U. S. Electric Lighting Co., to be found in the report of Commonwealth v. Northern Electric Light and Power Co. (preceding case), ante, p. 521.]

"And we find the facts to be as thus stated.

"(3) The business in which defendant is engaged is that of supplying light to its customers in the city of Philadelphia, by the means of its dynamos, wires, and arc lights or lamps; and it is not engaged in furnishing either heat or power, nor in manufacturing electric or other apparatus.

"(4) Defendant has a capital stock of one million dollars, eight hundred thousand dollars of which was issued and paid to the New England Electric Company, of Boston, now called the Brush Electric Light Company, of New England, for the right to use the patents within the county of Philadelphia, which enables the defendant to carry on its business and to furnish light to its customers, as above stated, and without which it could not carry on said business; and the other two hundred thousand dollars of capital stock was issued and paid for in cash by the other stockholders of the company, and invested in the real estate, dynamos, wires, poles, and other plant of defendant.

"(5) It is admitted and agreed for the purposes of this case, and we therefore find, that about one-half of the corporations taxable on capital stock, under the Acts of 1877 and 1879, pay no dividends, or dividends less than six per cent., and are, therefore, taxable at the uniform rate of three mills on the actual cash value of their capital stock. The other one-half pay dividends of six per cent. or more, and their capital stock is taxed at one-half mill for each one per cent. of dividend. Capital stock on which less than six per cent. dividend is paid is often appraised above par, and the companies whose stock is thus appraised pay more tax than if they paid six per cent. or more in dividends, and more tax proportionately than other companies which do pay greater dividends. Thus in 1880, 1881, and 1886, when defendant paid dividends of less than six per cent., it was taxable under the law at three mills on valuations largely above par, (in 1881, twenty-three per cent. above,) while, had it paid a six per cent. dividend, its tax would have been only three mills on par, and numerous other railroad companies which did pay

six per cent., and the actual value of whose stock was greater than that of defendant, were liable to and did pay only three mills on par. Owing to the varying conditions of corporate affairs, property and business, the rate of dividends is not a certain measure of the actual value of corporate stocks.

"The following tables prepared from the evidence, show with reasonable exactness the operation and effect of these Acts, with respect to taxation of capital stock:—

Companies which, having paid dividends amounting to six per cent. or more, were taxed at one-half mill upon their capital stock for each one per cent. of dividends.

Name of Company.	Dividends.	Rate of Tax.	Equal to tax on actual value of
Bethlehem Iron Company	8 per ct.	4 mills on par.	2½ mills
Citizen's Pass. Ry. Co.	15 "	7½ "	1½ "
Columbia Gas Light & Fuel Co.	6 "	3 "	1¼ "
Continental Pass. Ry. Co.	12 "	6 "	2½ "
Coudersport & Alleg. RR. Co.	10 "	5 "	4 "
Del. Lack. & Western RR. Co.	7 "	3½ "	2.45 "
Delaware & Hudson Canal Co.	6½ "	3½ "	2.12 "
Germantown Pass. Ry. Co.	10 "	5 "	2½ "
Green & Coates St. Pass. Ry. Co.	12 "	6 "	4.4 "
Lomb. & South St. Pass. Ry. Co.	16 "	8 "	2.1 "
Lackawanna Iron & Coal Co.	25 "	12½ "	7.44 "
Pennsylvania Coal Co.	16 "	8 "	2.67 "
Philadelphia Company	8 "	4 "	5.34 "
Philadelphia Traction Co.	6½ "	3½ "	2.38 "
Penna. & N. Y. Canal & RR. Co.	7 "	3½ "	2.19 "
17th & 19th Sts. Pass. Ry. Co.	6 "	3 "	" "
United Gas Improvement Co.	8 "	4 "	2.85 "
Union Pass. Ry. Co.	20 "	10 "	" "
West Phila. Pass. Ry. Co.	20 "	10 "	" "
Catawissa Railroad Co.	7 "	3½ "	2.92 "
Clevesfield & Pitts. RR. Co.	7 "	3½ "	2.34 "
Connecting Railway Co.	6 "	3 "	2.4 "
East Mahanoy Railway Co.	6 "	3 "	2.4 "
Erie and Pittsburgh Ry. Co.	7 "	3½ "	2.34 "
Hanover & York Railway Co.	6 "	3 "	2.4 "
Harris, Port. & Mt. Joy RR. Co.	7 "	3½ "	2.34 "
Northern Central Railway Co.	8 "	4 "	2.85 "
North Penn RR. Co.	8 "	4 "	2.35 "
Phila. & Trenton RR. Co.	10 "	5 "	1.08 "
Phila. Wilm. & Balt. RR. Co.	7 "	3½ "	2.68 "
Pitts., Ft. W. & Chi. RR. Co.	7 "	3½ "	2.34 "
Pitts. & Lake Erie RR. Co.	6 "	3 "	2.4 "
Pitts., McKees, & Young RR. Co.	6 "	3 "	2.4 "
Shamok, Val. & Potter RR. Co.	6 "	3 "	2.4 "

Companies which either paid dividends amounting to less than six per cent., or paid none at all, and were taxed three mills upon the appraised value of their stock, the same being above par.

Name of Company.	Dividends.	Excess of appraisal over par.	Excess of tax above what it would have been if 6 per cent. dividends had been paid.
Bloss Coal Mining & RR. Co.	5 per ct.	Par.	
Enterprise Transit Company	None.	48 per ct.	360 00
Lake Shore & Mich. S. RR. Co.	5 per ct.	7½ "	10,573 45
Lehigh Coal & Navigation Co.	5 "	6½ "	2,052 06
Lehigh Valley RR. Co.	5 "	7.62 "	21,202 53
Mortgage Trust Co. of Pa.	5 "	32.39 "	485 85
McKinley-Lanning L. & T. Co.	4 "	Par.	
Nequehoning Valley RR. Co.	5 "	6½ "	275 44
Northern Coal & Iron Co.	None.	Par.	
People's Passenger Ry. Co.	None.	556 "	8,340 00
Phila. Mort. & Trust Co.	5 per ct.	36 "	725 50

"(6) In the settlement appealed from defendant is charged for the year ending the first Monday of November, 1886, with a tax of three mills on \$250,000, the amount for which its capital stock was appraised for that year in the report made by it to the auditor-general. For the year ending

the first Monday of November, 1887, it is charged five and one-half mills upon its capital stock of \$1,000,000, it having during said year made a dividend of eleven per cent. upon said capital. The amount of this dividend was not all earned during said year, but represented the earnings of several preceding years.

"On these facts defendant claims in the first place entire exemption from taxation, on the ground that it is a manufacturing corporation; in the second place, exemption upon so much of its capital stock as was issued and paid for the right to use the patents under which it is doing business in the county of Philadelphia; and in the third place defendant claims that the Act of Assembly upon which the settlement appealed from is based is unconstitutional, and in conflict with the provisions of the State Constitution requiring uniformity of taxation, and with the provisions of the Fourteenth Amendment of the Federal Constitution.

"We have recently decided in *Commonwealth v. United States Electric Lighting Co.* (427 June Term, 1888, Dauphin County Common Pleas, 7 Pa. C. C. R. 90), that an electric lighting company, of the same character, and engaged in the same business as defendant, is not a manufacturing company, and is, therefore, not exempt from taxation upon its capital stock by sec. 20 of the Act of June 30, 1885, and without repeating it we adopt what is said in that case as our opinion on this point here. [The opinion in the case referred to will be found *ante*, p. 521.]

"We have recently decided in *Com. v. United Gas Imp. Co.* (Dauphin County Com. Pleas, No. 245 June Term, 1888, 7 Pa. C. C. R. 116), that capital stock invested in patent rights is not taxable. In that case the defendants were the absolute owners of the patent rights in question, while in this case they owned merely the exclusive right to the use of the patents within the city and county of Philadelphia, and it is therefore contended on behalf of the Commonwealth that the principle of that case does not apply here. We are, however, of the opinion that this contention cannot be sustained. The capital of defendant is as really invested in the patent rights, and its ownership within the prescribed territory is as real, in the one case as in the other. The difference between them is not in kind, but only in degree, and we think that the same principles must be applied to this case as to that, and we are required by the decisions of the Supreme Court of the United States to hold, as we did in the former case, that so much of the capital stock of defendant as is invested in the patent rights in question is exempt from taxation, and that, to that extent, the settlement appealed from is erroneous.

"Defendant contends further, that, as applied

to the facts of this case, section 4 of the Act of June 7, 1879, is unconstitutional and void, because in conflict with sec. 1, Art. IX., of the Constitution of Pennsylvania, which requires that all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the same; and also because it is in conflict with sec. 1, Art. XIV. of the Amendments to the Constitution of the United States, which provides that no State shall make or enforce any law which shall abridge the privileges or immunities of the citizens. On the authority of *Com'th v. Delaware Div. Canal Co.* (123 Pa. 594), and *Com'th v. City of Chester* (Id. 626), we hold that the objection with respect to the State Constitution cannot be sustained, nor do we think the objection referring to the Constitution of the United States is valid.

"We therefore arrive at the following—

"CONCLUSIONS OF LAW.

"(1) Defendant is not a manufacturing corporation, and is not exempt from taxation on its capital stock by section 20 of the Act of June 30, 1885, but is subject to the capital stock tax imposed by section 4 of the Act of June 7, 1879.

"(2) Defendant is not taxable upon so much of its capital stock as is invested in patent rights within the city of Philadelphia; and the settlement appealed from, so far as it imposes a tax upon so much of the capital stock of defendant as is so invested, is erroneous and illegal.

"(3) The fourth section of the Act of June 7, 1879, is not in conflict with section 1 of Article IX. of the Constitution of Pennsylvania, and is not unconstitutional.

"(4) The said section is not in conflict with section 1 of Article XIV. of the Amendments to the Constitution of the United States.

"(5) The Commonwealth is entitled in this case to tax upon the one-fifth of the amount for which the capital stock of defendant was appraised for the year 1886, and to a tax upon the one-fifth of the capital stock of defendant for the year 1887, as follows:—

One-fifth of \$250,000.00—\$50,000.00; tax three mills,	\$150 00
One-fifth of \$1,000,000.00—\$200,000.00; tax five and half mills	1100 00
	\$1250 00
Interest at 12 per cent. from June 25, 1889, to April 30, 1890	127 08
Attorney-general's commission at 5 per cent.	62 50
Total	\$1439 58

"For which amount judgment is directed to be entered, if exceptions be not filed within the time limited by law."

Defendant filed exceptions, alleging that the

Court erred (1) In not finding, as an additional fact, that during the year ending with the first Monday of November, 1887, the actual value of the entire capital stock of defendant did not exceed \$385,000 or 38.50 per centum of its nominal or par value; (2) In its first conclusion of law; (3) In its third conclusion of law; (4) In its fourth conclusion of law; (5) In directing judgment to be entered in favor of the Commonwealth for \$1439.58; and (6) In not directing judgment to be entered in favor of defendant.

The Court sustained the first exception and overruled the others. Defendant appealed, specifying for error this action of the Court.

M. E. Olmsted and Wayne MacVeagh (with them *Charles E. Morgan, Jr., and Francis D. Lewis*), for appellant.

William U. Hensel, attorney-general (with him *James A. Stranahan*, deputy attorney-general), for appellee.

October 5, 1891. **WILLIAMS, J.** The "conclusions of law" reached by the learned Judge of the Court below in this case embrace four distinct propositions. The first of these, holding that the defendant is not a manufacturing company, is sustained by *The Commonwealth v. The Northern Electric Light and Power Company*, decided at the present term [*ante*, p. 520]. The second affirms that the capital stock used by the defendant to pay for the use of the appliances obtained from the New England Electric Light Company, to enable it to enter upon its business, is invested in patent rights. This conclusion is overturned by *The Commonwealth v. The Central District and Printing Telegraph Co.*, also decided at the present term [*ante*, p. 515]. The third holds the Act of 1879, so far as the third section comes under notice in this case, to be constitutional. This is justified by *The Commonwealth v. The Delaware Division Canal Co.* (123 Pa. 594).

Tax laws have not yet been devised that will work out absolute equality of burden. If the Constitution requires this, we have no tax laws. Taxes must be levied under general laws, and where the measure of value and the rate are uniform and applicable to all the members of the given class, the incidental hardships and inequalities must be borne. The Act of 1879 taxes the capital stock of corporations. But some stocks are of much and some of little value; how are these to be distinguished? The Act looks properly at the earning capacity of the stock or the business it represents as affording the best measure of its value. It takes the earnings that are divided, and adds those that are carried to sinking fund, and the total thus made is used as the standard of valuation. If these amount to six per centum or upward, the stock

is worth its face value or more, and for purposes of taxation it is valued at par. The rate of taxation slides upward with the sum of the amounts carried to dividend account and to sinking fund. If this amounts to just six per cent. on the capital, the rate is three mills on the dollar of the par value. If it is seven per cent., the rate is three and a half mills on the dollar, and so on at the rate of a half mill on the dollar for every one per cent. of advance in the earnings, as shown by combining the items selected for this purpose. But if this total is below six per cent., it is assumed that the stock is worth less than par, and provision is made for an appraisal of its value. When this is made, the rate of three mills is applied to the appraised value in order to ascertain the amount of the tax. Why the net earnings were not adopted as the proper measure of value, instead of so much of them as may be divided and carried to sinking fund, it is not material to inquire. The standard adopted is applied impartially. Whether it is the best one that could have been adopted or not, is more a legislative than a judicial question, and the learned Judge was right in his conclusion that the provisions of the Act of 1879, relating to this subject, are not objectionable on constitutional grounds.

The remaining proposition is that which fixes and declares the amount of the tax due. Whether this is right or not depends on whether the fact that the dividend is declared in a given year is conclusive evidence that the money was earned during that year. If there can be no explanation of the circumstances under which the dividend is made or the time when the money was earned, the learned Judge computed the amount due at the proper rate, and upon the proper valuation. If on the other hand the dividend is *prima facie* evidence only, then both the valuation and the rate adopted are upon the facts found incorrect. The stock of the defendant company is one million of dollars. It declared dividends in 1887 amounting to eleven per cent. on the par value of the stock, and if this was all that appeared on the subject, the learned Judge correctly held the stock to be subject to a tax of five and one-half mills on its par value. But he found as a fact that the dividends were made, not out of the earnings of 1887, but out of the accumulated earnings of several years; and that the stock was really worth during that year but thirty-eight and one-half dollars per share, having a face value of one hundred. It does not apportion the earnings among the six or seven years during which the company had been in business; but for purposes of illustration let us suppose that for four years it had earned an average of three per cent. Its returns to the auditor-general showing its earnings and financial condition each year,

furnished the elements for the appraisal of the stock, and upon the valuation so made the rate of three mills has been regularly applied, and the taxes paid down to 1887. In that year the company decides, for some reason, not to carry the accumulations longer in its treasury, but to divide them. Its business is not increased, the earning power of the stock has not been increased, its intrinsic value remains as before, at about one-third of its face value; but the State tax has advanced from about one mill to five and one-half mills on the dollar of the face value. On shares whose value has not increased, the taxes are multiplied five and one-half times. This results from giving to the dividend the effect of conclusive proof that the money it represents was earned during the year. The Act of 1879 does not require this, and the consequences are so harsh, and work such gross inequality, that nothing less than a plain expression of the legislative intent would induce us to hold such a doctrine. If the tax is assessed on the basis of the actual value, the result would be as follows: stock, face value, one million of dollars, actual value, three hundred and eighty-five thousand dollars. If the dividend is conclusive of the value, then the stock must be valued at par. The rate would then be one-half mill for each one per cent. of the dividend or five and one-half mills on the par value of the stock, equal to five thousand five hundred dollars. We are of the opinion that the dividend should be regarded as evidence *prima facie* that the money was earned during the tax year in which it was declared. The burden of proof is then on the corporation. If it can show clearly that the dividend was made out of the accumulated earnings of previous years, in none of which did its earnings reach six per cent., and in all of which it paid taxes on the appraised value of its stock, the *prima facies* is overcome, and the tax should be levied on the actual value ascertained as the law directs. This is not in conflict with Lehigh Crane Iron Company v. Commonwealth (55 Pa. 448), for the profits divided in that case were what remained after the payment year by year of six per cent. dividends.

The judgment is reversed and judgment is now entered as follows:—

Tax at 3 mills on stock \$1,000,000,	
valued at \$385,000	1155 00
Int. 12 per cent. from June 25, 1889	
Attorney-general's com., 5 per cent.	57 75

Total

[See preceding cases.]

W. M. S., JR.

May, '91, 22, 32.

June 2, 1891.

Commonwealth v. Edison Electric Light Co.

Corporations—Taxation—Acts of June 7, 1879, and June 30, 1885—Electric light companies—Capital invested in license to use patent rights not exempt from taxation.

A company that produces electricity and sells it to customers for the generation of light, heat, or power, is not a manufacturing company within the meaning of the Act of June 30, 1885 (P. L. 193), exempting the capital stock of manufacturing companies from taxation.

The capital stock of an electric company used to pay for the use of appliances from a parent company to enable it to enter upon its business, is not invested in patent rights so as to relieve it from the operation of the tax laws of this State.

Appeals by the Commonwealth of Pennsylvania and the Edison Electric Light Company of Philadelphia, from the judgment of the Common Pleas of Dauphin County, upon an account settled by the auditor-general for tax on capital stock of the Edison Electric Light Company of Philadelphia, for the tax year 1887.

This case, by agreement of the parties, was tried before McPHERSON, J., without a jury, and his findings of fact and conclusions of law were as follows:—

“(1) The defendant is a Pennsylvania corporation, chartered December 23, 1886, under the general corporation Act of 1874, for the purpose of ‘manufacturing and selling electrical light, heat, and power.’ (P. L. of 1887, p. 545.)

“(2) It was admitted upon the trial, and we find as a fact, that the electricity and the light applied by this company are produced as follows:—

[Here follows the testimony of Professor Morton, which will be found in the opinion of SIMONSON, P. J., in the case of Commonwealth v. U. S. Electric Lighting Co., appearing in the report of Commonwealth v. Northern Electric Light and Power Co., *ante*, p. 521.]

“(3) The business of the defendant, in the year 1887, was confined exclusively to preparing a plant for the purpose of supplying light to customers, by means of electricity, through the instrumentality of engines and dynamos, substantially as described in paragraph 2. The business of so supplying light did not begin until March, 1889.

“(4) During the tax year ending the first Monday of November, 1887, it declared no dividend, and its capital stock was appraised at \$140,000.

“(5) During said year its actual capital stock was \$140,000, and of this amount \$49,000 either

in cash or stock was issued and paid to the Edison Electric Light Company of New York, under an agreement and a license dated February 3, 1887, for the right to use its patents within the city of Philadelphia. Without this right the defendant could not carry on its business and furnish light to its customers. We find that said right was fairly worth the price paid for it, and in 1887 constituted in actual value ^{\$9,000}~~14,000~~ parts of all the property and assets represented by the defendant's capital stock. We make the said agreement and license part of this finding.

"CONCLUSIONS OF LAW.

"Two questions are raised here, both of which have already been decided by this Court; the first as to the alleged exemption from taxation, in *Com. v. U. S. Elec. L. Co.* (7 Pa. C. C. R. 90), and in *Com. v. Brush E. L. Co.* (No. 443 Sept. T., 1890, Dau. C. P.), and the second as to the taxability of capital stock invested in patents or in licenses thereunder in *Com. v. U. G. Imp. Co.* (7 Pa. C. C. R. 116), and *Com. v. Brush E. L. Co.* (No. 195 Sept. T. 1889 [*ante*, p. 527], and 443 Sept. T. 1890, Dau. C. P.). We refer to those cases for the reasoning which supports the following conclusions:—

"(1) Defendant is not a manufacturing corporation, and is not exempt from taxation on its capital stock by section 20 of the Act of June 30, 1885 (P. L. 193).

"(2) Defendant is not taxable upon so much of its capital stock as is invested in the right to use the patents above referred to, and the settlement appealed from is erroneous so far as it taxes said portion of defendant's capital stock.

"(3) The Commonwealth is entitled to recover as follows:—

Tax at three mills upon \$91,000 . . .	\$273 00
Interest at twelve per cent. from November 6, 1888, to January 3, 1891 . . .	70 68
Attorney-general's commissions . . .	13 65
Total	\$357 33

for which amount the prothonotary is directed to enter judgment, unless exceptions are filed as required by law."

To these findings both plaintiff and defendant filed exceptions, the Commonwealth's being as follows: The Court erred (1) in the fifth finding of fact, (2) in its second conclusion of law, and (3) in not entering judgment for the full amount of the Commonwealth's claim.

The defendant filed the following exceptions: The Court erred (1) in its first conclusion of law; (2) in not holding that, in so far as it imposed a tax upon the capital stock of the Edison Electric Light Company of Philadelphia, the Act of June 7, 1879, was repealed by the twentieth section of the Act supplementary to said Act approved June

30, 1885; (3) in directing judgment to be entered in favor of the Commonwealth for \$357.33; and (4) in not directing judgment to be entered in favor of defendant.

The exceptions of both parties were overruled and appeals were taken by both plaintiff and defendant, specifying for error the action of the Court in overruling their exceptions.

James A. Stranahan, deputy attorney-general (*William U. Hensel*, attorney-general, with him), for the Commonwealth.

M. E. Olmsted (*Samuel B. Huey* with him), for Edison Electric Light Co.

COMMONWEALTH'S APPEAL, MAY, '91, 22.

October 5, 1891. WILLIAMS, J. Two questions are raised in this case. The first is whether the appellee is a manufacturing company. While it might well be so regarded if the question was an open one, we have no doubt that it does not come within the class recognized by our Acts of Assembly relating to manufacturing companies; and the learned Judge of the Court below reached a correct conclusion upon this question for reasons given in the opinion of this Court just filed in the case of the Commonwealth *v.* The Northern Electric Light and Power Co. [*ante*, p. 520.]

The other question is whether any portion of the capital stock of the Philadelphia Company is invested in patent rights, and for that reason exempt from taxation? The Court below was of the opinion that stock issued to the Edison Electric Light Company of New York amounting to about forty-nine thousand dollars, out of a total capital of one hundred and forty thousand dollars, was invested in patent rights, and therefore exempt. This finding rests on the written agreement or license bearing date on the third day of February, 1887, and we are now to inquire whether the finding is sustained by the agreement. It contains a recital that the Edison Electric Light Company of New York is the owner of many patents obtained for appliances used in the production of electricity by artificial means, its delivery to customers, and its utilization for purposes of light, heat, and power. It recites further the desire of the Philadelphia Company to acquire an exclusive right to use such appliances in the city of Philadelphia. Then follows the grant of the desired exclusive right, but only as to the use of the appliances and under certain conditions and limitations, which show plainly the purpose of the owners of the patents to maintain their exclusive ownership in them, and their absolute control over the manufacture of the appliances and over the manufactured articles when finished. Among these conditions is one that limits the right of the licensee to the supply of its customers on the described circuit. Another forbidding the use of the license for any other purposes than such

as relate to light, heat, and power to propel stationary machinery. Another declaring the license to be personal to the licensee, and forbidding any assignment or transfer of it. Still another reserves to the New York Company the right to terminate the license on any default made, resume the exclusive ownership of the territory, and grant a new license to another party covering the same exclusive right in the same territory. Under this agreement the licensee secures the right to use the appliances made under the several patents held by the licensor, for a fixed price, to be paid in money, in its own stock, or in both; and it secures nothing more. The New York Company, on the other hand, retains its exclusive ownership of all its patents, an absolute control over the manufacture of its appliances protected by the patents, and over the use and disposition of every one of the manufactured articles which its licensee uses.

We have just held in the Commonwealth *v. The Central District and Printing Telegraph Company* [*ante*, p. 515], following *Patterson v. Kentucky* (97 U. S. 501); *Stephens v. Cady* (14 How. 528); *Webber v. Virginia* (103 U. S. 344), that the exclusive right secured to the inventor by letters patent is an incorporeal right, clearly distinguishable from the ownership of the instrument or appliance manufactured under and by virtue of that right; and that a lessee of the instrument or appliance acquires no title to or ownership in the patent under which it was made. In the language of Justice FIELD in *Webber v. Virginia* (*supra*), "the right conferred by the patent laws of the United States on inventors, to sell their inventions and discoveries, does not take the tangible property, in which the invention or discovery may be exhibited or carried into effect, from the operation of the tax and license laws of the State." Whether the "tangible property," that is, the machines or appliances made and ready for use, is in the hands of the makers, of venders, lessees, or licensees, can make no difference. Such property is not a patent right, but the visible, tangible fruit of the right secured by the patent, which passes to a purchaser or lessee in precisely the same way that any other manufactured articles pass from the maker to the buyer or lessee.

It is not necessary to repeat what was said upon this subject in the Commonwealth *v. The Central District and Printing Telegraph Company* (*supra*), but for reasons given in the opinion filed in that case we reverse the judgment as to the taxability of the stock of the appellee used to pay the rent of, or the price of the license to use the manufactured appliances of the New York Company in its business in Philadelphia.

Judgment is now entered in favor of the appellee, the Commonwealth of Pennsylvania, for

the sum of one hundred and forty-nine dollars, with interest and costs, in addition to the judgment entered in the Court below.

Tax on \$49,000 capital stock, . . . \$149 00

Int. at 12 per c. from Nov. 6, '88,

to

Atty.-general's com.

EDISON CO.'S APPEAL, MAY, '91, 32.

October 5, 1891. WILLIAMS, J. This is an appeal from the same decree which we have just considered on the appeal of the Commonwealth. The only question here presented is whether the appellant is a manufacturing corporation within the meaning of the Act of 1885, exempting manufacturing corporations from the operation of the revenue law of 1879. This question is disposed of by the opinion in the Commonwealth *v. The Northern Electric Light and Power Company* filed herewith [*ante*, p. 520]. For reasons given in that case this appeal is dismissed and the judgment affirmed.

[See preceding cases.]

W. M. S., JR.

May, '91, 23.

June 2, 1891.

Commonwealth v. Chester Electric Light and Power Company.

This case presented the same state of facts as those contained in the case of the Commonwealth *v. Edison Electric Light Company*, *ante*, p. 531.

James A. Stranahan, deputy attorney-general (*William U. Hensel*, attorney-general, with him), for the Commonwealth.

Robert Snodgrass, for appellee.

October 5, 1891. WILLIAMS, J. The question presented upon this appeal is identical with that presented by the appeal of the Commonwealth from the judgment in the case of the Commonwealth *v. The Edison Electric Light Company of Philadelphia*, in which an opinion has just been filed [*ante*, p. 531]. For reasons there given we reverse the judgment entered in the Court below, so far as it relates to the taxability of the stock of the appellee, used to pay the rent for, or the price of the license to use the manufactured instruments or appliances furnished by the Edison Company in New York to the Chester Company for use in carrying on their business in the city of Chester.

Judgment is now entered in favor of the Commonwealth, for the further sum as follows:—

Tax on \$15,000 stock . . . \$60 00

Interest at 12 per cent

Attorney-general's commission . . . 3 00

[See preceding cases.]

W. M. S., JR.

July '90, 121.

April 28, 1891.

City of Titusville v. Brennan.*Peddlers—City ordinance—Police powers—
Interstate commerce.*

The Legislature has pronounced the peddler's business to be injurious in tendency and has forbidden any one to engage in it except under certain restrictions. These regulations have been made in the exercise of the police power to protect the public from fraud and violence, and they are constitutional and valid.

A city ordinance which forbids any person, whether a citizen of this or any other State, to engage in the business of canvassing or soliciting within the city for orders for goods, books, paintings, wares, or merchandise of any kind, without first obtaining a license from the mayor for that purpose, is a valid exercise of police power.

A person who goes about from house to house in the city to sell by sample frames and pictures for a dealer who resides in another State, is subject to the provisions of such an ordinance. If he was an importer of frames, there could be no doubt of his right to ship them in original bales or packages into the State and in that condition to sell them, nor could there be any doubt of his right to ship into the State and sell a single frame. What the ordinance is aimed at is not the sale of frames at wholesale or retail, but personal solicitation from house to house by canvassers.

Whether or not such a dealer is engaged in interstate commerce, he is still subject to the police power of the State. This power, however, must be exercised by means of laws that are equal and uniform in their operation, and must not be made use of as a means for discriminating between citizens of the different States.

Appeal of J. W. Brennan, defendant, from the judgment of the Common Pleas of Crawford County, upon a case stated, in which the city of Titusville was plaintiff.

The case stated was as follows:—

(1) J. A. Shepard is a manufacturer of picture frames and maker of portraits, residing in Chicago, in the State of Illinois, of which State he is a citizen, and in which city he has his manufactory and place of business.

(2) In the prosecution of said business he employs agents who, under his direction, solicit orders for pictures and picture frames, in the State of Pennsylvania and other States of the Union, by going personally to residents and citizens of said State of Pennsylvania, and other States, and exhibiting samples of his pictures and frames, going, where necessary, from house to house in said State of Pennsylvania and other States.

(3) The defendant, J. W. Brennan, was an agent of the said J. A. Shepard, employed by him to travel and solicit orders for pictures and frames, in the manner stated, upon a salary, and also upon commission upon the amount of his sales, at the time of his arrest, May 25, 1889,

upon a warrant issued by the authorities of the city of Titusville, in the State of Pennsylvania.

(4) Upon receiving orders for pictures and picture frames, the agents of the said J. A. Shepard forwarded the same to him at Chicago, in the State of Illinois, where the same were made, and from there shipped by said J. A. Shepard to the purchasers in Titusville, in the State of Pennsylvania, by railroad, freight, and express, and the price of said goods was collected and forwarded by the express companies, and sometimes by the agents, to said Shepard, at Chicago, in the State of Illinois. J. W. Brennan, the agent employed by J. A. Shepard, was engaged in conducting the business in the manner stated at the time of his arrest, May 25, 1889. The said J. W. Brennan, at the time of his arrest and before had not been otherwise employed than as stated, and was acting solely for the said Shepard.

(5) The city of Titusville had enacted an ordinance, in force at the date of the arrest of said J. W. Brennan, which, in the twelfth section thereof, provides in words and figures as follows:—

That all persons canvassing or soliciting within said city, orders for goods, books, paintings, wares, or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited, shall be required to procure from the mayor a license to transact said business and shall pay to the said treasurer therefor the following sums, according to the time for which said license shall be granted, viz: For one day, one dollar and fifty cents; one week, \$5.00; three months, \$10.00; one year, \$25; provided, that the provisions of this ordinance shall not apply to persons selling by sample to manufacturers or licensed merchants, or dealers residing or doing business in said city.

And the said ordinance further provides in the eighteenth section thereof as follows:—

That any person or persons failing to obtain a license as required by this ordinance shall upon conviction thereof before any magistrate, alderman, or justice of the peace, of said city, forfeit and pay a fine not exceeding one hundred dollars, nor less than the amount required for a license to such person or persons, together with twenty per cent. added as a penalty, with costs of suit, and in default of payment thereof shall undergo a confinement in the city or county prison for a period not exceeding ninety days, or perform hard labor on the streets or elsewhere in said city not exceeding such period.

(6) At the time of his arrest the defendant, Brennan, was not and had not been selling by sample to manufacturers or licensed merchants or dealers residing in said city of Titusville, and was not within the proviso of the twelfth section of said ordinance relating to such excepted persons.

(7) The defendant, J. W. Brennan, at the time of his arrest, had not obtained a license as

required by said ordinance, and had not paid to the treasurer of the city of Titusville the license fee provided by said ordinance.

(8) The defendant was arrested, tried, convicted, and sentenced to pay a fine of \$25 and costs of suit, under said ordinance, on the 29th day of May, 1889, before W. M. Dame, city recorder of the city of Titusville.

If the Court should be of opinion, upon the facts stated, that the defendant, J. W. Brennan, was liable to take out license and pay the license fee provided by said ordinance, then judgment to be entered for the plaintiff, the city of Titusville, for \$25 and costs of suit. If the Court should be of opinion that said Brennan was not so liable, then judgment to be entered for the defendant, with costs of suit.

The Court entered judgment in favor of plaintiff, upon the case stated, for the sum of \$25; whereupon defendant took this appeal, assigning for error the said entry of judgment.

Roger Sherman (Samuel Grumbine with him), for appellant.

George A. Chase, for appellee.

October 5, 1891. WILLIAMS, J. There are two questions presented by this record. The first is whether the Court below was correct in finding as a fact that the defendant was a peddler. The other is whether, as a matter of law, the defendant is engaged in interstate commerce and is under the protection of the national government.

If the defendant is a peddler, the law is settled in this State that he is not above the obligation to conform to the requirements of the laws of the State regulating the business of peddling. The Legislature has pronounced his business to be injurious in tendency, and has forbidden any one to engage in it except under certain regulations, intended to bring such persons under the notice of the local authorities, and afford some little security for his good behavior. These regulations have been made in the exercise of the police power, to protect the public from fraud and violence, and they are constitutional and valid. (*Commonwealth v. Gardner*, 133 Pa. 284.)

But what is the defendant's business, as gathered from the facts appearing in the case stated? He certainly is not an importer, or a wholesale dealer, supplying the trade in this State, from a source of supply beyond the State lines, in original or unbroken packages. He is not a "drummer" or travelling agent, acting as an intermediary between the importer or the wholesaler and the local trade. Although he carries a few articles on his back or in his wagon, he would hardly ask us to hold that he was engaged in interstate transportation. He comes into this State, according to the case stated, in order that

he may here engage in the business of going from house to house to sell frames and pictures for a dealer who resides in another State. He hunts his customers in their own homes. To the inmates of the homes into which he intrudes himself he exhibits what he alleges to be a sample of the goods he is prepared to supply. The only apparent difference between him and the ordinary pack-peddler is that the peddler produces the precise article he offers for sale, and delivers it to the purchaser on the spot; while the defendant produces from his pack a sample; the customer buys on his assurance that the article will be like it; and the article is subsequently delivered by some itinerant, or by express, if it is delivered at all. There is in each case the same intrusive domiciliary visitation, the same relentless personal pursuit of a purchaser, the same practised and persistent itinerant salesman adroitly pressing his wares on the attention of those who neither need nor wish for them, but who are unable to resist the wiles or penetrate the deceptions practised upon them. The business of both is, in general character, the same. Whether the difference in mode of delivery should distinguish the one from the other is, in this case, a matter of no consequence whatever.

The ordinance under which this suit was brought is not directed against peddlers by name, but against a particular method of making sales of goods. It forbids any person, whether a citizen of this or any State, to engage in the business of canvassing or soliciting within the city of Titusville for orders for goods, books, paintings, wares, or merchandise of any kind, without first obtaining a license from the mayor for that purpose. It does not discriminate against citizens of other States, or goods grown or manufactured in other States. It does not wholly prohibit the exercise of any trade or business. It regulates a particular business in such a manner as to bring those who engage in it under the notice, and so far as possible under the supervision of the police authorities of the city. Whether the defendant is a peddler is, therefore, not the question to be settled. It is whether the defendant is engaged in the business described in the ordinance. If he is, and the agreed facts show clearly that he is, then he must obey it or show that it is not binding on him. We do not understand that he denies the power of the city to pass such an ordinance upon the authority of any of our own cases.

The case of *Warren Borough v. Geer* (117 Pa. 207), involved the validity of an ordinance drawn in almost the identical words found in this one. The Court below held that the borough had not power to pass such an ordinance because it interfered with the exercise of a common right. This Court held otherwise, and distinctly as-

sented the power of the borough to make and the duty of the Courts to enforce the ordinance. But it is urged that the United States Courts have held another doctrine, and that we should put ourselves in harmony with the law as held by them. We recognize the duty to which our attention is thus called, and shall discharge it with great pleasure whenever we find ourselves in conflict with the decisions of the Supreme Court of the U. S. upon this or any other subject. We are thus brought to consider the so-called "Federal Question;" the question whether the man who sells ready-made clothing, pinch-beck jewelry, picture frames, or other articles, from house to house, by personal solicitation addressed to one whom he has brought to buy, in the privacy of his or her own home, is engaged in interstate commerce, and, therefore, superior to the police power of the States. We shall not undertake the definition of interstate commerce. It is, perhaps, too early to attempt it. But the Supreme Court of the U. S. has provided us with abundant authority upon the real question we have to consider, which is, whether the business of the defendant is subject to the police power?

In the *Beer Company v. Mass.* (97 U. S. 25), that Court laid down the broad proposition that "all rights are held subject to the police power of the State." In the course of a very satisfactory discussion of the subject by the learned Justice delivering the opinion of the Court, this language is employed: "Whatever differences of opinion may exist as to the extent and boundaries of the police power, and how difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The Legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex*." In *Mugler v. The State of Kansas*, a law which did not regulate but absolutely prohibited the manufacture and sale of liquors as in Kansas, was sustained as a valid exercise of the police power. To the same effect is *Foster v. Kansas* (112 U. S. 201). Equally conclusive upon this point are the *Oleomargarine Cases*. This State forbade both the manufacture and sale of that commodity, except under restrictions which were destructive to the business. We held the law valid as an exercise of the police power, and on appeal, the Supreme Court of the U. S. affirmed the decision. The fact that the article, the manufacture and sale of which is regulated or prohibited, is made under the authority of letters-patent granted by the U. S. does not pre-

vent the exercise of the police power of the States. In *Patterson v. Kentucky* (97 U. S. 501), this question was raised, and it was held that letters-patent confer no new or independent right of sale, but secure an exclusive right in the discovery to the inventor or his representative. This right is incorporeal, but "the use of the tangible property that comes into existence by the application of the discovery is not beyond the control of the State Legislature." On the other hand, it was distinctly held in *Patterson v. Kentucky* "That the right which the patentee or his assignee possesses in the property created by the application of a patented discovery must be enjoyed subject to the complete and salutary power with which the States have never parted, of so defining and regulating the sale and use of property within their respective limits, as to afford protection to the many against the injurious conduct of the few." In *Webber v. Virginia* (103 U. S. 344) it was said by Justice FIELD, delivering the opinion of the Court, that "the patent for a dynamite powder does not prevent the State from prescribing the conditions of its manufacture, storage, and sale, so as to protect the community from the danger of explosion." But while the existence of the police power is thus clearly recognized by the Courts of the United States, it must be exercised by means of laws that are equal and uniform in their operation. It must not be made use of as a means for discriminating between citizens of the different States. If it is, it loses its police character and becomes an unconstitutional trade regulation. Thus, the State of Missouri passed a law prohibiting the sale of goods grown or produced or manufactured outside of the State without a license. To sell the same goods grown, produced, or manufactured within the State no license was required. This law was held to be void, because it was designated to operate against the citizens of other States and in favor of the citizens of Missouri. (*Welton v. The State of Missouri*, 91 U. S. 275.) When the burden imposed is equal, without regard to citizenship, similar laws have been upheld. (*Coe v. Errol*, 116 U. S. 517.)

If the defendant was an importer of frames, there could be no doubt of his right to ship them in original bales or packages into the State, and in that condition to sell them. There is just as little doubt of his right to ship into the State one frame, for there is no law of the State which prohibits his sale of a single frame. What the law is aimed at is not the sale of frames at wholesale or at retail, but personal solicitation from house to house by canvassers, who, like peddlers, are here to-day and gone to-morrow; whose flippant representations cannot be stopped, and whose frauds cannot be punished, unless they are brought under the notice and to some extent under the

control of the local authorities. What trades need to be restricted and forbidden to all who have not obtained a license, is purely a legislative question. The sale of liquors, the keeping of a hotel, the running of a cab, the keeping of a lottery, the sale of lottery tickets, the practice of medicine, the manufacture of oleomargarine, peddling from house to house, and many other kinds of business, have been the subject of regulation, restriction, or prohibition, by an exercise of the police power of the several States. Where the Courts have interfered in such cases, it has been to prevent the abuse of the police power, and to see that its hand was laid impartially, and without discrimination between States, on the evil to be corrected. Whether the solicitation from house to house by itinerant vendors or canvassers is an evil to be suppressed, or reduced in its proportions by appropriate legislation, is, under ordinary circumstances, as we have said, a legislative question. If it was for us to determine, a glance at our own cases would determine it. The books are full of cases arising out of the efforts of those who have been defrauded to recover their money, to be relieved from their bonds or notes given under the influence of a bald fraud, or wheedled out of them under pretence that they were signing a receipt, an order, a promise to act as agent, or the like. There is probably not a county in the Commonwealth into whose Courts the victims of the frauds of travelling canvassers for moris-multicaulis trees, patent churns, hay-forks, washing-machines, self-hooking or self-unhooking whiffletrees, and a hundred more equally worthless things, have not come by petition to open judgment, or by affidavit of defence to an action, seeking relief. It is the same story. A well-dressed, plausible stranger, with flattery and promise of enormous gains, induces some honest but inexperienced man to sign a paper promising to exhibit some worthless article left with him to his neighbors, or to pay for it at a small price, when he has sold it at a large one, or the like, and goes his way. Not long after some other stranger presents to the astonished victim his promissory note for one or two or five hundred dollars and demands payment. It next turns up in the hands of some note-shaver, and then litigation begins. The loss to industrious, well-meaning people by these practices reaches many thousands of dollars every year. It goes to support in idleness a class of swindlers who should be in prison. The subject is as fairly within the scope of police legislation as cheating by false pretences, or larceny by a bailee. We should as soon expect the thief, who stole goods in one State to be sold in another, to be protected under the interstate commerce powers of the general government, as that the travelling cheats who live by drawing the blood of the hard-

working, but too confiding, farmers and mechanics, should be so protected. It may be that the defendant is honest, and sells a good frame for an honest price. There are no doubt some honest peddlers and canvassers, worthy men and women who are needy, and find this a convenient way to earn money. The trouble in such cases is that they are in a business that men and women, who are not honest, employ as a means of swindling; and that the business is, therefore, properly put under some regulations and restrictions that seem to them, and that in their cases may really be, unnecessary and burdensome. If they choose to embark in the sale of strong drink, or in the sale of goods as peddlers, or as canvassers, or of oleomargarine, they must take notice of the restrictions laid upon the business they select and comply with them.

The judgment is affirmed.

H. S. P. N.

Jan. '91, 292.

April 8, 1891.

Johnson et al. v. Ash.

Ground-rents—Spanish milled silver dollars—Covenant to pay rent in—Character of coin tendered.

Where the covenant in a ground-rent deed, made while Spanish dollars were a legal tender, is to pay the rent in Spanish milled dollars, a tender of Spanish milled dollars is a compliance with the covenant, although such dollars are no longer a legal tender.

The several Acts of Congress of April 2, 1792, February 9, 1793, and April 10, 1806, adopting Spanish milled dollars as the standard of value of the United States dollar, and making the said dollars, when the actual weight thereof is not less than 17 dwts. 7 grains, a legal tender, can form no part of the contract, even if the covenant of the ground-rent deed specifies no weight for the Spanish milled dollars therein covenanted for.

It makes no difference that at the time the ground-rent was created Spanish milled dollars of 17 dwts. 7 grains were a legal tender in the United States, and that the ground-rent deed stipulates for a coin in no way essentially different from that made a legal tender by the Act. Therefore, although these coins have been demonetized by the Act of Congress of February 21, 1857, to tender them is still a compliance with the covenant of the deed.

Such a covenant for the payment of Spanish milled dollars is a covenant to pay a commodity, not money; therefore the demonetization of the coin by Spain, whereby it ceases to be money, will not so destroy the character of the coin as to invalidate a tender of it in payment of the ground-rent.

Appeal of Barclay Johnson and Sallie P. Johnson, his wife, in right of said wife, and Elizabeth B. Pleasants, plaintiffs, from the judgment of the Common Pleas No. 2, of Philadelphia County, upon a case stated, wherein Thomas Ash was

defendant, to recover the amount of a certain ground-rent.

The facts, as set forth in the case stated, were as follows:—

"It is agreed that this action be entered with like effect as if a summons in covenant and assumption had issued returnable the first Monday of December, 1890, had been duly served by the sheriff and so returned, upon a certain ground-rent deed made by Israel Pleasants and Ann his wife to Thomas Ash, dated June 11, 1808, and recorded at Philadelphia in Deed Book I. C. No. 22, page 337, etc., for premises situated at the northeast corner of Bainbridge and Charles streets, containing in front on said Bainbridge Street 20 feet 6 inches, and in depth along said Charles Street of that width 60 feet, reserving to said grantors their heirs and assigns forever 'the rent or sum of fifty-four Spanish milled silver dollars and two-thirds of a dollar, in four even quarterly payments of thirteen dollars and two-thirds of a dollar each, on the 12th day of the months of March, June, September, and December in each and every year forever hereafter.'

"And that said ground-rent deed provided further for the erection by said Thomas Ash within one year of a 'building or buildings to be at least of the value of six hundred dollars,' which buildings were duly erected.

"Also that said ground-rent should be redeemable within twenty years by the payment to said grantors, their heirs and assigns, of 'the just and full sum of eight hundred and eighty-eight dollars.' And the right of redemption was not exercised.

"That the following facts are further agreed upon by the said parties as a case stated in said action: By divers descents, wills, conveyances, and assignments the title to the ground-rent in question became vested in the plaintiffs. The present owners of the ground are defending this suit in the name of the covenantor.

"On March 12, June 12, and September 12, 1890, quarterly payments of said ground-rent became due. Immediately after each quarterly payment matured, defendant through his agent produced and tendered to the plaintiffs thirteen Spanish milled silver dollars and sixty-seven cents. The owners of said ground-rent refused to receive said coins in payment and satisfaction of said quarterly payments of ground-rent on the ground that they, the plaintiffs, were entitled to the ground-rent in lawful silver money of the United States.

"Spanish milled silver dollars are milled silver dollars which were coined in the mints of Spain or its colonies; and under the Coinage Act of U. S. of April 2, 1792, sec. 9, were adopted as the standard of value of the U. S. dollar thereby authorized (U. S. Stats. at Large, Vol. I., page

248). At the time the ground-rent in question was created they were a part of the money current in the United States. A decree of the chancellor of the exchequer of Spain of October 19, 1868, adopted the new system of the Latin Union, and after prescribing the new coins of the system (among which the Spanish milled silver dollar has no place) provided that—

Art. I. In all Spanish dominions the unit of account shall be the peseta, a coin equivalent to 100 centimes.

Art. II. Gold coins of 100, 50, 20, 10, and 5 pesetas shall be issued. . . . These coins shall be used in circulation in place of the old ones in all public and private transactions. . . .

Art. III. Similarly there will be coined silver pieces of 5 pesetas, . . . the receipt and circulation of these coins will be subject to the same regulations as those given for the gold coins. . . .

Art. X. From the 31st of December, 1870, the use of the monetary system created by this decree shall be obligatory in all public offices as well as among individuals.

Art. XI. Public and private contracts made before the issue of the present decree in which payment in the coin now in circulation is expressly stipulated, may be settled in the coin of the new system of equivalent value. [See Spanish Decree in Report of the Director of the Mint of U. S. for the fiscal year ending June 30, 1874, to which decree reference is made if deemed necessary.]

"On April 10, 1806, Congress passed a law (U. S. Stat. at Large, Vol. II., page 374), providing, *inter alia*—

That from and after the passage of this Act foreign gold and silver coins shall pass current as money within the United States, and be a legal tender for the payment for all debts and demands, at the several and respective rates following, and not otherwise, viz., . . . Spanish milled dollars at the rate of one hundred cents for each, the actual weight whereof shall not be less than seventeen pennyweights and seven grains, and in proportion for the parts of a dollar.

"Under this Act Spanish milled silver dollars continued to be a legal tender in the United States until demonetized by Act of Congress of February 21, 1857 (U. S. Stats. at Large, Vol. XI., page 163), which provided—

Sec. 3. That all former Acts authorizing the currency of foreign gold or silver coins, and declaring the same a legal tender in payment of debts, are hereby repealed.

"If the Court should be of the opinion that the tender of the forty-one Spanish milled silver dollars and one cent was a sufficient tender, then judgment is to be entered in favor of the defendant; otherwise judgment is to be entered in favor of plaintiffs for forty-one dollars and one cent lawful money of the United States of America, with costs."

The Court entered judgment upon the case stated in favor of the defendant, without filing any opinion; whereupon the plaintiffs took this appeal, assigning for error this action of the Court.

Henry Pleasants (Samuel Hinds Thomas with him), for appellants.

The question in this case is whether the covenant in the ground-rent deed is for a specific article or for lawful money (*i. e.*, legal tender dollars), of the United States.

The fact that the covenant of the ground-rent in question calls for a coin which, at the time the ground-rent was created was a legal tender, without specifying any particular weight or fineness for the coin; and that the word dollars, without further designation, is used throughout the deed, except in the reservation clause, distinguishes the case at bar from any adjudicated case.

Mather v. Kinike, 51 Pa. 425.

Dutton v. Pallaret, 52 Id. 109.

Christ Church Hosp. v. Fuechsel, 54 Id. 73.

Perot v. Eichholz, 25 WEEKLY NOTES, 525.

It is, however, a generally recognized principle in the cases, "that when gold or silver is stipulated for, without mentioning the weight of the coin, the lawful dollars for the time being are intended;" and the absence of any express stipulation as to description in contracts for payment of money generally warrants the inference of an understanding between the parties, that such contracts may be satisfied before or after judgment by the tender of any lawful money.

Shollenberger v. Brinton, 52 Pa. 34.

Mervine v. Sailor, Id. 45, 47.

Butler v. Horwitz, 7 Wallace, 261.

Hill v. The Trustees, 7 Phila. 28.

Perot v. Eichholz, 25 WEEKLY NOTES, 525.

In view of the facts, that at the time this contract was made, Spanish milled dollars of a certain weight were a part of the money current in the United States, and of the same standard of value as the United States dollars, and that they were expressly excluded from the provisions of the Act of Congress of 1793 (U. S. Stat. at Large, vol. 1, p. 301), by which foreign coins were to cease to be legal tenders, the conclusion is deducible that the standard Spanish dollar of 17 dwts. 7 grains was contemplated in the reservation clause of the deed, and it follows that the reservation is not for a specific article, or a mere commodity, but for lawful money; and as these Spanish dollars were demonetized in 1857, the rent reserved could no longer be paid in such dollars, but must be paid in such legal tenders as the government provides and sanctions when the time for payment arrives.

United States v. Gardner, 10 Peters, 618.

Knox v. Lee, 12 Wallace, 467.

Perot v. Eichholz, 25 WEEKLY NOTES, 525.

Maule v. Stokes, 3 Id. 373.

Morris v. Bancroft, 1 Id. 223.

This reasoning was expressly approved by the Court below in the recent case of *Perot v. Eichholz* (25 WEEKLY NOTES, 525), and is analogous to that adopted by this Court in *Maule v. Stokes* (3 WEEKLY NOTES, 373), (decided while silver

was demonetized as to amounts over \$5), where a reservation in "current silver money of the United States" was held to mean, "such current silver as will at the time of the tender lawfully pay the amount of the ground-rent reserved," and to the decision in *Morris v. Bancroft* (1 WEEKLY NOTES, 223), where a reservation of lawful silver money, although of specified weight, was held payable in gold coin because both coins were legal tender.

Nor is it an answer to the argument to say that the intention to reserve legal tender dollars cannot be inferred because of the qualification "Spanish milled," for this qualification in no way distinguishes them as dollars not a legal tender (as was done in *Mather v. Kinike*), and the subsequent abandonment of even this qualification in other parts of the deed indicates how little importance the parties to the deed attached thereto.

Any other view than this, that the dollars reserved were not a mere commodity, but "coins that our land recognized as money" (see *Mather v. Kinike, 51 Pa. 429*) would lead to the result that the tender might be made in Spanish milled dollars of any weight whatever, although worn or even clipped far below the legal tender weight.

It is a reasonable rule that, where the terms of a deed descriptive of the consideration are applicable both to what are and what are not legal tender, doubts must be solved in favor of the legal tender construction, else a presumption would exist in favor of trade by barter rather than trade by money.

Shollenberger v. Brinton, 52 Pa. 96, per AGNEW, J.

But even if the reservation in this deed be regarded as a reservation of a specific article or a mere commodity, the contract was clearly for such Spanish milled dollars as were then prescribed by, and current in Spain, *i. e.*, such pieces of silver as were stamped by the Spanish government and thereafter recognized by it as having the currency value it sanctioned. The subsequent demonetization of these dollars by Spain had the effect of withdrawing that governmental recognition and sanction, and they thereby lost their existence as dollars and became again simply pieces of silver. A tender, therefore, of such demonetized or obsolete coin is no more a payment of the debt contracted than would a present tender of notes of the late Confederate States be payment of a contract lawfully made in the insurgent States during the civil war. Under such circumstances the rule has been clearly enunciated by the Supreme Court of the United States, that the value of the demonetized or obsolete currency is to be estimated "in lawful money of the United States at the time when and place where such contracts were made."

Effinger v. Kenney, 115 U. S. 586.

Hence, even regarding the reservation as re-

ferring specifically to Spanish currency the tender made by the defendant is clearly insufficient. Unless our view be adopted the effect of the demonetization of these coins might cause the ground-tenant (in consequence of such coins becoming exceedingly rare), to pay a rent many times in excess of that originally contemplated. An instance of such a condition of the coinage is seen in the case of the dollar of 1795, now valued by numismatists at about one hundred dollars each.

Joseph M. Pile, for appellee.

The covenant of the deed calls for Spanish milled silver dollars, and the ground-landlord cannot refuse a tender of such dollars.

Mather v. Knike, 51 Pa. 426.

Bronson v. Rodes, 7 Wallace, 229.

Butler v. Horwitz, Id. 258.

April 27, 1891. *PER CURIAM*. The Court below properly held that the plaintiff was obliged to receive the kind of money his contract called for. It is to be presumed that when the ground-rent was created the reservation of the rent in "Spanish milled silver dollars" was for the benefit of the owner of the rent. It was certainly not for the benefit of the ground-tenant. The plaintiff having enjoyed what benefit there was under the contract, may well take the disadvantages thereof, if there are any.

Judgment affirmed.

Counsel for appellants (with whom was *Samuel S. Hollingsworth*), subsequently moved for a reargument of the questions whether—

First. The coins tendered, having ceased to be "money," the tender of them is a performance of the covenant of the ground-rent deed; and if

so,

Second. Whether any "Spanish dollars," or only the "Spanish dollars" of full standard weight, can be tendered in payment of said ground-rent.

May 18, 1891. *PER CURIAM*. *Reargument* refused.

S. H. T.

[The effect of the above decision is of importance to investors in irredeemable ground rents. For many years this class of security has been in demand, and has commanded a premium. Many of these rents were created prior to the year 1800, and were reserved in the foreign coins then in circulation and current in the country under authority of Congress; but as the United States currency became more freely circulated the new legal tender was substituted for the old currency.]

It is decided by the Supreme Court in this case that the fact that at the time of the reservation of the ground rent the coin reserved was a legal tender warrants no inference that the reservation was intended to be in legal tender money, for this question was fairly raised by the case stated. And it would seem to follow that no legal presumption exists in Pennsyl-

vania in favor of trade by money rather than in trade by barter. On these points compare the decisions collected in the note to *Filmer v. Branch Bank*, reported in 4 Amer. Law Register (N. S.), pages 336-351, which received the approval of Justice Thompson in *Shollenberger v. Brinton* (52 Pa. 48); and an article published in the Popular Science Monthly for July, 1891, page 358, etc.

The question, whether the landlord having reserved the rent in Spanish dollars could demand full weight Spanish dollars, was not raised by the case stated.

In view of the fact, that the weight of the Spanish dollars is recognized as 17 dwts. 7 grs. by the Act of Congress of April 2, 1792 (U. S. Stats. at Large, vol. 1, page 248), adopting it as the standard of value for the original United States dollar which it prescribed should "Contain 371 $\frac{1}{4}$ grains of pure or 416 grains of standard silver," there should be no reasonable doubt that, in the absence of an express contract for a *less weight* Spanish dollar, the full weight Spanish dollar would be intended. This national recognition of the full weight Spanish dollars being even more authoritative than State legislation (*Weaver v. Pegely*, 29 Pa. 27).]

Quarter Sessions.

Commonwealth v. Clark.

Criminal law—Attempt—Burglary—What constitutes an attempt to commit—Going upon the steps of a dwelling-house at night with intent to commit.

Sur motion for a new trial.

The facts are fully recited in the opinion of the Court.

Samuel A. Boyle, assistant district attorney, for the Commonwealth.

October 7, 1891. PENNYPACKER, J. The defendant was tried upon an indictment charging him with burglary, entering in the night with intent to steal, and receiving stolen goods. The evidence showed that on the morning of August 29th last, at three o'clock, a special officer and night watchman heard the footsteps of a man at the dwelling-house No. 1511 North Fifteenth Street, and going to the place saw the defendant come down from the step of the door. The occupants of the house were at the time away for the summer. The officer followed the defendant for some squares, and he was then arrested. Upon being questioned he said he was a gardener, and was going to Jenkintown to work. This statement proved to be incorrect. Concealed about his person were found a jimmy, two candles, four wooden wedges, some matches, and a dead-latch key. The jury were instructed that the defendant could not be convicted of

the offences with which he was charged, but that if they found that he had gone up upon the step with intent to commit a burglary, and in pursuance of that intent, it was evidence upon which he could be convicted of an attempt to commit a burglary. The jury brought in a verdict of guilty of an attempt. The defendant was without counsel, and for the purpose of disposing of the case, it will be treated as though he had made a motion for a new trial, upon the ground that the Court erred in its instructions to the jury.

The Act of March 31, 1860, section 50, provides that "If on the trial of any person charged with any felony or misdemeanor, it shall appear to the jury on the evidence that the defendant did not complete the offence charged, but was guilty only of an attempt to commit the same, such person shall not by reason thereof be entirely acquitted but the jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same."

The question arises as to what is an attempt under this Act, and it is one not without difficulty. The case of *Regina v. St. George* (in 9 Carrington & Payne, 483) arose under the statute of 1 Vict. c. 85, s. 3, which provided that "Whoever shall by drawing a trigger or in any other manner attempt to discharge any kind of loaded arms at any person" with intent to murder or do grievous bodily harm should be guilty of felony. The defendant was indicted charged with pointing a pistol and by drawing the trigger attempting to discharge it at one Durant. The evidence was: "He pushed the muzzle of the pistol against my trousers. . . . He had his finger on the trigger and the pistol was cocked but not full cocked. My hand, I think, prevented him from cocking it. If it had not been for my hand the pistol would have gone off, and I should have been shot through the body. . . . My hand was on guard so that the prisoner could not get at the trigger." The Court (PARKE, B.) held: "It appears to me that the charge of felony cannot be supported as it is not proved that the prisoner drew the trigger. The words 'in any other manner' in the statute mean something analogous to the drawing the trigger which is the proximate cause of the loaded arm going off."

In *Regina v. Lewis* (in the same book, p. 523), where there was an indictment under this statute, it appeared that the defendant said to the prosecutor, "Then you are a dead man," that he took a loaded blunderbuss out of his coat and held it with both his hands, that he was on the opposite side of the room from the prosecutor, that the muzzle was toward the side of the room on

which the prosecutor was but it was not pointed at him, and that the defendant was then seized and secured. The Court held that there must be something more than the mere presentation of the blunderbuss and that some act must have been done by the prisoner to satisfy the jury that he did in fact attempt to discharge the weapon.

These cases were determined upon the theory that under the words of the Act to constitute a felony the attempt must be to discharge the pistol by "drawing the trigger," or in some similar manner.

It was held in *Smith v. The Commonwealth* (4 P. F. Smith, 209), that soliciting a woman to commit adultery was not an attempt to commit the crime within our Act of Assembly.

In *Stabler v. Commonwealth* (14 Norris, 318), the defendant expressed a determination to be revenged for a grievance, gave poison to a witness and asked him to put it in a spring, so that certain persons should be poisoned, and offered him a reward for administering it. The witness refused, and returned the poison, but afterward found it in the pocket of his coat. The Court held that even if it were delivered, with the intent that it should be administered, the acts did not constitute an attempt to murder under the statute. The acts proved were remote and not proximate.

In *Kelly v. Commonwealth* (1 Grant, 484), the defendant at night broke into a house in which were a father and daughter. The latter was a woman of loose character, and it appeared he had visited her before. A scuffle ensued, and while the woman was away calling assistance the father received a blow from the effects of which he died. The question was as to whether or not there was an attempt to commit a rape, for, if so, the defendant could be convicted of murder in the first degree. The Court below left it to the jury to say "for what purpose did the prisoner and his confederates go to that house that night? was it for fornication or rape?" and presenting the evidence asked them if in it "they see anything like fornication or consent." The Supreme Court held that this was an error, since it substituted the intent for the attempt, and transformed acts indifferent, or at most equivocal as to the girl, into an actual attempt upon her, and thus changed the whole inquiry.

It appears therefore that an attempt must be actual and not constructive, and that to constitute guilt the defendant must have done something more than to have formed an intent to commit the crime. How much further is it necessary that he should have gone? In *Smith v. Commonwealth* (*supra*), WOODWARD, C. J., says: "The attempt can only be made by an

actual ineffectual deed done in pursuance of and in furtherance of the design to commit the offence." If this was intended as a definition of what constitutes an attempt, it does not seem to be satisfactory. Suppose a pickpocket to form a purpose to steal, and that he then follows his intended subject through the streets seeking an opportunity, but fails to find it. Here is an ineffectual deed in furtherance of his design, and yet it could not be said that he had made an attempt to commit the crime. When, however, he takes the first unlawful step in the direction of the commission of the crime and in furtherance of his design, however slight, it would seem that the attempt is complete.

In the present case the defendant had gone up on the steps, as the jury have found, with intent to commit a burglary, and in furtherance of his design. The steps of a dwelling are intended as a means of entrance and exit for persons lawfully using the house, and may be an invitation to such persons. They are nevertheless private property, and one who trespasses upon them with felonious purpose, has committed an actual unlawful deed in pursuance of this purpose. He has made but a slight move in the unlawful direction, but if he had reached the roof and lowered himself to a window his act would have been no different in kind. When he has left the public street, upon which any one may lawfully walk, and gone upon private property with intent to commit a burglary, it seems to me he may be convicted of an attempt.

In *Kelly v. Commonwealth (supra)*, THOMPSON, J., said: "If the entry into the house of deceased had been shown to have been burglarious, with the design to commit a rape, and the breaking and entry were pursuant to such design, it might have been considered under such circumstances evidence of an attempt. But to constitute it such, the specific intent to commit the crime must have existed at the moment of breaking and entering—not formed afterwards—for, if so, the breaking could not be construed an attempt, as it had not this character in the minds of the prisoner and his associates at the moment of doing the act."

There can be no question that the present defendant, when he went upon the steps and was interrupted by the approach of the officer, had formed the purpose to commit a burglary, and was acting in pursuance of it, and the jury have so found.

The motion for a new trial is overruled.

Orphans' Court.

Jan. '91, 5.

October, 1891.

Fouché's Estate.

Will—Nuncupative will—Requisites of will—Form of.

A paper, signed by a decedent at the end thereof, intended to take effect at his death, and making an intelligent disposition of his property, contains all the requisites of a valid will.

The form of a testamentary paper, the fact that it speaks in the past tense, and not in the present, or that the testator calls it a nuncupative will, does not affect its validity.

Whenever a party has the power to do a thing (statutory provisions being out of the way) and means to do it, the instrument he employs is to be so construed as to give effect to his intention.

Sur appeal from the decision of the register of wills refusing to admit to probate the alleged will of William W. Fouché, deceased.

Letters of administration having been granted to Edward C. Diehl, Mary W. Fouché, and Frank Fouché, a paper, purporting to be a will of decedent, was offered for probate, which the register refused to grant. Whereupon this appeal was taken.

The will in question and the facts of the case are sufficiently set forth in the opinion of the Court.

John A. Scanlan, for appellant.

William C. Hannis, for appellees.

October 31, 1891. ASHMAN, J. On the morning of November 7, 1890, six days before his death, and when he was in declining health, the decedent, in the presence of his wife and children, declared that he was about to make his will by word of mouth; that he desired them to witness that he left everything to his wife after his death, and that she could do with it as she pleased. Immediately before this interview, he had explained to one of his sons, who was very deaf, the meaning of a nuncupative will, and apparently, in order to be certainly understood, had shown the son a paper, on which he had already written the word "nuncupative," and to which he proceeded to add as the definition, "by word of mouth." A few days after his death, the writing now offered as his will was found among other papers which were taken from his desk. It was upon the identical paper which had been exhibited to the son, the words

"nuncupative by word of mouth," not having been erased. The paper read as follows:—

"Nov. 7th, 1890.

Nuncupative by word of mouth My will was made on the above date, everything left to my dear wife Mary W. Fouché, all my real and personal estate and everything I own at the time of my death.
WILLIAM W. FOUCHÉ."

Probate was refused on the ground that this was not a valid testament.

The reasoning by which it is sought to uphold this ruling is highly ingenious, but of necessity highly technical; and for the latter cause should be adopted cautiously, if at all, in determining the intent of a testator who knew nothing of technical terms. It assumes at the outset that the decedent had actually no purpose whatever in writing the paper, or, as counsel states it, he "scrawled it to while away a weary hour." The basis of this assumption was that the testator had used the blank page of a printed notice, and on a fold of the paper had made some calculations in figures. However it may be with counsel, this is not the spirit in which a Court may proceed to test the validity of an instrument in the nature of a will. If it may find that the testator wrote simply for amusement, because his pretended will was upon note paper, it may also find that he wrote only as a joke because his spelling was grotesque. It would be well, perhaps, if all wills were engrossed on parchment and drafted by lawyers, but the circumstances under which many of them are prepared preclude any nice selection of stationery or counsel. Certainly it would be cruel, if a testator, in his last hour, should be harassed with the thought that his final wishes as to the disposal of his estate would depend for their fulfilment upon the size and quality of the paper on which his will was written. We pass over the next argument, which, however, was not pressed with fervor, that the writing was void as a will, because the testator had not signed his name at the foot of the figures. These figures had no more to do with the writing than the circular on the reverse of the paper, and he was no more called upon to sign the one than the other. The point upon which the contestants mainly rested was that the utmost effect of the writing was to serve as a republication of a nuncupative will, and that the latter was void, and therefore incapable of revival. It is at least open to debate whether a will which is void in its inception may not be made good by a codicil, duly executed, which distinctly affirms it. (*Druce v. Denison*, 6 Ves. 397.) But is it within the bounds of credulity that a testator who has made what he deems a complete will in the morning should think it necessary to formally republish it in the afternoon

of the same day, or that, having formed such a resolve, he should recite anew all the provisions of the anterior will? The contrary supposition, which the evidence here raises into a certainty, is that the decedent intended by this writing not a republication, but a new will. He had cut out from newspapers, and had placed in his desk, along with the will, various slips descriptive of short and eccentric wills which had been admitted to probate, and he had also kept by him a pamphlet giving directions for drawing wills, and defining the law as to nuncupative wills. It was taken for granted by the contestants themselves that he had patterned his will after these specimens, and that he knew the character of unwritten wills. If the field of conjecture is to be laid open for one purpose, we may pursue it for another, and assume that having learned that a nuncupative will must be reduced to writing within six days after the testator's death, the decedent had anticipated that duty and had himself written out his testament. Or he may have concluded that his oral will was void because it was not made in the extremity of his sickness, or that, even if valid, it would not carry his real estate; and he thereupon, and we think wisely, committed his intentions to writing. But there is no need, either for evidence of what the testator had previously declared was his purpose, nor for conjecture as to what he afterwards intended; the writing itself is before us, and the sole inquiry is: Does it contain the requisites of a valid will? Is it signed by the testator at the end thereof? does it take effect at his death? and does it make an intelligent disposition of his property? To all of these questions, we believe there can be but one answer. Its form, or rather its want of form, is nothing (*Frew v. Clarke*, 80 Pa. 170), that it speaks in the past tense, and not in the present, is nothing (*Black v. Jobling*, L. Rep. 1 Prob. 685; *Williams on Executors*, vol. I., page 138); and that the testator called it nuncupative is also nothing. A promissory note or a deed, provided it is meant to operate at the death of the maker or grantor, may be a good will, no matter by what name the instrument may have been described (*Turner v. Scott*, 51 Pa. 126; *Patterson v. English*, 71 Id. 458). This paper, so far from depending upon extrinsic testimony to explain or to enforce it, is absolutely complete in itself, and is to be upheld in the face of all adverse criticism as to its form, upon the principle laid down in *Bond v. Bunting* (78 Pa. 210), that "wherever a party has the power to do a thing (statutory provisions being out of the way), and means to do it, the instrument he employs shall be so construed as to give effect to his intention." This contest would have been avoided, if it had been borne in mind, that whether the testator had executed

one will or many, nuncupative or written, valid or invalid, was a thing of no measurable consequence, if the paper which he finally executed, and which is now under scrutiny, conformed to statutory requirements, and expressed his last intentions. That it did both we have no manner of doubt.

The appeal is sustained, and the record re-committed to the register, with directions to admit the instrument to probate.

H. C. O.

Jan. 91' 50.

October, 1891.

Sweeds's Estate.

Distribution—Practice—When distributive share may be paid to heir or devisee of distributee, and not to his administrator.

M., a daughter and devisee of S., died in 1878, leaving to survive her a husband and two children, one of whom died after her decease. Upon the distribution of the estate of S., in 1891, the distributive share of M. was claimed by her administrator, and also by her husband and surviving child:

Held, that although it was within the discretion of the Auditing Judge, after such a lapse of time, and upon proof that M. had not assigned her share, to have awarded it to the surviving husband and child, the ordinary and only safe course was to award it to her administrator.

The right to administer continues until the letters of administration are revoked, or the administrator discharged.

Sur exceptions to adjudication.

Upon the audit of the account of the executor of John Sweeds, deceased, before FERGUSON, J., it appeared that the testator died May 24, 1863, leaving a will, whereby a portion of his estate was devised to his daughter, Mary Gifford.

Mary Gifford died November 20, 1878, intestate, leaving to survive her a husband, a daughter, and a son, the latter of whom died unmarried, intestate, and without issue. Mary Gifford was a resident of New York, and letters of administration were granted in this State to Montgomery Evans. The object of the issuing of the letters was to enable the administrator to receive the proceeds of the sale of certain real estate, in Montgomery County, which he received and distributed in 1883. No claims were ever presented against her estate.

The whole distributive share of Mrs. Gifford was claimed by her administrator; two-thirds were claimed by her husband, Henry W. Gifford, and one-third by her daughter, Ida S. Cooke.

The Auditing Judge awarded the whole amount to Montgomery Evans as administrator; whereupon exceptions were filed by the husband and daughter.

William Henry Peace, for exceptants, cited—

McLean v. Wade, 53 Pa. 150.

Roberts v. Messinger et al., 134 Id. 298.

Walworth v. Abel, 52 Id. 370.

Robert H. Hinckley, contra.

October 31, 1891. ASHMAN, J. Mary Gifford, a daughter of the testator and a devisee under his will, died thirteen years ago, intestate, leaving surviving a husband and two children. By the death of one of the latter, intestate and unmarried, the husband's share of his wife's estate is increased to two-thirds. The surviving daughter takes one-third. The Auditing Judge awarded the share of Mary Gifford to the administrator of her estate, and the husband and daughter object that the award should have been directly to them. They allege, in the first place, that the fund represents real estate which had vested in Mary Gifford, and had descended to them at her death; and in the second place, that the administrator of that estate was appointed for the special purpose of receiving certain moneys due the estate in Montgomery County, which have been accounted for, and with which accounting his functions ended. They also allege that all debts due by the estate have been paid.

The answer to the first objection is, that the share of the realty which it is declared vested in the daughter at the death of this testator, and descended to her heirs, was converted into personalty by a testamentary direction to sell. The proceeds of sale, which make up the bulk of the distributive fund, were therefore personalty, and divisible as such. It was within the discretion of the Auditing Judge, after the lapse of time just mentioned, and upon satisfactory proof that the daughter had made no assignment of her interest, to have ordered payment of her share to the surviving husband and child; but he certainly committed no error in adopting the course which is ordinarily pursued, and which has the merit of being the only course which is absolutely safe. The second objection, that the administration to the daughter's estate was a limited one, because when it issued only one sum was due to the estate, and that the collection and disbursement of that sum determined the administration, is novel. The record shows that the letters of administration were never revoked, and that the administrator was never discharged.

The exceptions are dismissed.

H. C. O.

WEEKLY NOTES OF CASES.

VOL. XXVIII.] FRIDAY, NOV. 20, 1891. [No. 31.

Supreme Court.

Jan. '91, 219.

April 9, 1891.

Orne v. Fridenberg.

Equity — Injunction — Laches — Building restrictions — Easements — Covenants.

In an application for relief by injunction against the breach of restrictive covenants contained in a conveyance of real property, the complainant must show that he has not been guilty of laches.

Semble, that an entire change of a neighborhood from a place for residence to a business centre, will sometimes justify a chancellor in refusing an injunction to restrain a violation of building restrictions.

A. filed a bill in equity to restrain B. from continuing to maintain certain erections on the latter's ground which adjoins that of A., for the reason that they were in violation of certain building restrictions imposed upon said property by the owner of both, when he sold and conveyed to B.'s predecessor in title in 1825. B. averred in his answer that the erections complained of existed when he bought the premises in 1875, and had then existed for more than twenty years:

Held, (1) that complainant had his choice of remedy in an action at law, or a bill for injunction, and having elected the latter, he cannot invoke the aid of equity unless he shows himself to be free from laches, and the facts in this case show that he was not sufficiently diligent in asserting his rights.

(2) That by this decision, complainant is not debarred from pursuing his remedy at law to recover any damage that he can prove has been sustained.

Appeal of Solomon R. Fridenberg, Samuel M. Fridenberg, and Isaac S. Isaacs, executors and devisees in trust under the will of Louis E. Fridenberg, Solomon R. Fridenberg, and Samuel M. Fridenberg, defendants, from the decree of the Common Pleas No. 1, of Philadelphia County, granting an injunction restraining them from maintaining certain erections in violation of building restrictions, as prayed for in a bill in equity filed by John F. Orne.

The bill and answer were referred to an examiner, who filed his report, and thereupon John M. Collins, Esq., was appointed Master, and he found the facts to be substantially as follows: In the year 1825 Edward Shippen Burd resided in a large house standing on a lot of ground at the southwest corner of Ninth and Chestnut streets, Philadelphia, which lot contained 98 feet in front on Chestnut Street and extended 235 feet to

George (now Sansom) Street, and in the rear of said lot stood a stable. In April and May of said year said Burd acquired title to two lots of ground adjoining his said lot on the west, which two lots together contained 27 feet in front on Chestnut Street and extended 235 feet to said George (or Sansom) Street. Being then the owner in fee simple of ground 125 feet in front on Chestnut Street by 235 feet in depth to said George Street he conveyed the western part of said lot 24 feet front by 235 feet deep, to Thomas C. Rockhill in fee, subject to the—

Express condition nevertheless that all the buildings heretofore erected and now standing upon the said lot of ground hereby granted shall within one year from the date hereof be completely prostrated and that he the said Thomas C. Rockhill his heirs or assigns shall not at any time hereafter erect or build or permit or suffer to be erected or built on the above described lot of ground any buildings whatever other than privies milk or bathing houses walls or fences not exceeding nine feet in height from the surface of the Curbstones immediately in front of the said lot on Chestnut Street according to the City regulation thereof excepting a message on the Chestnut Street front of the said lot not exceeding sixty feet in depth with a Piazza adjoining the same to the South for a staircase only not exceeding twenty-five feet in depth and a stable and coach house on George Street front of the said lot which Stable and coach house shall not be of a greater height nor extend in depth further North than the Stable and coach house of the said Edward Shippen Burd built and now standing upon the ground to the Eastward thereof. Also upon this further condition that the North or front wall of any building at any time hereafter to be erected or built upon the said Chestnut Street front shall be built precisely on a line East and West with the Northern wall of the Western wing of the said Edward Shippen Burd house built and now standing upon the lot of ground on the South side of the said Chestnut Street between the said lot of ground and Ninth Street that is to say at the distance of ten feet one inch and five eighths parts of an inch from the South line of the said Chestnut Street also that the ground between the said North wall of the said building so to be erected on Chestnut Street and the South line of the said Chestnut Street shall be forever left open for a public pavement and footway free from every obstruction or incumbrance whatever except steps cellar doors and scrapers.

The title to the Burd property by sundry conveyances became duly vested in John F. Orne, and after the beginning of this suit the same was duly conveyed to Henry C. Gibson, and he was made a party to this suit; the Rockhill property is now owned by the testamentary trustees under the will of Louis E. Fridenberg.

The bill alleged that the defendants have violated and are violating said restrictions and easement by permitting and maintaining the following erections, structures, and buildings upon said lot No. 908 Chestnut Street, viz:—

(1) A brick building (meaning the one on Sansom Street), and a frame building annexed thereto north (meaning south) of the house, fronting on Chestnut Street, and numbered 908

(Fridenberg's store), which buildings are neither a stable or coach-house, or privy, milk, or bath-house, wall, or fence, but a tavern and drinking and concert-saloon, and which buildings are more than nine feet high above the Chestnut Street curb, and which frame building extends in depth farther north than the said stable and coach-house on Edward Shlippen Burd's homestead lot adjoining on the east, the defendants other than Monaghan permitting and maintaining.

(2) A frame building adjoining the piazza of the said house on Chestnut Street on the south thereof, and exceeding nine feet in height above the surface of the curbstone in front of the property; and—

(3) A structure, obstruction, and incumbrance upon the ground between the north wall of said building No. 908 Chestnut Street (which is ten feet one and five-eighths inches south of the south line of said street) and the south line of said street, being neither steps, cellar-door, nor scrapers, but an extension of the first-story front part of said building.

The Master found that Rockhill occupied the premises No. 908 and built nearly in conformity with the directions. In 1858 Edward Clinton bought said premises and occupied the front part as a store and the stable as a factory; he also erected a frame pigeon-house on the premises.

"The proofs further show, what the personal inspection of the Master has confirmed, that [in addition to the said frame pigeon-house erected by said Clinton (and which was the only building he erected during his ownership) there are certain recent erections and additions put on said lot 908 Chestnut Street since the sale by Clinton], which are complained of in the bill and which are as follows:—

"(1) A frame building extending 50 feet 11½ inches north from the north wall of the brick building (stable) upon Sansom Street, measuring 12 feet 9½ inches in height at its highest point, and its eaves about 9 feet 10 inches in height above the level of the front curb on Chestnut Street.

"(2) A bulk-window, with its surroundings, erected between the north wall of the house on the Chestnut Street front of defendant's lot (which is 22 feet 1½ inches from the present outer edge of the Chestnut Street front curbstone) and the south line of Chestnut Street, the same being 21 feet 6½ inches in height above the curbstone on Chestnut Street, and 18 feet 7 inches south of the present outer edge of the said curbstone, the surface of the window being on a line with the surface of the windows of the plaintiff's property adjoining, and the depth of said bulk-window being about 3 feet 6½ or 7 inches. It is erected on the space which said E. S. Burd directed should be 'forever left open for a public pavement

and footway, free from every obstruction or incumbrance whatever, except steps, cellar-doors, and scrapers.'

"Assuming that the alleged restrictions are existing and valid, and looking now only to the nature and character of said two last-mentioned erections and structures [the said frame building 50 feet 11½ inches long (C), and the said bulk-window, with its surroundings, are manifest violations of said restrictions.] These structures were not on the ground when Clinton sold it in 1870, and there was no proof that Henry Thomas, during his brief ownership, added anything to the buildings, and the defendants admit that since the date of the deed to their testator, Louis E. Fridenberg, that is during the last five years (prior to the filing of the bill), 'the building occupied by Mr. Monaghan has been inclosed'—that is, the said frame building 'C'—and that 'some betterments have been done to the front building, not, however, increasing its size.' This latter refers to said bulk-window, and its wood, metal, and marble surroundings.

"If the said words of the answer as to the building 'C,' that it has 'been inclosed,' are meant to imply, and it be assumed as a fact (although there is no testimony upon the subject), that when said Louis E. Fridenberg bought the place there was a shed there which has since 'been inclosed,' the acts of the said Louis E. Fridenberg, or his said testamentary trustees, defendants, made it into a wooden house, and as such it was occupied by defendant Monaghan, in direct connection with the George Street brick house, 'B' (formerly the stable). So that the Master finds that [the said Louis E. Fridenberg or his said trustees, the defendants, to all ordinary intents and purposes, erected the said long wooden building 'C,' and the defendants S. R. Fridenberg, S. M. Fridenberg, and I. S. Isaacs keep and maintain the said erection to the present time.]

"And the Master finds that [either the said Louis E. Fridenberg, or his said trustees, defendants, erected said bulk-window, with its surroundings,] as above described; and the said Solomon R. Fridenberg, Samuel M. Fridenberg, and Isaac S. Isaacs, defendants, keep and maintain the said bulk-window and its surrounding erections to the present time.

"And the Master further finds that the said Solomon R. Fridenberg, Samuel M. Fridenberg, and Isaac S. Isaacs, defendants, keep and maintain the said wooden building so as aforesaid put up by said Clinton (marked 'D') to the present time.

"And the Master also finds that [at the time of the bill filed, the said brick building on Sansom Street (marked 'B'), and the said long frame building annexed (marked 'C'), were, without

the consent of the plaintiff (Orne), occupied together by defendant, John Monaghan, in the character of tenant of said defendants S. R. Fridenberg, S. M. Fridenberg, and I. S. Isaacs, trustees, as a drinking-saloon and dance-house, known as 'In Philadelphia,' and in 1884 they were, without the consent of the plaintiff, Orne, together used as a billiard and pool-room and drinking-saloon; and they are now, without the consent of the plaintiffs or either of them, used together as an office and annex to an electric light company's works.] And assuming, for the present, that the said restrictions imposed by said Burd are existing and valid, and looking only to the facts respecting the use of said brick building, the use of the said building on Sansom Street (formerly George Street) at the time of bill filed, or afterwards, as a saloon or dance-house, was a manifest violation of said restrictions; and its permitted use now for any other purpose but that of a stable and coach-house, without the consent of the plaintiffs, is a manifest violation of said restriction by the said defendants Solomon R. Fridenberg, Samuel M. Fridenberg, and Isaac S. Isaacs.

"The Master further finds that the ornamental cornice at its finish on the front top of said Orne's store (906) projects over the defendants' east line two feet one inch; and the sills of eleven windows on the side of said Orne's store project over defendants' east line one inch and three-eighths of an inch on an average. The plaintiff offered to remove said projections at any time on request. If they have not yet been removed, they are to be removed at once.

"A witness for defendants expressed the opinion that the plaintiff's windows had a full and perfect supply of light, and that there was no obstruction that he could see. The Master finds, however, that the wooden erection ('D') is high enough to be, to some extent, an interference with the full supply of light; but, as it will appear hereafter, inasmuch as the question here is not one of nuisance, but easement, evidence of the amount of actual direct damage to plaintiff is not considered material.

"It further appeared that the western wall of plaintiff's store, to the distance of about thirty-nine feet north from Sansom Street, is over on defendants' lot four and one-quarter inches, thus being to that extent a party-wall.

"The Master submits as follows:—

"1. The question arising in this case is important, touching the right to, and value of, the easement which the plaintiff claims has been violated by the defendants. This easement is in itself a very valuable property in a pecuniary point of view, worth doubtless many thousands of dollars to the plaintiff owner, and the property No. 908 Chestnut Street would sell for an amount

proportionately less on account of being subject to said restrictions, the right to which in the plaintiff constitutes the easement. And although there is no evidence as to the value of the said property No. 908, yet it may be assumed that when said Louis E. Fridenberg bought said property in the year 1875 for \$27,500—subject to mortgages, \$45,000—he gave much less than said property would have sold for if it had been free of said restrictions. The said restrictions, if enforced, are of great value in another sense to the dominant lot, the restricted space affording light and air to workmen through a large number of windows in the west wall of said Orne's storehouse. The use of said space is not merely a convenience, but it is necessary to the enjoyment of the plaintiff's premises. The right, however, to the easement in this case, which has been violated, depends in nowise on its utility, or even necessity, but upon a contract, having originated in a grant (as above recited) from E. S. Burd, who necessarily paid for the easement by an allowance or deduction from the consideration for which he conveyed said property No. 908 Chestnut Street to said Thomas C. Rockhill, his heirs and assigns.

"2. It is stated above that if said restrictions created by said Burd in his grant to Rockhill, his assigns, etc., are valid and subsisting restrictions, then said long frame building (C) and said bulk-window and the Clinton frame building are manifest violations thereof; and that the permitted use of said brick building on Sansom Street for any other purpose than that of a stable and coach-house, without the owner plaintiff's consent, is also a violation thereof. The Master now submits that the said restrictions are valid and subsisting restrictions, entitling the owner of the property No. 906 Chestnut Street to the interference of a Court of equity by injunction to restrain the continuance of such violations. As to the right of the owner plaintiff to the benefit and advantage of said restrictions, and of the liability of said defendants trustees and their land to bear the burden of the restrictions, there can be no dispute. The evidence shows that Edward Shippen Burd, being the owner of a lot of ground, with buildings thereon, at the southwest corner of Ninth and Chestnut streets, 125 feet front on Chestnut Street by 235 feet in depth to George (now Sansom) Street, conveyed the western part of said lot, 24 feet front by 235 feet deep, to Thomas C. Rockhill in fee, on condition, *i. e.*, subject to the restrictions quoted in the bill, which were against—

"(1) All buildings other than privies, milk, or bathing-houses, walls, or fences not exceeding nine feet in height from the surface of Chestnut Street front curbstone (that surface being the same then as now), excepting—

"(a) On the Chestnut Street front a house not exceeding sixty feet deep, with a staircase piazza not exceeding twenty-five feet deep, and—

"(b) A stable and coach-house on the George (now Sansom) Street front, not higher nor extending farther north than the stable and coach-house of said E. S. Burd on the adjoining lot; which stable and coach-house was in height 28 feet 7 inches to the apex of the roof, and 21 feet 1 inch to the square of said stable above the curb level of said street (then and now the same level), and in depth north 35 feet 4½ inches from the then north line of said street, which line was 10 feet north from the present outer edge of the curb there; and—

"(2) To the effect that the north or front wall of any building at any time thereafter to be erected or built upon the Chestnut Street front should be precisely on a line east and west with the north wall of the 'west wing' of said Burd's house; that is, on a line ten feet one and five-eighths inches from the then south line of Chestnut Street, which south line was twelve feet south from the present outer edge of the Chestnut Street front curb; and that the ground between said north wall and the south line of Chestnut Street should 'be forever left open for a public pavement and footway, free from every obstruction or incumbrance whatever, except steps, cellar-doors, and scrapers.' The advantage of these restrictions was enjoyed by the owners of the ground east of said property No. 908 for over forty-five years without infringement, excepting said Clinton's pigeon-house, etc.

[Said restrictions are in apt words to create a conditional estate in fee in Thomas C. Rockhill, his heirs and assigns.] By the terms of the grant they were made expressly operative upon the assigns of said Rockhill. They, therefore, ran with the land, because the liability to conform to said restrictions passed to the assignees of the land (No. 908); and so the easement, or right to take advantage of said restrictions, reserved by said grantor Burd, ran with his other land adjoining on the east, for the benefit of which the easement was created, because it passed to the successive assignees of said other land. And even if it had not run with the land, in a strict sense, it would be enforced against all purchasers who took with notice of it. This common-sense view was taken by Lord COTTENHAM in *Tulk v. Moxhay* (2 Phil. Ch. Rep. 774), and it has been followed in *Luker v. Dennis* (L. R. 7 Ch. Div. 227; 47 L. J. Ch. 174). Now, these defendants, Fridenberg and Isaacs, as well as their testator, had full notice of all the restrictions created by Mr. Burd. It would be idle to say otherwise. They are on the face of every deed in the title, including that to Louis E. Fridenberg. Grantees of land subject to restrictions are affected with

knowledge of all information necessary to observe the restrictions (*Whitton v. Whitton*, 38 N. H. 172; *Rowell v. Jewett*, 69 Me. 293). The standards to measure by in the present instance are so plain that he who runs may read them. When said Louis E. Fridenberg bought said premises No. 908 Chestnut Street, the front wall thereof at the first story was (as it is now above that) 10 feet 1½ inches (according to said restrictions) south of the south line of Chestnut Street, which it was well known was 12 feet south of the outer surface of the curbstone; and when said Louis E. Fridenberg, or his trustees, the defendants (the answer does not state which), built said bulk-window and extended it and the whole first story 3 feet 7 inches out from said wall, he or they knew perfectly well that he or they was or were doing what said restrictions prohibited. And so, when he or they (the answer does not state which) made said wooden house over 50 feet long and over 9 feet high in the yard, it was done with full knowledge that said building was in violation of the said restrictions.

"The case of *Clark v. Martin* (49 Pa. 289) is similar to the present, and the analogy of that case may be said to be controlling in this in favor of granting the relief prayed for by the plaintiff. . . .

"And there are many other authorities which hold that such restrictions, though in the form of a condition, are enforceable in equity, and entitle the lot-owner, who has the right to the benefit of the restrictions, to a writ of injunction to restrain the breach, or the continuance of any breach, of such restrictions.

"Equity will enforce agreements made by the owner of land for the benefit of other land against subsequent grantees of the land with notice, express or constructive, whether they appear as stipulations, restrictions, reservations, conditions, or covenants, and independent of the question whether they would at law be treated as covenants running with the land. (Sm. Lead. Cas., 9th ed., p. 220.) As it was said in *Whitney v. Union Railway Company* (11 Gray, 359): 'When, therefore, it appears by the fair interpretation of the words of the grant that it was the intent of the parties to create or reserve a right in the nature of a servitude or easement in the property granted, for the benefit of other land owned by the grantor, and originally forming, with the land conveyed, one parcel, such right shall be deemed appurtenant to the land of the grantor; and binding on that conveyed to the grantee, and the right and burden thus created will respectively pass to, and be binding on, all subsequent grantees of the respective parcels of land.'

"And it was held in *Peck v. Conway* (119 Mass. 546), that if the restriction or reservation creates an easement, or servitude in the nature

of an easement, and if this easement is created for the benefit of an adjoining lot, of which the grantor in the deed remains the owner, and not for the personal convenience of the grantor, and is intended to be annexed to such lot, it will be appurtenant to it and will pass to a grantee of it. And whether or not it is so must be determined by the instrument creating it, aided, if necessary, by the situation of the property and the surrounding circumstances. (See also *Bear v. Whister*, 7 Watts, 148; *Linzee v. Mixer*, 101 Mass. 531; *Tobey v. Moore*, 130 Id. 448; *Bank v. Marshall*, L. R. 40 Ch. Div. 112.)

"When, therefore, only five and one-half years before this bill was filed, the said Louis E. Fridenberg bought the property No. 908 Chestnut Street, and accepted the deed from Thomas above referred to, containing the said restrictions set out in full, he became bound to conform to said restrictions. [The conveyance established a privity of estate, and his acceptance of the restrictions a privity of contract, between him and said Orne, the then owner of the property No. 906, and the owner of the easement.] The said L. E. Fridenberg, after the conveyance to him, was in of the same estate as the original transferee, subject to the easement, namely, Thomas C. Rockhill.

"3. [Hence the acceptance by the grantee of a title expressed to be subject to such restrictions, although the deed be signed only by the grantor, really amounts to a covenant by the grantee, and runs with the land as much as a covenant for a rent-charge or a covenant for title.] The restriction clause, though in form a condition, operates as a covenant in a Court of equity. No special words are necessary to make a covenant which will run with the land. (*Trull v. Eastman*, 3 Met. 121.) And, if such appear the intention, the clause will be so construed, though it appear in the deed as an express condition. (*Hartung v. Witte*, 59 Wis. 285.) In *Burbank v. Pillsbury* (48 N. H. 475) this principle was established after a full discussion of the subject. . . . This is in accordance with the general course of the decisions in this country, and is undoubtedly the law in this State. (See *Kellogg v. Robinson*, 6 Vt. 276; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35; *Bowen v. Beck*, 94 Id. 86; *Wilcox v. Campbell*, 35 Hun, 254; *Kentucky Central Ry. v. Kenney*, 82 Ky. 154; and *Clark v. Martin*, *supra*.)

"No matter whether the stipulation or restriction in the deed amounts to a covenant or not, or is a strict condition, an injunction is proper, and by that high remedial writ a Court of equity will enforce the agreement, express or implied, against a party purchasing with notice of it. As Lord COTTENHAM said in *Tulk v. Moxhay* (2 Phill. Ch. 777-8), 'If an equity is attached to the

property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased.'

"Said restrictions then operating as a covenant, the case of *St. Andrew's Church's Appeal* (67 Pa. 512) is in point, as bearing upon the violation of said restrictions by said defendants, trustees, in permitting Monaghan to use the brick building on Sansom Street as a saloon and dance-house, under a lease the sudden termination of which by an injunction the said defendants deplored in their answer. In that case there was a mutual covenant between grantors and grantees that the lots should be subject to the restriction that none of them should 'be used for purposes other than a dwelling-house, office, privy, coach-house, or stable,' etc., and the defendants were about to erect a church, and it was contended, *inter alia*, that the contemplated edifice was not against the spirit of the covenant. But the Court (*SHARSWOOD, J.*) held that the purpose of the restriction was not material, nor whether the inconvenience was greater or less to the grantor or his assignees; that if a church should be allowed the covenant would be at an end; 'there would be nowhere any power to restrain its application to any purpose not a nuisance in itself. To protect himself, therefore, from such a consequence it was the clear right of the plaintiff to stand upon the covenant, even though the erection of a church might not prove of any actual inconvenience or annoyance to him so long as it was only used as a church.'

"In the present instance, the permitted use of said Sansom Street house as a drinking-saloon and dance-house was a gross violation of said restrictions; but to whatever innocent uses said defendants may offer to apply said building, the principle of the above case makes it clear that the owner, plaintiff in this cause, has the right to stand upon the covenant which has run with, and binds the land of the defendants, that said building shall not—without the consent of said plaintiff—be used for any other purpose but that of a stable and coach-house; and he has the right to ask the Court for an injunction to restrain said defendants from using it, or permitting it to be used, for any other purpose without his consent. It is not to be supposed that such consent will be unreasonably withheld, but it is necessary to any other use; otherwise, as Judge SHARSWOOD said, 'the covenant' (or easement) 'would be at an end.'

"4. But it is objected that the bill does not allege that the said defendants have 'erected or built, or permitted or suffered to be erected or built,' the said structures complained of (referring to three of the four alleged violations), but that they have 'permitted and maintained' said erections, structures, buildings, etc.; and defen-

dants aver that they have not violated said restrictions, assuming them to be valid and subsisting, because they did not erect, or permit to be erected, said structures. This reason is, in substance, expressed in paragraph 5 of the answer, in which they say: 'Defendants submit that said testator having in his lifetime viewed and then bought the same in its present condition, his representatives are entitled to use the same peaceably and without molestation or disturbance, especially as whatever erections, etc., are on the ground have, as stated, been placed there by a former owner over twenty-one years ago,' etc. And this, notwithstanding the admission preceding it, 'that the building occupied by Mr. Monaghan has, since the date of said deed (the deed to L. E. Fridenberg) 'been inclosed, and some betterments have been done to the front building, not, however, increasing its size.' We have seen above that the statement, that 'whatever erections are on the ground have been placed there by a former owner,' is disproved by the evidence, excepting as to the frame structure next to the staircase piazza south, which was put up by Mr. Clinton, and which, upon notice from Messrs. Eli K. Price and Joseph B. Townsend, he promised to remove upon a month's notice. But suppose that said long frame building over nine feet high (C) and the said bulk-window extension were not erected by said defendants, Fridenbergs and Isaacs, but by their testator, Louis E. Fridenberg; yet the Master submits that [the easement in this case is what is termed 'continuous,' and the duty of the terre-tenant, subject to restrictions, to protect said easement by conforming to said restrictions, is continual]; so that it is as much his duty not to 'permit' or 'maintain' a prohibited erection already on the ground, no matter by whom it was put there, as it is not to 'erect' or 'build' a forbidden structure himself. *Qui hæret in litera hæret in cortice.* And it would be monstrous injustice to, and invite to fraud upon, the owner, plaintiff, to hold that if the owner of premises No. 908 were, *e. g.*, to erect some prohibited structure during the absence, or otherwise without the knowledge, of the owner of premises No. 906, and immediately thereafter sell out said lot No. 908, the plaintiff could have no redress against the purchaser in respect of said prohibited erection, because it was built by a previous owner. If so, Mr. Burd's deed to Rockhill, so far forth as it created and reserved said easement, would be (in the language of Judge Gibson on another subject) but 'the outward and visible sign of an inward and utter vacuity.' Even at common law the occupant of an estate is liable for continuing a nuisance thereon which had been erected by a previous owner or occupant. (*Brady v. Weeks*, 3 Barb. 157; *Bemis v. Clark*, 11 Pick. 452.) 'An

action on the case lies against him who erects a nuisance and against him who continues a nuisance erected by another.' 'The continuance and every use of that which is in its erection and use a nuisance, is a new nuisance,' etc. (*Staple v. Spring*, 10 Mass. 72.) But where there is chancery jurisdiction the equity to restrain a permanent and continuous injury to a private easement is much stronger than in the case of a private nuisance, where the parties are strangers to each other in title, for where, as in this case, the easement is created by deed, the continuous injury adds to the elements of nuisance that also of the violation of a solemn covenant. And if the crowding tendency in large business centres seeks to evade old easements, it is only another proof of the growing disregard for the obligation of contracts.

"5. The right to easement in the present instance has been jealously guarded by the owners of the premises east of No. 908. [Neither the present owner, nor any former owner, of the easement has ever waived it expressly or impliedly, in whole or in part, nor acquiesced in any violation of it.] There has been no nonuser. The easement is negative, and there has been no adverse enjoyment for a length of time so as to impair the right, nor change such as to extinguish the right. Most of these causes might operate against an easement arising by prescription, but not one created by deed. There is a great difference. In *Erb v. Brown* (69 Pa. 216), it was decided that even an agreement by parol between the owners of the servient and dominant tenements will not extinguish a servitude created by deed; that this can only be done by deed or note in writing, or operation of law, and that a servitude by grant will not become extinguished by disuse, unless accompanied by denial or other act to quicken its owner to assert his right. The Court said: 'The servitude imposed on the plaintiff's land for the benefit of the defendant's estate was created by deed; and under the Statute of Frauds, could not be assigned, granted, or surrendered, unless by deed or note in writing, or by act or operation of law. It could not be extinguished or renounced by a parol agreement between the owners of the dominant and the servient tenements (*Dyer v. Sandford*, 9 Met. 395). Nor could it become extinguished by disuse, or lost by nonuser (*Curtis v. Kessler*, 14 Barb. 571; *Smiles v. Hastings*, 24 Id. 44), unless there was a denial of the title, or other act on the adverse part to quicken the owner in the assertion of his right (*Nitgill v. Paschall*, 3 Rawle, 82).' To the same effect are *St. Mary's Church v. Miles* (1 Wh. 229), *Banner v. Augier* (2 Allen, 128), *Jewett v. Jewett* (16 Barb. 150), *Farrar v. Cooper* (34 Me. 394), and cases *passim*. It cannot be pretended in this case that there has been any waiver of the

restriction against buildings over nine feet high (as above stated) in respect of said frame pigeon-house put up by Clinton. Said Clinton when notified by the trustees of the Burd estate to remove it, agreed to do so upon a month's notice. His written agreement binds the land in the hands of his assignees, they being affected with knowledge of it. But whether this is so or not, said frame structure is obnoxious to the restrictions; and, without more, the defendants are bound not to permit it to remain there, so far as it is a violation.

"There have been cases where the owner of the easement has so materially changed the condition of the estate as thereby to increase the burden of the servitude upon the servient estate to an extent that would destroy the right to the easement altogether. But nothing of the sort has occurred in this case.

"The erection of Orne's store (No. 906) by the trustees of said Burd's estate did not increase the burden upon the lot No. 908, or diminish the use and enjoyment of that lot by its owners. The erection was in the exercise of the legal right of said Burd's trustees to build a wall or house on their own land; and the windows were left in the west wall of said Orne's store in order to the enjoyment of the easement of light and air over the restricted space next west of it, that being one of the objects of the reservation of said easement.

"In the lapse of time, by natural causes or otherwise, changes in tenements must take place; and if any variation in the enjoyment of an easement would destroy the easement, it would virtually do away with all easements. The question is whether or not there has been a substantial variance in the mode or extent of user or enjoyment of the easement so as to throw a greater burden on the servient tenement. There must be an additional or different servitude, and the change must be material either in the nature or the *quantum* of the servitude imposed (*Heath v. Bucknell*, L. R., 8 Eq. 1; *Hall v. Swift*, 4 Bing., N. C., 381). Judge Brewster cited, *inter alia*, the case of the Duke of Bedford v. British Museum (2 M. & K. 552), where the grantor of land with restrictions had so altered the character and condition of the adjoining lands, that it was contended that the restriction ceased to be applicable. The case does not seem to have any application here, not only because no alterations have been made by the grantor and his assigns here, such as were made by the grantor and his assigns there, but because that case turned at last upon a point purely of equity, the Court conceiving that, however the rights of the parties might be at law (doubtful, perhaps), it was a case in which equity ought not to interfere.

"The circumstances of *Luttrell's Case* (in 4

Rep. 84), are more nearly similar to those of this case, but not quite so. There the plaintiff, having two old fulling-mills, tore them down and erected two corn-mills upon the same privilege, and the question was, whether by such a change the owner lost the prescriptive right to the use of the water in the manner in which he had enjoyed it in respect to his former mills. And it was held that the change did not affect the presumptive right, provided that the change did not prejudice the other party.

"6. It being quite clear the owner plaintiff in this case is entitled to the benefit of said restrictions, and [that the defendants, said Fridenbergs and Isaacs, violated, and are now continuing to violate, the said restrictions,] [an injunction ought to be issued against said defendants to prevent them from continuing the wrong.] A mandatory injunction is clearly within the power conferred upon the Court by the Act of June 16, 1836, which provides that 'the Courts of Common Pleas shall have the power and jurisdiction of Courts of Chancery so far as relates to—V. The prevention or restraint of the commission or continuance of acts contrary to law, and prejudicial to the interests of the community or the rights of individuals.'

"[The damage to plaintiff from the violation of said restrictions, and the continuance thereof, is not adequately remediable at law,] and the inadequacy of any remedy at law is a sufficient equity to warrant an injunction in this cause; and, the injury being constantly recurring and continuing, an injunction is the only remedy to avoid a multiplicity of suits and suppress litigation. . . .

"The projection of the cornice and window-sills over defendants' lot does not affect the plaintiff owner's title to the relief by injunction under the circumstances, he having offered to remove said projections, which must be done before final decree (*Daniel's Ch. Pr.* 989, 990; *Schaidt v. Bland*, 66 Md. R. 141)."

Defendants filed exceptions to these findings of the Master, as marked in brackets above. The Court overruled these exceptions, and entered the following decree:—

"And now, to wit, November 19, 1890, this cause coming on to be heard upon the report of the Master, it is ordered that the said report be confirmed. And it appearing by said report that the lot of ground owned by defendants, Solomon R. Fridenberg, Samuel M. Fridenberg, and Isaac S. Isaacs, trustees under the last will of Louis E. Fridenberg, on the south side of Chestnut Street, one hundred and one feet west of Ninth Street, containing in front twenty-four feet, and in depth two hundred and thirty-five feet to Sansom, is subject to the restrictions reserved in the indenture of Edward Shippen Burd and wife to Thomas

C. Rockhill, his heirs and assigns, dated July 9, 1825, recorded in deed-book G. W. R. No. 8, page 215, etc., for the benefit of the property real adjoining to the eastward thereof, to the effect that, with the exception of the front building on Chestnut Street and the back building on Sansom Street, there should not be erected or suffered on said lot any building other than privies, milk, or bathing-houses, walls, or fences not exceeding nine feet in height above the curb level on Chestnut Street; and that the back building on Sansom Street should be only a stable and coach-house; and that the ground between the north wall of the building 'on Chestnut Street and the south line of the said Chestnut Street shall be forever left open for a public pavement and footway, free from every obstruction or incumbrance whatever, except steps, cellar-doors, and scrapers.' And it appearing that there is on said lot a frame building adjoining the south end of the staircase piazza of the building on Chestnut Street, twenty-four feet long, erected on top of a low brick building, the highest point of which frame building is twenty-one feet four and three-fourths inches above said curb level; and that there is also a frame building extending fifty feet eleven and one-half inches north from the north wall of the brick building upon Sansom Street, and being twelve feet nine and a half inches in height at its highest point, as described in said report; and, further, that there is a bulk-window, with appurtenances, erected between the north wall of the house on the Chestnut Street front of defendants' lot and the south line of Chestnut Street, said window projecting three feet six and five-eighths inches from said north wall, as particularly described in said report, which said three erections are in violation of said restrictions. And it appearing further that the brick building on the Sansom Street end of said lot the said defendants at the time of bill filed permitted to be used as a drinking-saloon and dance-house instead of a stable and coach-house, which said permitted use was in violation of said restrictions, the Court doth order, adjudge, and decree that the said defendants, Solomon R. Fridenberg, Samuel M. Fridenberg, and Isaac S. Isaacs, and each of them, be enjoined from keeping and maintaining, or permitting to remain, the said bulk-window, with its surroundings as above, and in the said report particularly described, and from keeping and maintaining, or permitting to remain, the said two frame buildings between the Chestnut Street front building and the back building on Sansom Street, as above, and in said report particularly described; and, further, from using, or permitting to be used, the said brick building on Sansom Street for the purposes of a saloon or dance-house, or any similar use, by whatever name called or known, and from all use or appli-

cation of said building for any purpose whatever except that of a stable and coach-house only, without the consent of the said owner plaintiff, Henry C. Gibson, his heirs or assigns; and, further, from erecting or building, or permitting or suffering to be erected or built, on the said lot of ground, any buildings whatever other than those allowed by said restrictions and provided for in the said indenture from said Edward S. Burd to Thomas C. Rockhill of the 9th of July, 1825. And it is further ordered, adjudged, and decreed, that a writ of injunction do issue forthwith against the said defendants, commanding them to comply with all and singular the premises so enjoined upon them; and, further, that the defendants do pay the costs of the cause. This decree, however, not to be enforced until the plaintiffs remove the projection of the cornice and window-sills of their building over the defendants' premises, if required by them."

The defendants thereupon appealed, specifying for error the overruling of their exceptions and the entering of the above decree.

F. Carroll Brewster and John G. Johnson, for appellants.

George L. Crawford (George M. Dallas and Henry C. Loughlin with him), for appellee.

October 5, 1891. *PAXSON, C. J.* This was a bill filed in the Court below to restrain the defendants, who are the appellants here, from continuing to maintain certain erections on the premises 908 Chestnut Street, Philadelphia, upon the ground that they were erected in violation of certain building restrictions imposed upon said property by Edward Shippen Burd, when he sold and conveyed it to Thomas C. Rockhill in 1825. The title to the adjoining or Burd property has been vested by numerous mesne conveyances in the plaintiff, and the Rockhill property is now owned by the appellants as testamentary trustees.

The three principal matters complained of in the bill are: (a) A stable and coach-house on Sansom Street; (b) A bulk window on Chestnut Street; and (c) Two frame buildings between the Chestnut Street front building and the back buildings on Sansom Street.

The Court sustained the bill and awarded the injunction prayed for. As to the stable, the injunction merely prohibited its use "for any purpose whatever, except that of a stable and coach-house." It could not have been any broader, for the reservation expressly permitted its erection, nor did the reservation limit its use or occupancy further than may be implied from the designation of the building as a "stable and coach-house." As to the other buildings the injunction was mandatory, and the decree is broad enough to require their destruction.

The answer avers that the erections complained of are the same that existed on the premises when the defendants' testator first viewed and bought the premises in 1875, and had then existed for more than twenty-one years previously. There is no finding by the Master which essentially contradicts the answer in this respect. Exact dates are not very material, in our view of the case, as it is undisputed that all of the structures were there many years before this bill was filed.

The plaintiff had a choice of remedies. He might have brought his action at law, or he might, as he did, file his bill. By adopting the latter remedy, he submitted his case to the conscience of a Chancellor, who will or will not enforce a mere legal right as the equities of the case demand.

A Chancellor does not, and ought not, to interfere by way of mandatory injunction, even though the injury be clearly established, where there has been long-continued delay in asserting the right, and a remedy exists at law. The plaintiff had only to look out of his side windows to see the erections in the yard, and the bulk window on Chestnut Street was plainly before him every day, as he entered and left his own store. It must not be forgotten that the defendants did not put up the offending buildings. Nor did their testator. He found them there when he purchased the property, and may well have supposed that the restrictions were no longer in force. Be that as it may, the fact remains that the plaintiff was guilty of very gross laches in enforcing his rights. If there is anything well settled in equity it is that a Chancellor will not extend the aid of an injunction where the party has slept for a long time upon his rights. Authorities might be cited without number were it necessary. I shall refer to a few only. I find the law upon this subject nowhere better expressed than in 2 High on Injunctions, 1159. It covers the present case so fully that I give the extract at some length: "In considering applications for relief by injunction against the breach of restrictive covenants contained in conveyances of real property, the Courts require due diligence upon the part of the plaintiff seeking the relief, and laches or acquiescence on his part in the violation of the restrictive covenant will ordinarily defeat his application. Indeed, equity requires the utmost diligence in this class of cases upon the part of him who invokes its preventative aid, and a slight degree of acquiescence is sufficient to defeat the application, since every relaxation which plaintiff permits in allowing erections to be made in violation of the covenant amounts *pro tanto* to a disaffirmance of the obligation. Where, therefore, plaintiff lies by for a period of four or five months, permitting defendants to go on with

their erections in disregard of the covenant, he will be denied relief by injunction. And where a vendor of real property takes from each of several purchasers a covenant that he will leave un-built a certain portion of the premises conveyed, he will not be permitted to enjoin a breach of this covenant by one of the purchasers when he has permitted prior purchasers to violate it without taking proceedings against him. And, generally, whenever plaintiff stands idly by and permits the erection complained of to be made and expenses to be incurred therein, without objecting, his application for the aid of a Court of equity comes too late and will not be entertained. Thus, where purchasers of real estate have bought upon condition that they are to use the land for a specific purpose and none other, they will not be restrained from using it for other purposes, when plaintiff has permitted them to go on without objection, and to incur large expenses in the work proposed, no sufficient excuse being shown for the delay in invoking the aid of equity."

This is the recognized rule in England and this country. (See German Roman Catholic Asylum's Appeal, 115 Pa. 165; Mitchell v. Steward, L. R. 1 Equity Cases, 541; Roper v. Williams, 12 Eng. Ch. Rep. 23; Water Lot Company v. Bucks, 5 Geo. 315.) In Clark v. Martin (49 Pa. 289), where a mandatory injunction was awarded, to abate a building erected in violation of a restriction, the application was promptly made before its erection. Indeed, I doubt if a case can be found in the books, where an injunction has been awarded after the delay that has been shown here.

This practically disposes of the case. Were it necessary to go further a strong argument might be made against awarding the injunction by reason of the changed circumstances. When Mr. Burd conveyed this property to Mr. Rockhill in 1825, he lived in the old mansion at the S. W. corner of Ninth and Chestnut streets. The lot was over one hundred feet in front and extended back with a stable on the Sansom Street front. The house had wings on each side receding somewhat from the front line of the main building. It was natural that he should restrict the building on Chestnut Street to the line of his wings, and the erection of high buildings in the rear, yet he permitted the erection of a stable and coach-house on the rear of the lot similar to his own. After Mr. Burd's death the whole scene was changed. The old Burd mansion was demolished and a row of stores now occupy its site. There is nothing to show that the erections on 908 interfere in any sensible degree with plaintiff's enjoyment of light and air. The stable has not been used for many years, as such; it is now used as an office by the Edison

Light Company. The location is no longer a residential neighborhood, and a stable there would be far more objectionable than its present use, even if it could now be rented for that purpose. This entire change of circumstances and surroundings might well make a Chancellor hesitate ere he applied the strong arm of an injunction. There is a line of well-decided cases which hold that such changes in the neighborhood; the character of the improvements, and the purposes to which they are applied, are sufficient to justify a Chancellor in refusing an injunction to restrain violations of building restrictions. It is sufficient to refer to *Page v. Murray*, decided by Chancellor MCGILL in New Jersey in 1890 (and to be found in 19 Atlantic Reporter, 17); *Trustees of Columbia College v. Thacker* (87 N. Y. 319); *Peck v. Matthews* (L. R. 3 Equity Cases, 517); *Layers v. Collyer* (L. R. 24 Chan. 100); *Duncan v. Central Passenger Railway Company* (85 Kentucky, 825).

While we think, for the reasons given, that the plaintiff is not entitled to an injunction, he may still sue at law and recover damages, if he can show he has sustained any.

The decree is reversed and the bill dismissed at the costs of the appellee.

October 29, 1891. PER CURIAM. Reargument refused. W. M. S., Jr.

Jan. '90, 243.

January 14, 1891.

Fearn v. West Jersey Ferry Co.

Evidence—Admissibility of depositions taken in another case—Common carriers—Injury to passenger—Presumption of negligence arising from—Burden of proof—Duties of carrier to passengers—Ice and snow—Liability for slippery passage-ways.

A deposition taken in one action is only admissible in evidence in another action involving the same subject matter, when the two actions are between the same parties or their privies. It is not sufficient that one of the parties is the same. Identity of subject matter, in whole or in part, and identity of parties in interest, must unite to render a deposition in one case admissible in another.

The general rule that the mere happening of an injurious accident to a passenger while in the hands of the carrier will raise *prima facie* a presumption of negligence, and throw the *onus* on the carrier of showing the absence of negligence by it, is not applicable where the cause of the accident is known as well to the plaintiff as to the carrier. In such case it is incumbent upon the plaintiff to prove an omission or violation of a duty which the company owed to him.

The obligation of a common carrier to keep its platforms and approaches in a reasonably safe condition,

does not extend to the removal of snow while actually falling, or of ice only recently formed. A liability on the part of the carrier to a passenger injured by a fall, the result of nothing more than the ordinary slipperiness of ice and snow, does not arise unless they have been suffered to remain for an unreasonable length of time.

In an action for negligence by F. against a Ferry Company, wherein A., the wife and administratrix of F., was substituted as plaintiff, the deposition of F. taken in an action by A. against the same company for injuries received through the same accident, was offered in evidence:

Held, that the parties in the two actions were not identical, and the deposition was not admissible.

In the above action it appeared in evidence that the injuries to F. were caused by the slipperiness of the deck of defendant's boat, owing to a fall of snow, which had begun a few minutes before the accident, and which was still in progress when the accident occurred. On motion of the defendant the Court entered judgment of nonsuit:

Held, that the plaintiff had failed to show any omission or violation of duty by the company in connection with the cause of the accident, and therefore the nonsuit was properly ordered.

Appeal of Amelia Ann Fearn, administratrix of John Fearn, deceased, plaintiff, from the judgment of the Common Pleas No. 1, of Philadelphia County, in an action of trespass, brought by John Fearn against the West Jersey Ferry Company, to recover damages for an injury sustained by John Fearn by reason of the alleged negligence of the defendant. Pending the suit the death of the plaintiff was suggested, and the name of Mary Ann Fearn substituted as plaintiff.

On the trial, before BIDDLE, J., the following facts appeared: On February 10, 1883, John Fearn and his wife, Amelia Ann Fearn, were on their way from Washington to New York, intending to stop at Camden, N. J., for which purpose they came to the Broad Street Depot, in Philadelphia, and went to the defendant's ferry at the foot of Market Street, after 9 o'clock P. M., to take the boat for Camden, which they found tied up at the slip. It had been snowing in Philadelphia and was still snowing. There was a covering of snow on the street at the Broad Street Depot. They found the snow swept off the boardwalk in front of the ferry house at Market Street, and went into the ferry house, passed by the man at the gate on to the slip where the boat comes in, and from the slip on to the boat, the iron wicket gate being open for them. It had very recently started to snow, and the boat, whose business it was to ply in the river in the storm, was lying in her slip with the portion of the deck on which the accident occurred necessarily exposed. Their son, who had gone to the Broad Street Depot to meet them, was with them. The passage-way on the deck of

the ferry to the ladies' cabin was covered with snow. Both Mr. and Mrs. Fearn fell, one behind the other, almost as soon as they had gotten on the boat. Both were injured. Suit was brought for the injury received by the wife, and damages recovered in the United States Circuit Court for the Eastern District of Pennsylvania.

The plaintiff offered in evidence the deposition of John Fearn, plaintiff in this case, taken in the suit of John Fearn and Amelia Ann Fearn his wife, to the use of said Amelia Ann Fearn, against the West Jersey Ferry Company, in the Circuit Court of the United States, Eastern District of Pennsylvania, brought to recover for the injuries to the wife received on the same occasion and at the same time. Objected to, the said deposition appearing to have been taken in a proceeding in another Court, between different parties, and under a different issue. Objection sustained, and offer overruled. (First assignment of error.)

On motion of the defendant's counsel, the Court entered judgment of nonsuit, which the Court in banc subsequently refused to take off. (Second assignment of error.)

Whereupon the plaintiff took this appeal, assigning for error the refusal to admit the above deposition in evidence, and the judgment of nonsuit.

Frank P. Prichard and J. Davis Duffield, for appellant.

It is generally deemed sufficient for the admissibility of a deposition taken in one suit and offered in another, that the matters in issue were the same in both cases, and the parties against whom the deposition was offered had full power to cross-examine the witness. Complete materiality or identity of all the parties is not necessary.

- 1 Greenleaf Evid. § 553.
- Haupt v. Henninger, 37 Pa. 138.
- Kohler v. Henry, 4 Phila. 61.
- Hobart v. McCoy, 3 Pa. 419.
- Galbraith v. Zimmerman, 100 Id. 374.
- Fulton v. Sellers, 4 Brewster, 42.
- Cornell v. Green, 10 S. & R. 14.
- Wolf v. Wyeth, 11 Id. 149.
- McAdams v. Stilwell, 13 Pa. 90.
- Hepler v. Mount Carmel Savings Bank, 97 Id. 420.
- Bank v. Wirebach, 106 Id. 37.
- Pratt v. Patterson, 81 Pa. 114.
- Act of March 28, 1814, § 1; P. D. 729, pl. 34.
- Act of May 23, 1887, § 9; P. L. 161.

An examination of these cases shows that the parties need not be identically the same, nor need all the matters in dispute be identical; but it is sufficient if the parties are substantially the same, and some of the subject matters involved in the suit the same, to make the evidence pertinent and admissible.

The question of negligence should have been

left to the jury. Negligence is the absence of that measure of care which the circumstances require, and in the case of an injury to a passenger there is always a presumption of negligence on the part of the carrier.

- Penna. R. R. Co. v. Coon, 17 WEEKLY NOTES, 137.
- Christie v. Griggs, 2 Campbell, 77.
- Erie & W. V. R. R. Co. v. Smith, 23 WEEKLY NOTES, 511.
- R. R. Co. v. Anderson, 94 Pa. 351.
- Holbrook v. R. R. Co., 12 N. Y. 234.
- Penna. R. R. Co. v. McKinney, 124 Pa. 462.
- Spear v. P. W. & B. R. R. Co., 21 WEEKLY NOTES, 87.
- P. & R. R. Co. v. Hughes, Id. 166.
- Penna. R. R. Co. v. Fuller, 3 Pennypacker, 176.
- Sullivan v. R. R. Co., 30 Pa. 234.
- W. J. R. R. Co. v. Pollard, 22 Wallace, 341.
- Pawling v. Hoskins, 25 WEEKLY NOTES, 443.
- Neslie v. Ry. Co., 18 Id. 342.
- Seymour v. R. R. Co., 3 Bissell, 43.
- Weston v. R. R. Co., 73 N. Y. 595.
- Sheppard v. Ry. Co., 20 W. R. 705.

George Tucker Bispham (A. H. Wintersteen with him), for appellee.

In order that depositions taken in prior suits shall be admitted in subsequent suits, the parties and issues must have been the same.

- Haupt v. Henninger, 37 Pa. 138.
- Harger v. Thomas, 44 Id. 128.
- Miles v. O'Hara, 4 Binney, 108.
- Norris v. Monen, 3 Watts, 465.
- Sample v. Coulson, 9 W. & S. 62.
- 1 Wharton on Evidence, § 177.

Where the cause of the accident is clear and undisputed, the burden is on the plaintiff to show that the defendant violated some duty to him, before any presumption of negligence whatever arises.

- Farley v. Traction Co., 132 Pa. 58.
- Hayman v. Penn. R. R. Co., 20 WEEKLY NOTES, 466.
- Neslie v. Ry. Co., 18 Id. 342.

Carriers are only bound to keep their platforms and approaches thereto in a reasonably safe condition, with such diligence as a good business man in such matters is accustomed to use.

- McDonald v. Chicago R. R. Co., 26 Iowa, 124.
- Wood's Railway Law, p. 1166.
- Wharton on Negligence, §§ 821, 822.
- Stanton v. City of Springfield, 12 Allen, 566.
- Borough of Mauch Chunk v. Kline, 100 Pa. 119.
- McLaughlin v. City of Corry, 77 Id. 113.
- Dehnhardt v. City of Phila., 15 WEEKLY NOTES, 214.
- Hanson v. Borough of Warren, 22 Id. 133.

In all the cases cited by the appellant the ice and snow had been allowed to accumulate for a considerable time.

October 5, 1891. McCOLLUM, J. The questions which confront us in this case are first, whether the deposition of John Fearn was admissible; and, second, whether there was error in the refusal to take off the nonsuit. The deposition was taken in a suit in the Circuit Court of the United States, in which Amelia Ann Fearn

was the plaintiff, and the West Jersey Ferry Company was the defendant. In that action the plaintiff claimed damages for personal injuries caused by the alleged negligence of the defendant company. In this case the administratrix of John Fearn claims that he received an injury through the negligence of the same company, which caused his death. It is contended by the appellant that the injuries for which these suits were brought were received at the same time and place, and were attributable to the same cause, to wit, the neglect of the defendant company to keep its boat in a reasonably safe condition for the ingress and egress of its passengers. Assuming that the claim of the appellant is correct, it does not follow that a deposition taken in one action is admissible as evidence in the other. The actions are not between the same parties, although we have the same defendant in each. The fact that the plaintiff in the first action was the wife of the plaintiff in this action, or that she is now his widow and administratrix, can make no difference in the rule which allows testimony taken in one action to be given in evidence on the trial of another which involves the same subject-matter and is between the same parties or their privies. The joinder of the husband in the former suit was merely formal, and it did not give him control of or an interest in it. It was the wife's claim that was litigated; the judgment was obtained in her right, and it was exclusively hers. Identity of subject-matter, in whole or in part, and identity of parties in interest, must unite to render a deposition in one case admissible in another. This is the doctrine of our cases, of the Act of 1814, and of the Act of 1887, which contains the last legislative deliverance on this subject. (*Haupt v. Henninger*, 37 Pa. 138; *Harger v. Thomas*, 44 Id. 128; Act of March 28, 1814; *Pur. Dig.* 11th ed. 729; Act of May 23, 1887; *P. L.* 158.) The appellant's offer was not within this rule, and the deposition was properly rejected.

In considering the question raised by the second specification of error, it must be borne in mind that there is no evidence in the case which suggests any defect in the construction of the boat, and that the sole complaint is that its deck was slippery. This condition and its cause are adequately described in the appellant's testimony. It appears that it commenced snowing about the time Fearn left the Pennsylvania Railroad Station for the ferry, and that it was snowing when he entered the boat. As a result of the brief storm then in progress, the deck was covered with a thin coating of snow, and in crossing it to reach the cabin he slipped and fell. Nearly five years after this occurrence, alleging that he was injured by his fall and that it was caused by the negligence of the defendant company, he brought this action.

After his death his administratrix was substituted as plaintiff, and on the trial the evidence of his widow and son was relied on to sustain the charge of negligence. This developed the situation at the time of the accident, the commencement and progress of the snowstorm, and the condition of the boat as affected by it, substantially as we have stated. Assuming, as the appellant contends, that the cause of the accident was the slippery condition of the deck, it is obvious that this condition was produced by the snow falling upon it. It is not pretended that it was the duty or within the power of the company to prevent the snow falling on the deck of its boat, but it is claimed that its obligation to its passengers required it to immediately remove the snow and restore the condition which existed before the storm. It is well known that rain or snow falling upon the sidewalks of a town or city, the steps and platforms of railway cars, and the decks of ferry-boats, will render them slippery, and consequently more difficult to walk upon. But it is not practicable to absolutely prevent this condition while the rain or snow is falling, and the mere existence of it during the storm which causes it, raises no presumption of negligence on the part of the municipality, the railway, or the ferry company. In our case it commenced snowing but a few minutes before the accident, and was snowing at the time of it. There was no accumulation of ice or snow on the deck formed or left there from a prior rain or snow-fall. There was not a spark of evidence from which an inference could be drawn that there was any ice on the deck where Fearn crossed it. Where the snow was displaced by his fall, the deck had a slippery appearance, caused by the moisture from the snow upon it. It is shown by the testimony and the photographs produced by the appellee on the trial, that it was the same appearance presented by the decks of ferry-boats of like construction, in a rain-storm, or when wet from any cause. It was therefore incumbent upon the appellant, to prove an omission or violation of a duty which the company owed to him. The cause of the accident was known as well to the appellant as to the company. In such case the presumption of negligence arising from the mere fact that a passenger was injured while on the appellee's boat has no application. (*D. L. & W. R. R. Co. v. Napheys*, 90 Pa. 135; *Hayman v. Penna. R. R. Co.*, 118 Id. 508, and *Farley v. Traction Co.*, 132 Id. 58.) As the appellant failed to show any omission or violation of duty by the company in connection with the cause of the accident, we think the nonsuit was properly ordered. We find nothing in *Neslie and Wife v. Passenger Railway Co.* (113 Pa. 300), which is in conflict with this conclusion. In that case there was ice on the step

of the car, caused by a storm of the day before, and the ice "had been suffered to remain on the step from the previous day," and it was held that "whether it remained there for such time and in such form as to establish the negligence of the defendant" was a question for the jury. Here there was only a slippery condition of the deck, caused by a storm in progress when the accident occurred.

Judgment affirmed.

S. H. T.

Jan. '91, 126.

March 27, 1891.

Funk's Estate.

Wills—Construction of—Separate use trust—When not valid—Contemplation of marriage defined—When wills are read from their date and when from the date of testator's death—Act of June 4, 1879.

In Pennsylvania, a separate use can only be created for the benefit of a woman actually married, or in immediate contemplation of marriage, and, although the use is effectual as respects the marriage contemplated, it will not revive upon a second marriage.

As used in connection with the principles governing the law of separate use trusts in Pennsylvania, the phrase "in immediate contemplation of marriage" means in contemplation of an immediate marriage with a particular person.

In Pennsylvania a feme covert has only those powers over her separate use which are actually and expressly conferred by the settlement or will.

The principles and policy which govern separate uses in Pennsylvania are so different from those prevailing in England, that English authorities are inapplicable here, and the same may be said of authorities in many of the States.

For some purposes a will speaks from the death of the testator, while for other purposes it speaks from the period of its execution; and, as a general rule, the power or capacity of a testator to make the devises contained in his will, the legality of the execution of the devises, and the nature and quantum of the estate devised, are referable to, and are determined according to the law as it exists at the time of the execution of the instrument.

A testamentary trust for a separate use must be valid at the time it is declared, that is, at the time of making the will, and if it is invalid then, the subsequent happening of circumstances in the testator's lifetime, under which a valid separate use could be created, will not render the trust valid; it must be created anew, either by republishing the old will or executing a new one.

The above principle is not affected by the Act of June 4, 1879 (P. L. 88), which provides that "every will shall be construed with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

Neale's Appeal (104 Pa. 214), followed.

A testator by his will, dated May 27, 1872, directed his estate to be divided into four equal parts, each of the children to receive annually the income from one of them, "but as each of my daughters completes her thirtieth year . . . they shall have respectively paid to them the principal of . . . her respective share . . . to be so conveyed or secured to them that the same shall be free from the control of their husbands, and not to be liable for their debts." In April, 1875, one of the daughters married a man whom she met for the first time in 1873. Testator died September 6, 1886. An account having been filed by the trustees, under the will, after the said daughter had attained her thirtieth year, on distribution of the balance in the trustees' hands:

Held, that the separate use created by the above will was null and void as to the said daughter, and she having attained her thirtieth year was entitled to receive her share of the fund clear of the trust.

Appeal of the Real Estate Trust Company of Philadelphia, substituted trustee for Mrs. Mary U. Quin and her children, under the will of Francis Funk, deceased, from the decree of the Orphans' Court of Philadelphia County, making distribution of the balance in the hands of said trustee.

The facts of the case are fully set forth in the opinion of the Supreme Court, *infra*, and in the report of the case in the Court below. See Funk's Estate, 27 WEEKLY NOTES, 473.

The Auditing Judge, FERGUSON, J., held that the trust was at an end, and that the *cestui que trust* was entitled to the balance in the hands of the trustee clear of the trust. Exceptions to these findings were filed by the trustee, which, after argument, were dismissed by the Court, in an opinion by ASHMAN, J. (PENROSE, J., dissenting), and a decree entered awarding the said balance to the *cestui que trust*.

Whereupon the said trustee took this appeal, assigning as error that the Court erred in holding the trust was void and at an end, and in awarding the trust estate to the *cestui que trust* clear of the trust.

George Junkin, for appellant.

Frank L. Lyle, for appellee.

October 26, 1891. CLARK, J. The facts of this case, as they are stated in the paper-books, are substantially as follows: The last will and testament of Francis Funk, deceased, was executed May 27, 1872; at that time he had a wife, two sons, Francis and Frederick, a married daughter, Mrs. Fougeray, and an unmarried daughter, Mary U. Funk, the appellee. A. J. Quin, who was a lieutenant in the British Army until 1873, in that year visited this country, and then first made the acquaintance of Mary U. Funk, who became his wife in 1875.

Francis Funk, the testator, did not die until September 6, 1886; his wife and his son Francis died some years before. He left to survive him, therefore, only one son and the two daughters

before mentioned. By his last will and testament, already referred to, he first provided for the payment of his debts and funeral expenses, and gave the residue of his estate to his executors in trust: first, to pay the net income of the whole of his estate to his wife during widowhood, for the support of herself and daughter, Mary U., as long as she remained single, provided she assisted her mother; and for the education and maintenance of the two sons until they became self-supporting; second, at the termination of the widowhood of his wife (a) to expend so much as might be necessary for the education and maintenance of his two sons until they became self-supporting; (b) to pay to Mary U., one-fourth of the net income of the estate so long as she remains unmarried; (c) to pay to his daughter, Ella Z. Fougeray, the unexpended balance of the income, provided it did not exceed one-fourth of the whole income.

Then follows this clause: "And in case of the marriage of my said daughter Mary, then from that time to pay over unto each of my said daughters an equal half part of the income which may remain after the necessary amounts expended for the education and support of my said sons; provided, however, that the income to be paid to each one of my said daughters shall not exceed one-fourth part of the whole of the net income of my estate; and provided also, that the same shall not in anywise be subject to the control of their respective husbands, or be in any way or manner liable for their debts. And from and after the time that my youngest child has completed his education and is also able to maintain himself, then in trust to pay over unto each of my children an equal portion of the income of my estate until such youngest child shall attain his twenty-first year of age. Whereupon, I order my estate to be divided into four equal parts, each of said parts to contain, as near as may be, an equal fourth part of each kind of investment forming a part of my estate. Each of my children shall receive thereafter, annually, the interest arising from one of said equal parts; but as each of my daughters completes her thirtieth year, and each of my sons completes his twenty-fifth year, they shall respectively have paid to them the principal of her or his respective share of my estate, the principal of the shares of my said daughters to be so conveyed or secured to them that the same shall be free from the control of their husbands and not to be liable to their debts."

In case either of his children should die leaving no child to survive, that share was to go to the surviving children under the will.

Upon the adjudication of the account of the executors of Francis Funk the estate was divided into three parts, one of which was awarded to the surviving son, he, then, being over twenty-five

years of age; and the shares of the daughters were awarded to the trustee to be appointed for them under the will, both being over thirty years of age. Upon their petition, the Real Estate Trust Company, of Philadelphia, was appointed trustee for each daughter, and received each of their shares thus awarded for their benefit. Mrs. Fougeray's husband having, since then, died, the Orphans' Court declared the trust at an end, and awarded to her the capital of her trust estate, and it has been paid to her. The Real Estate Trust Company having filed an account in the Orphans' Court, Mrs. Quin contended that, as at the execution of the will she was neither a married woman nor in immediate contemplation of marriage, the trust as to her was executed, and she was entitled to have the fund awarded to her absolutely, free from any control or claim on the part of the trustee. The Orphans' Court accepted this view of the case, and awarded the fund to Mrs. Quin.

It is conceded that Mrs. Quin at the time of the making of the will was a single woman, and that the marriage relation which was subsequently formed was not then in contemplation; but it is contended on the part of the appellant that, as she was a married woman when the will took effect at the death of her father in 1886, the trust for her separate use was operative and effectual, for the purposes set forth in the will, and that the trust should have been sustained. This is the only question for our consideration; and it is admitted by the appellant that if Neale's Appeal (104 Pa. 214), was rightly decided, it governs this case, for the question involved in the case at bar was there clearly decided.

The rules of equity which govern in the creation of a separate use, and which define its nature and effect in Pennsylvania, are and always have been widely different from those which prevail in England, and in many of the States.

It was at first decided in *Massey v. Parker* (2 M. & K. 174), that a separate use created for the benefit of a single woman would not, upon her marriage, debar her husband from his marital rights; but subsequently, in *Tullett v. Armstrong* (4 M. & Cr., 377), a different doctrine was declared. It was there held that a valid separate use could be created for the benefit of a single woman, which would come into operation at her marriage whenever it should occur; and, further, that if the exclusion of any future husband was in contemplation, this intention would be carried into effect, but if the separate use was intended to be confined to a particular marriage, a second husband would not be excluded from his marital rights. The question in each case under the English rule is, what was the intention of the settlement or will? (*Lewin on Trusts*, 758.) Under the English rule, if the *feme sole*

chooses to make any disposition of the property before coverture, she may do so; she has the option of determining the trust at any time before coverture; but if she does not, it will attach on the first or any subsequent marriage, according to the terms of the will or other mode of settlement. And even after coverture, unless her power of anticipation be restrained, the feme covert may, in general, deal with the property precisely as if she were feme sole. "A feme covert, acting with respect to her separate property," says Lord THURLOW in *Hulme v. Tenant* (1 B. C. C. 20), "is competent to act in all respects as if she were a feme sole." Upon this ground it has been determined that if, without any direct or express reference to her separate property, a feme covert, who has property settled to her separate use, professes to bind herself by any written instrument, the implication of law is that she meant to charge her separate estate, for, except with reference to that, the instrument was without meaning and nugatory. Thus, if a feme covert execute a bond even to her husband, or join in a bond with another, even with her husband, or sign a promissory note or bill of exchange, or give a guarantee, though she is not personally bound, yet her separate estate, if anticipation be not restrained, is liable. (*Lewin on Trusts*, 942.) She is liable, also, through her separate estate, for any general engagement made with reference to, and upon the faith or credit of that estate (*Id.* 761-767).

But in Pennsylvania, Rhode Island, North and South Carolina, and in others of the States, following the case of *Massey v. Parker* (*supra*), a different doctrine has been declared. In this State a separate use can only be created for the benefit of a woman actually married, or in immediate contemplation of marriage, and, although effectual as respects the first marriage, it will not revive for her protection under a second marriage. (*Wells v. McCall*, 64 Pa. 207; *Yarnall's Appeal*, 70 Id. 339; *Snyder's Appeal*, 92 Id. 504.) It is equally well settled in this State that a feme covert has only those powers over her separate estate which are actually and expressly conferred by the settlement or will (*Lancaster v. Dolan*, 1 Rawle, 236).

It must be observed that the general doctrine, upon which this separate estate of the wife rests in this State and the other States named, is essentially different from that prevailing in England. It is peculiar; its peculiarity, as we said in *MacConnell v. Lindsay* (131 Pa. 476), being founded on the particular purpose intended to be accomplished. In England and in many of the States the rule, as we have said, is to treat the wife as the absolute owner, possessing the *jus disponendi* and the incidental power of charging the estate with her debts, as if she were a feme sole.

Whereas in Pennsylvania this estate in equity was intended, through her disabilities, to protect the feme covert, not only from her own improvidence, but also from the improvidence and impotency of her husband. As early as 1829, in the case of *Lancaster v. Dolan* (1 Rawle, 231), it was distinctly held that a feme covert is, in respect to her separate estate, to be deemed a feme sole only to the extent of the powers clearly given by the instrument by which the estate is settled, and that she has no right of disposition beyond that. "Instead of holding the wife to be a feme sole to all intents as regards her separate estate," says Chief Justice GIBSON in that case, "she ought to be deemed so only to the extent of the powers clearly given in the conveyance; and that instead of maintaining that she has an absolute right of disposition, unless she is expressly restrained, the converse of the proposition ought to be established, that she has no power but what is expressly given." This case was followed by *Thomas v. Folwell* (2 Wh. 11), where it was declared to be the settled law of Pennsylvania that a married woman possesses no power, in respect of her separate estate, but what is positively given or reserved to her in the instrument by which the trust is created. That this was an intentional departure from the known English rule is apparent from the language of Chief Justice GIBSON, who, in delivering the opinion of the Court, said: "Why is a settlement ever made? Certainly to exclude the husband's control. But to exclude his direct control, which consists in an exercise of legal power, and yet leave him the means of giving effect to an indirect control, which consists in an exercise of personal influence, is to do nothing. We daily see the incompatibility of the wife's protection with the qualified power of alienation, given her by our statutes; and the English chancery reports show that the same mischief has ensued from the license allowed her under deeds of settlement, by reason of which, what would otherwise have kept the wolf from the door, has been wasted or pirated by the husband. . . . We therefore hold it to be the settled law of Pennsylvania, that instead of her having every power for which she is not negatively debarred in the conveyance, she shall be deemed to have none except what is positively given or reserved to her." The rule declared in *Lancaster v. Dolan* has been steadily adhered to in a long line of cases; too long to justify a reference to all of them here. The following cases, however, may be cited: *Dorrance v. Scott* (3 Wh. 316); *Wallace v. Coston* (9 W. 137); *Lyne's Executor v. Crouse* (1 Pa. 111); *Rogers v. Smith* (4 Id. 93); *Pennsylvania Insurance Co. v. Foster* (35 Id. 134); *Wright v. Brown* (44 Id. 224); *McMullin v. Beatty* (56 Id. 389); *MacConnell v. Lindsay*,

(131 Id. 476). If anything in the law may be regarded as settled, it is that a feme covert, as to her separate estate, has no power of disposition beyond what is conferred upon her in the instrument creating the trust.

In *Maurer's Appeal* (86 Pa. 380), a case involving this precise question, Mr. Justice SHARSWOOD says: "It is too late to shake the authority of *Lancaster v. Dolan* (1 Rawle, 232). Whether the decision in that case was right or wrong it has been so often recognized and affirmed since 1829, that it is now one of the most firmly established rules of property in this State."

But, as restraints upon alienation are repugnant to the general policy of the law, it became necessary to restrict the operation of the rule; in other words, the peculiarity of our system as declared in *Lancaster v. Dolan*, called for a corresponding rule confining its operation to a more restricted class of persons; for if a separate estate might be settled upon every single woman, the free alienation of property and transmission of titles would thereby be most seriously embarrassed. Hence, in *Smith v. Starr* (3 Wh. 62), it was held that if a married woman having a separate estate becomes discover, the restraints upon the disposal of the estate attaching during coverture cease to exist when she becomes *sui juris*. This case was followed by *Hamersley v. Smith* (4 Wh. 126), where Chief Justice GIBSON, in the opinion of the Court, said: "The point in contest was virtually decided in *Massey v. Parker* (2 Mylne & Keene, 174), when it was settled that a restriction attempted by a gift to the separate use of an unmarried woman, is an impracticable one; and that it has no force to prevent her from giving the property to a husband by the act of marriage, or disposing of it in the interim. . . . Perhaps it is not easy to discern the policy of a rule which disables a benefactor from making a determinate provision for his beneficiary, which cannot be squandered or reft from him; yet the law seems to be thus settled, not only by the cases cited, but by *Newton v. Reid* (4 Simons, 141), and *Woodmeston v. Walker* (2 Russ. & Mylne, 197), in which the principle was applied to an unmarried woman. An apparent exception to it is a gift to the separate use of a woman in contemplation of her marriage with a particular person; which, by force of the agreement implied by his assent, constitutes a future separate use during the particular coverture, but which is in reality no exception at all. . . . Admitting the soundness of the principle that there cannot be a restraint which is repugnant to the gift, it is impossible to doubt the correctness of the decision in *Massey v. Parker*, which is in accordance with it. Now the difference betwixt that case and the present

is, that here the feme was married at the time of the gift, and there she was not; but the effect of it is only that she had in our case an unquestionable separate use during the first coverture." These cases were followed and re-affirmed in *Harrison v. Brolaskey* (20 Pa. 299), *Stacey v. Rice* (27 Id. 75), *Bush's Appeal* (33 Id. 85), *McKee v. McKinley* (Id. 92), *Nice's Appeal* (50 Id. 143), *Freyvogel v. Hughes* (56 Id. 228), *Koenig's Appeal* (57 Id. 352). The same rule obtains whether the exclusion of the husband's marital rights refer to a particular marriage, or to a second, or any future marriage, for it has been uniformly held, as intimated in *Hamersley v. Smith* (*supra*), that a separate use can only be created for the benefit of a woman married or in contemplation of marriage with a particular person; and, certainly, neither a married woman nor one in contemplation of a particular marriage could be supposed to have in view a second or other marriage.

The same doctrine is re-asserted in *McBride v. Snyth* (54 Pa. 245). Mr. Justice STRONG says: "Whatever may be the rule in the English Courts, it is here too well established to be disturbed by anything else than a legislative enactment, that a separate use for a woman cannot be created unless she is covert, or unless in immediate contemplation of her marriage;" citing *Potts's Appeal* (30 Pa. 168), *Dubs v. Dubs* (31 Id. 149). "We take it, therefore, as settled," says Mr. Justice AGNEW in *Wells v. McCall* (64 Pa. 207), "that the trust will be supported, notwithstanding the *cestui que trust* is a feme sole at its creation, provided that it be done in immediate contemplation of marriage. This leads us to inquire what is meant by an immediate contemplation of marriage. Evidently, the expression means in contemplation of an immediate marriage—one presently in view of the donor, and to take place in a short time after the instrument is to take effect—in contemplation of marriage with a particular person, says GIBSON, C. J., in *Hamersley v. Smith* (*supra*). That the marriage must be in immediate view at the time of the creation of the trust, is proved by all the cases which decide that on the termination of the coverture the trust falls and is not revived by a second marriage, for if any marriage would answer to the provision for the trust, a second would as well as the first. But a second marriage is evidently a thing not in immediate contemplation, being cut off from view by the uncertainties of a first marriage, the death of the husband, and an intention to marry a second time." To the same effect are *Springer v. Arundel* (64 Pa. 218), *Ogden's Appeal* (70 Id. 501), *MacConnell v. Lindsay* (*supra*), and *Kuntzleman's Estate* (136 Pa. 142).

So, also, in *Snyder's Appeal* (92 Pa. 504), the testator made his will in December, 1870, and

died a few days thereafter. The youngest daughter attained majority in August, 1878, which was the time fixed for the division of his estate. At this time one of the daughters was married and another betrothed; the other daughters remained single, and it was conceded that the will was inoperative to create any trust as to them. But as to the married daughter and the daughter then contemplating marriage, it was contended the trust for their use then took effect. It was held, however, that as none of the daughters were married or in contemplation of marriage at the creation of the trust, the separate use fell. The fact that one of them became covert or betrothed before the distribution of the estate, was of no effect; the validity of the trust must be determined by the status of the woman at the time of the creation of the trust. "This appears," said Mr. Justice STERRETT, "to be the utmost limit to which this Court has gone in favor of private right as against public policy, and it would perhaps be unwise to go any further. Trusts for coverture, either actual or in contemplation at the time of their creation, have some foundation in reason which cannot apply to coverture in the more remote future. In the former, the testator is presumed to know the then existing or contemplated alliance, and has the data on which to base an intelligent judgment as to the propriety of creating a trust. While in the latter, he can have nothing more than a bare possibility as a guide." To the same effect is the reasoning in *Philadelphia Trust Company's Appeal* (93 Pa. 209).

Whatever may be the rule in equity elsewhere, there can be no question whatever as to the rule existing in this State. The doctrine here is, undoubtedly, that a separate use can only be created for the protection of a woman married or in immediate contemplation of marriage, which, of course, implies marriage with a particular person, for how could a woman be said to be in immediate contemplation of marriage if she was not, at the time, contemplating marriage with some particular person. The principles and policy which govern separate uses in Pennsylvania are so different from those prevailing in England, that English authorities are inapplicable here, and the same may be said of authorities in many of the States.

The marriage must be in existence, or in contemplation, at the creation of the trust; and although the trust does not take effect until the testator's death, it is very plain that it is created and exists under and by virtue of the will. For, as Lord MANSFIELD said, in *Harwood v. Goodright* (Cowp. 90): "A devise of lands is considered by our Courts not so much in the nature of a testament, as of a conveyance by way of appointment of particular lands to a particular devisee."

Upon that principle it was established that a man could devise those lands only which he had at the time of such conveyance, and no after-acquired lands would pass; whereas, a testament would operate upon whatever personal estate a man died possessed of, whether acquired before or after the execution of the instrument (*Williams on Executors*, 6). In *Girard's Heirs v. City of Philadelphia* (2 Wallace, 305), Judge GRIER said: "The reason why after-purchased lands do not pass by a will, even though the testator has expressed clearly his wish or intention that they should, is not because such a purchase is a revocation of the will, but because a will is in the nature of a conveyance or an appointment of a particular estate, and consequently the testator must have the power to dispose at the time the will is executed. Hence a devise of land, though it operates in future, can pass only such interest or estate as the testator had at the time, and continued to have till his decease." So, in our own case of *Girard v. The City of Philadelphia* (4 Rawle, 335), it was held that real estate acquired after the making of a will does not pass under a devise of the residue of the testator's real estate, without a subsequent republication of the will, even where the testator, in addition to the general devise of the residue, declares in a codicil that it is his wish and intention that all the real estate which he shall thereafter purchase should pass by the same will. The *ratio decidendi* was stated in part as follows: "That a will is a species of conveyance, not strictly subject to the rules of conveyances at the common law it is true, the vesting of the estate being postponed till the death of the testator; yet operating, as regards his disposing power and capacity, by relation to the making of it, inasmuch as to require his power over the estate to be perfect at the time, just as his capacity must be perfect at the time, it being settled that the want of a disposing mind and memory at the performance of the act of disposition, is not supplied by the restoration of it before the death, for the same reason that an intervening loss of it will not prejudice a disposition unexceptionable at the time—in other words, that the act of disposition must be complete in every respect at the performance of it." Of course, the matter decided has long since been changed by the Act of April 8, 1833 (P. L. 250), and by the more recent Act of June 4, 1879 (P. L. 88); but the reasoning of the case is none the less applicable here on that account. If a will is executed in due form by a person of unsound mind it will not be received for probate because he was subsequently restored to his right mind and died without revoking it. The question is as to the testator's capacity at the time of execution. Upon the same principle the legality of the execution of a will is to be judged of by the law

as it stood at the time of its execution (*Mullen v. McKelvy*, 5 W. 399; *Jack v. Shoenberger*, 22 Pa. 416; *Gable's Executors v. Daub*, 40 Pa. 217; *Camp v. Stark*, 81* Pa. 235.) So, also, the power or right of a person to make a will is determined by the law as it existed when the will was made, not as it was at the testator's decease (*Kurtz v. Saylor*, 20 Pa. 205). In *Martindale v. Warner* (15 Id. 471), the will was made before the Act of May 6th, 1844 (P. L. 565), which provides against the lapse of legacies in certain cases, but the testator died after its passage. The will gave the residuary estate to the testator's two sons, who died before the testator, each leaving children. In the opinion filed, the Court said: "No devise or legacy hereafter made, is the phraseology of the Act; thereby meaning, according to the usual acceptance of language, wills made and executed after the passage of the Act. If they had designed otherwise, it would have been easy to express their meaning in plain and unambiguous terms. Though a will, it is true, does not take effect till after the testator's death, yet it is inchoate, though not consummate, from the execution of it, and for many purposes in law, of which this is one, it relates to the time of the making of it." It was accordingly held that the devise in favor of the residuary legatees lapsed. "It is true that every will is ambulatory until the death of the testator, and a disposition made by it does not actually take effect until then. General words apply to the property of which the testator dies possessed, and he retains the power of revocation as long as he lives. The act of bequeathing or devising, however, takes place when the will is executed, though to go into effect at a future time." Upon this ground it was held, in *Taylor v. Mitchell* (57 Pa. 212), that when a testator died in 1866, his will, executed in 1843, in the presence of a single subscribing witness, was sufficient to create a charitable use, notwithstanding the Act of April 26, 1855, which requires two witnesses. To the same effect is *Mullock v. Souder* (5 W. & S. 198). A will speaks for some purposes from the period of its execution, and for other purposes from the death of the testator, yet it never operates until the latter period (*Hitchcock v. Hitchcock*, 35 Pa. 393; *Williams on Executors*, 972-973.) By the Act of June 4, 1879, it is provided that "every will shall be construed with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." It has also been held that where a testator bequeathed a certain portion of the residue of his estate to his "legal and natural heirs," the distribution was

referable to the intestate laws, and as there could be no heirs to the living, the rights of the distributees were, of course, to be determined by the law existing at the testator's death. (*Woods' Appeal*, 18 Pa. 478; *Dubs v. Dubs*, 31 Id. 151.) But, as a general rule, the power or capacity of the testator to make the devise in question, the legality of the execution of the devise, and the nature and quantum of the estate, are referable to the time and are determinative according to the law as it exists at the execution of the instrument.

In this state of the law, how was it possible that Neale's Appeal could have been determined otherwise than it was? It was not pretended in that case that *Elwina Finlay*, at the time of the making of the will of *James E. Brown*, deceased, was either married or in immediate contemplation of marriage. In fact, she was but nine years of age and did not marry for almost eight years thereafter. The trust which was created by the will was, at the time of the execution of the will, either valid or invalid, and her subsequent marriage in the lifetime of the testator could have no effect whatever to make it valid if before that it was invalid. The legality of the testator's disposition of his estate must be determined as of the date of the will, although it does not go into effect until his death. It is of no consequence that the *cestui que trust* was married in the lifetime of the testator. If he desired to validate the devise, which, presumably, he knew to be invalid, he could have done so by changing, re-executing, or republishing the will, and his failure to do that is conclusive upon us that he did not wish to do so.

If it is believed that the law should be otherwise, the appeal should be to the Legislature. The rules prevailing in this State in reference to separate uses have become rules of property. To change them by judicial decision would unsettle many titles and do much injustice, for which no remedy could be applied. We are of opinion that Neale's Appeal was rightly decided. The ruling in that case was simply the logical and inevitable conclusion to be drawn from the cases which preceded it. And as Neale's Appeal in all respects governs the decision of the case at bar—

The decree of the Orphans' Court is affirmed, and the appeal dismissed at the cost of the appellant.

C. K. Z.

June 4, 1891.

Commonwealth v. Delamater et al.

Criminal law—Indictment—Certiorari—Jurisdiction of Supreme Court to remove by certiorari before trial, indictments pending in county Courts—When exercised.

The Supreme Court has power to issue a writ of certiorari to the Quarter Sessions of any of the counties to remove a pending indictment and all proceedings thereon into the Supreme Court, but such power is to be exercised with extreme caution, and only in a clear case.

Com. v. Balph et al. (111 Pa. 365; S. C. 17 WEEKLY NOTES, 53, 361), followed, and distinguished in its facts.

The allegation that a prejudice exists which may affect the jurors, and the fact that in an indictment the county is the prosecutor, and money alleged to be lost by the action of the defendants the county money, is insufficient to cause the Supreme Court to remove an indictment from the county Court.

Sur petitions of George B. Delamater, George W. Delamater, T. A. Delamater, and Victor M. Delamater for a rule to show cause why writs of certiorari should not issue to the Quarter Sessions of Crawford County to remove the records, indictments, and proceedings in certain cases (Nos. 15, 16, and 17 Feb. Sess., and 6, 7, 8, 9, 25, and 26 May Sess. 1891) against them by the Commonwealth to the Supreme Court.

Upon the filing of the petitions, with accompanying affidavits, a rule to show cause was granted as prayed for, whereupon the Commonwealth filed an answer and affidavits in support thereof.

The facts are sufficiently set forth in the opinion of the Supreme Court.

George A. Jenks and Joshua Douglass (with them *A. B. Richmond*), for the rule, cited—

Com. v. Meginnis, 2 Wh. 113.

Com. v. Simpson, 2 Grant. 439.

Com. v. Balph et al., 111 Pa. 365; 17 WEEKLY NOTES, 53, 361.

2 Bac. Abr. Tit. "Court of King's Bench," 689-691; 4 Bl. Com. 266.

2 Hale's Pleas of the Crown, 215.

King v. Inhabitants, etc., 2 Lev. 112.

Rex v. Harris et al., 3 Bur. 1332.

King v. Inhabitants, etc., 6 Term Rep. 192.

Rex v. Corrie, 2 Burr. 859.

People v. Vermilyea, 7 Cowan, 137.

State v. Hunt, Cox's Rep. (N. J.) 287.

State v. Gibbons, 1 Southard (N. J.), 41.

Nicolls v. The State, 2 Id. 539.

State v. The Judges, 3 Har. & McH. (Md.) 115.

Com. v. Commissioners, etc., 1 Wr. 239.

Com. v. Nathans, 5 Pa. 125.

County of Allegheny v. Gibson, 90 Id. 397.

Wesley B. Best, district attorney of Crawford County, *Thomas Roddy*, and *George F. Davenport*, contra.

The power of the Court to issue the writ is undoubted, but it is to be exercised with extreme caution.

Com. v. Balph et al., 111 Pa. 365.

Com. v. Simpson, 2 Grant. 439.

Com. v. Mickle et al., 2 Phila. 238.

November 9, 1891. *PAXSON, C. J.* There are nine of these cases, and they all involve the same principle. Three of the defendants were members of the banking firm of Delamater & Co., and were indicted in the Court below, at the instance of a number of prosecutors, for the offence of receiving the money of said prosecutors knowing the bank to be insolvent. In the case No. 15, of February Term in the Court below, to which I shall more especially refer, it is charged that the money so received was the money of the county of Crawford. Four of said cases appear to be against Victor M. Delamater alone, who is charged with the same offence, as the cashier of the bank.

A petition in each case was presented to this Court near the close of the term in the Eastern District, praying for the allowance of a writ of certiorari for the purpose of bringing up the record in order that the venue might be changed by an order of this Court. Upon the presentation of the petition we granted a rule to show cause, returnable at Harrisburg in the Middle District. The case was heard on the last day of the term, too late to dispose of it at that time with the care its gravity requires.

The grounds of these applications briefly stated are, that at the time of the failure of Delamater & Co., there were over a thousand individual depositors in said bank; that these depositors resided in nearly every township and district in said county, and are greatly excited and prejudiced against the petitioners by reason of the failure of the said bank; that this excitement and prejudice extends from said depositors to their neighbors and friends in every district throughout the county; that inflammatory articles against the petitioners have been printed in the public newspapers published in said county, and that by reason of all these causes the petitioners cannot have a fair and impartial trial in said county.

In support of this allegation, we have the sworn statement of the petitioners and a considerable number of other citizens of Crawford County.

On the other hand, the Commonwealth in answer to the rule served upon the district attorney, emphatically denies that any such feeling or prejudice exists against the petitioners as will prevent a fair and impartial trial; and have furnished us with the affidavits of a large number of citizens to that effect. These affi-

davits exceed in number those presented on behalf of the petitioners; the age, occupation, and residence of each affiant is stated, showing that they are scattered over the body of the county. The Commonwealth further contends that some, and perhaps the most objectionable of the alleged inflammatory articles were published in a small paper of little circulation and influence, while the majority of the papers of Crawford County have treated the petitioners with reasonable fairness, and that some of them were friendly.

There is no question of our power to grant the relief prayed for. That was settled in *Com. v. Ralph et al.* (111 Pa. 365). But as was said in that case "it is a power to be exercised with extreme caution," and we may add, only in a clear case. It must be exercised in aid of the administration of justice, not to defeat it, or needlessly embarrass it.

That the *Balph* case differs widely from this in its facts plainly appears from the following extract from the opinion of the Court: "Without entering into detail, it is sufficient to say that the case arose out of a conflict of jurisdiction between the Court of Common Pleas of Warren County and the Court of Common Pleas No. 2, of Allegheny County, in regard to the appointment of a receiver, culminating in the appointment of such officer by each Court, and an attempt by each to enforce its own orders and decrees. So far did this proceed that the Court of Warren County discharged upon habeas corpus a person adjudged guilty of contempt by the Court of Allegheny County, and who was in custody under an attachment. The petition further averred that a fair and impartial trial before a Judge and jury of Warren County could not be had because of the excitement and prejudice existing against them in said county, not only on the part of the public generally, but by the jurors likely to be empanelled in the cause, and the Judge before whom the case would be tried."

In the case in hand the only allegation is that a prejudice exists which may affect the jurors; and the fact that in one of the indictments the county is the prosecutor, and the money lost the county money, was pressed upon us as a reason why the prejudice, if it exists, probably extends to the whole body of taxpayers, including, of course, the jurors. But we are unwilling to believe that such a fact would influence the action of a jury of Crawford County. There are cases constantly being tried, of a *quasi* public nature, in which jurors, as citizens and taxpayers, are interested to some extent. If such interest would disqualify a juror cases might arise where an offender could not be tried in any county of the Commonwealth, as, for instance, an indictment for the embezzlement of State funds. In Philadelphia, and, perhaps, some other counties of the State, county

treasurers have been indicted and tried for the embezzlement of the county moneys, and I have never heard it even alleged that an impartial jury could not be obtained because of their interest as taxpayers. It would be an inconvenient rule to adopt and recent events warn us not to be hasty in doing so.

It will be observed that it is not alleged in any of the petitions that the prejudice referred to extends to the learned Judge, or that he is even likely to be influenced by it in any degree. That such fact is not alleged is conclusive that it does not exist. We have the right to assume, and from our personal knowledge of him we can do so confidently in this case, that the learned Judge below will do his whole duty, fully, fearlessly, and impartially. That duty will require him to see to it that the petitioners are not convicted upon insufficient testimony, and to set the verdict aside if improperly rendered. Should there be any error in his rulings the petitioners are entitled to their bill of exceptions, and there is not a Judge of this Court who would not properly allow an appeal in case the record should disclose even a fairly debatable question.

We cannot measure this case by the Acts of Assembly allowing a change of venue in civil cases. That body is clothed with legislative powers, and may grant such change in any case which, in their wisdom, they may consider public policy requires it. On the other hand, our powers are restricted and can only be exercised where it clearly appears that such exercise is necessary to secure an impartial trial. We are not so satisfied in these cases under the facts as presented. That a prejudice exists to some extent in Crawford County against the defendants may be conceded. This is almost always so in the case of the failure of a bank with a large number of depositors. Yet it by no means follows that this feeling is so strong and universal, that among the large and intelligent body of men who, in a great measure, compose the population of Crawford County, a jury cannot be found who will try the petitioners fairly, upon the law and the evidence, and not otherwise. It is further to be observed that popular feeling of this kind is fleeting in its character and soon passes away. The delay that has necessarily resulted between the granting of these rules and the disposal of them by this Court will naturally tend to allay public feeling and soften prejudice. We are all of opinion that the rule in each case must be discharged and it is so ordered.

Rule discharged.

H. C. O.

July '90, 205.

Jan. 27, 1891.

Smith's Estate.***Personal property—Disposition of—Gift—Trust—Evidence sufficient to establish a trust.***

The owner of personal property may, by a proper transfer of the title, make a gift of it direct to the donee, or he may impress upon it a trust for the benefit of the donee; but whether a gift or a trust is intended, if the transaction is imperfect or executory, equity will not aid in its enforcement.

Almost all trusts are in a certain sense executory, requiring a conveyance or something else to be done to execute them; but a technical executory trust is one in which the limitations are imperfectly declared, and the donor's intention is expressed in such general terms that something not fully declared is required to be done in order to complete and perfect the trust and to give it effect.

A gift of personal property is not effectual unless the donor has manifested an intention to relinquish the right of dominion in himself and create it in another: the intention to make the gift must be accompanied by delivery of possession or some equivalent act. But a trust is equally effective whether the donor transfers the title to another as trustee, or declares that he himself holds the property for the purposes of the trust.

When the owner of personal property disposes of it either by gift or by the creation of a trust, he must complete the disposition of the property in the method intended. If the disposition of the property in the method intended by the donor is defective, the Court will not resort to the other method for the purpose of carrying it into effect, there being no principle of equity which will perfect an imperfect gift, nor will a Court of equity impute a trust where a trust was not in contemplation.

A trust as to personal property may be proved by parol or written testimony, and the declaration of trust need not be any in particular form, but the intention to create a trust must be plainly manifest, and not derived from loose and equivocal expressions made at different times.

When the owner of certain bonds, transferable by delivery, executes written declarations not couched in formal language but sufficient to clearly indicate an intention to create a trust as to such bonds in favor of one to whom he stood *in loco parentis*, and makes an oral declaration consistent with such intention to create a trust, and thereafter disposes of the income from said bonds for the benefit of the *cestui que trust*, carefully preserves the written declarations among his papers where they are found, together with the bonds, after his death, and does nothing inconsistent with this declaration of trust, the trust will be sustained as against the testator's residuary legatees, although the declaration of trust was not exhibited to any one by the testator in his lifetime, and irrespective of his right to have revoked the trust.

Appeal of the Pennsylvania Company for Insurances on Lives and Granting Annuities, trustee under the will of Thomas Smith, deceased, from the decree of the Orphans' Court of Philadelphia County dismissing exceptions to and

confirming the adjudication of the second account of said company, as such trustee.

The facts of the case, together with the adjudication of ASHMAN, J., and the opinion of the Court, HANNA, P. J., dismissing the exceptions and confirming the adjudication, appear in the report of the case in the Court below. (Smith's Estate, 26 WEEKLY NOTES, 364.)

The Court having held that decedent held the bonds in question under a valid and binding trust, and having awarded them to Henry S. Parmalee, guardian of Thomas Smith Kelly, the *cestui que trust*, the said Pennsylvania Company as trustee of the residuary estate under the will of the decedent took this appeal, assigning as error the decision of the Court that the bonds were held by decedent under a valid and binding trust, and the Court's action in awarding the same to said guardian instead of to the appellant.

John G. Johnson (Frank P. Prichard with him), for appellant.

In every one of the cases cited in the opinion of the Court below in which a trust was sustained, there had been a declaration of trust made by the trustee in his lifetime to some one beside himself.

The evidence relied upon in the present case to prove a declaration of trust only, proves an intention to make a gift, which excludes the idea of a declaration of trust. Conceding the contrary to be true, there is no proof of a declaration made to any one beside the decedent.

The citation of a few of the recent authorities will show how strict has been the enforcement of the rule, that there must be some act on the part of the donor which divests him of the legal or equitable dominion over the property and vests an immediate right, legal or equitable, in the donee.

Bispham on Equity, § 66.

Richards v. Delbridge, L. R. 19 Eq. 11.

Trough's Estate, 75 Pa. 115.

Young v. Young, 80 N. Y. 422.

Flanders v. Blandy, 45 Ohio, 108; S. C. 26 Am.

Law Reg. N. S. 581.

E. Hunn Hanson (Alfred J. Wilkinson with him), for appellee.

The minor was a volunteer toward whom Mr. Smith stood in relation of protection so complete that although the parents were living he was *in loco parentis*. The grounds upon which a Court of equity will uphold and enforce a trust declared in favor of a volunteer have been so clearly laid down by Chancellors in England and so lately by this Court, that there is scarce room for question as to what they are.

Milroy v. Lord, 4 De Gex, F. & J. 264, 274.

Warriner v. Richards, L. R. 16 Eq. Cas. 340.

Richards v. Delbridge, 18 Id. 11.

Heartley v. Nicholson, 19 Id. 233, 242.

This Court, as fully as the English Chancery,

has recognized the validity of a declaration of a trust in favor of a volunteer.

Bond v. Bunting, 78 Pa. 210, 219.

Dickerson's Appeal, 115 Id. 198.

It is manifest from the decisions quoted that—

(1) A donor or settlor may by acts which admit of a clear, distinct purpose, manifest that he is not the beneficial owner of personal property, but another one, a mere volunteer, is; and—

(2) If he so acts that in the way of beneficial interest he shall part with his right to the property in favor of another, he may retain the legal custody of it without impairing the validity of his purpose.

(3) And finally, the volunteer, after the death of the donor, may obtain a decree in equity formally establishing his beneficial ownership if the donor neither change nor revoke his purpose.

October 26, 1891. *CLARK, J.* The appellant is the Pennsylvania Company for Insurances on Lives and Granting Annuities, trustees under the will of Thomas Smith, deceased; the appellee, Henry S. Parnalee, guardian of Thomas Smith Kelly, a minor. The proceeding was the adjudication of an account, filed by the trustees under the will of Thomas Smith, of the principal and income of \$13,000 of Pensacola and Atlantic Railroad Company's coupon bonds, which the said trustees claimed were part of the estate of decedent, and passed to them under his will. The guardian of Thomas Smith Kelly, a minor, appeared before the Auditing Judge, and claimed that the bonds had been held by the testator in trust for said minor, and should be awarded to the latter's guardian. The Auditing Judge and the Judges of the Orphans' Court sustained the guardian's claim, and awarded him the fund.

The owner of personal property, in order to make a voluntary disposition of it, may, by a proper transfer of the title, make a gift of it direct to the donee, or he may impress upon it a trust for the benefit of the donee. It is well settled, however, that whether a gift or a trust is intended, if the transaction still remains imperfect and executory, equity will not aid in its enforcement. The expression of a mere intention to create a trust, therefore, without more, is insufficient; like a promise to give, it will not be enforced in equity. (*Dipple v. Corles*, 11 Hare, 183; *Helfenstein's Estate*, 77 Pa. 328.) Almost all trusts are in a certain sense executory; ordinarily, a trust cannot be executed except by conveyance; there is, in most cases, something to be done. But this is not the sense in which a trust is said to be executory. An executory trust, properly so called, is one in which the limitations are imperfectly declared, and the donor's intention is expressed in such general terms that something not fully declared is required to be done, in order

to complete and perfect the trust, and to give it effect. When the limitations of a trust are fully and perfectly declared, the trust is regarded as an executed trust. (*Egerton v. Brownlow*, 4 H. of L. Cas. 210; *Cushing v. Blake*, 30 N. J. Eq. 689; *Pomeroy Eq.*, sec. 1001.)

Nor, in such case, if it appear that the intention of the donor was to adopt either one of these methods of disposition, will a Court resort to the other, for the purpose of carrying it into effect. What is clearly intended as a voluntary assignment or a gift, but is imperfect as such, cannot be treated as a declaration of trust; if this were not so, an expression of present gift would in all cases amount to a declaration of trust, and any imperfect gift might be made effectual simply by converting it into a trust. There is no principle of equity which will perfect an imperfect gift, and a Court of equity will not impute a trust where a trust was not in contemplation. (*Milroy v. Lord*, 4 DeG. F. & J. 264-274; *Flanders v. Blandy*, 45 Ohio, 198.) Upon the same ground it has been held that a paper of a testamentary character, but invalid for want of proper execution, cannot be enlarged or converted into a declaration of trust. (*Warriner v. Richards*, L. R. 16 Eq. 340.) In *Richards v. Delbridge* (18 Id. 11-13), it was held, overruling *Morgan v. Malleeson* (10 Id. 475), and *Richardson v. Richardson* (3 Id. 686), that to create a trust there must be the expression of an intention, not to create a present gift, but to become a trustee. (See also *Milroy v. Lord*, *supra*; *Brett's Lead. Cas.* 58; *Long's Appeal*, 86 Pa. 196.) Although the cases may not be altogether consistent, the rule is now, we think, well settled in accordance with the doctrine declared in *Richards v. Delbridge* (*supra*), that if the transaction is intended to be effected by gift, the Court will not give it effect by construing it as a trust. It is well settled that nothing can take effect as an assignment or gift which does not manifest an intention to relinquish the right of dominion on one hand and to create it on the other; if the donor has perfected his gift as he intended, and has placed the subject beyond his power or dominion, the want of consideration is immaterial; the donee's right will be enforced. A gift can only be effectual after the intention to make it has been accompanied by delivery of possession or some equivalent act; if it is not, the transaction is not a gift, but a contract merely.

If a trust is intended, it will be equally effectual whether the donor transfer the title to the trustee, or declare that he himself holds the property for the purposes of the trust. "It is well settled that the owner of personal property may impress upon it a valid present trust, either by a declaration that he holds the property in trust, or by a transfer of the legal title to a third

party upon certain specific trusts. In other words, he may constitute either himself or another person trustee. If he makes himself trustee, no transfer of the subject-matter of the trust is necessary, but if he selects a third party, the subject of the trust must be transferred to him in such mode as will be effectual to pass the legal title." (*Bispham's Eq.*, 67; *Perry on Trusts*, sec. 96-98; *Hill on Trustees*, 117 *et seq.*; *Dickerson's Appeal*, 115 Pa. 210.) In *Richards v. Delbridge* (L. R. 18 Eq. 11-13), Sir GEORGE JESSEL said: "A man may transfer his property without valuable consideration, in one of two ways: he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case, the person, who by those acts acquires the property, takes it beneficially or on trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognized as amounting to a valid declaration of trust, constitute himself a trustee, and without an actual transfer of the title may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward in trust for the other person." *Heartley v. Nicholson* (L. R. 19 Eq. 233), is to the same effect. If the donor makes a third party a trustee, he must transfer to him the subject of the trust in such mode as will be effectual to pass the title. The transaction, as in the case of a gift, to be effectual must be accompanied by delivery of the subject of the trust, or by some act so strongly indicative of the donor's intention as to be tantamount to such a delivery: but where the donor makes himself the trustee no transfer of the subject-matter is necessary. *Ex parte Pye* (18 Ves. 140); *Donaldson v. Donaldson* (Kay, 711); and *Crawford's Appeal* (61 Pa. 52), are illustrations of trusts in this form. In such cases, no assignment of the legal title is required, for the nature and effect of the transaction is that the legal title remains in the donor for the benefit of the donee. It is conceded that as the bonds of the Pensacola and Atlantic Railroad Company, the bonds in question, were not delivered to Thomas Smith Kelly by Thomas Smith, the transaction cannot be sustained as a gift. It is clear that a gift was not in contemplation, and the only question for our determination is, whether or not a complete and valid trust was created, for a trust would seem to have been contemplated.

There is no certain form required in the creation of a trust. In the case of personal property or choses in action, trusts may be proved by parol. If the declaration be in writing it is not essential, as a general rule, that it should be in any particular form. It may be couched in any language which is sufficiently expressive of the

intention to create a trust. "Three things, it has been said, must concur to raise a trust: sufficient words to create it; a definite subject, and a certain or ascertained object; and to these requisites may be added another, viz., that the terms of the trust should be sufficiently declared." (*Bispham's Eq.* 65; citing *Cruwys v. Colman*, 9 Ves. Jr. 323; *Knight v. Boughton*, 11 Cl. & Fin. 513.) The intention must be a complete one, and this requisite is especially applicable to trusts created by voluntary dispositions; "a mere inchoate and executory design is not enough, and unless there is some distinct equity, as fraud, for example, it cannot be enforced." (*Bisp. Eq.* 65.) The intention must be plainly manifest, and not derived from loose and equivocal expressions of parties made at different times, and upon different occasions, but any words which indicate with sufficient certainty a purpose to create a trust will be effective in so doing. It is not necessary that the terms "trust" and "trustee" should be used; the donor need not say in so many words "I declare myself a trustee," but he must do something which is equivalent to it, and use expressions which have that meaning; for however anxious the Court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning. (*Richards v. Delbridge*, *supra*.) In *Heartley v. Nicholson* (*supra*) Vice-Chancellor BACON says: "It is not necessary that the declaration of a trust should be in terms explicit, but what I take the law to require is, *that the donor should have evinced by his acts*, which admit of no other interpretation, that he himself had ceased to be, and that some other person had become, the beneficial owner of the subject of the gift or transfer, and that such legal right of it, if any, as he retained, was held in trust for the donee." "The one thing necessary," says the same learned Judge, in *Warriner v. Richards* (*supra*), "to give validity to a declaration of trust—the indispensable thing—I take to be, that the donor or grantor, or whatever he may be called, should have absolutely parted with that interest, which had been his up to the time of the declaration, should have effectually changed his right in that respect, and put the property out of his power, at least in the way of interest." The acts or words relied upon must be unequivocal, plainly implying that the person holds the property as trustee. (*Martin v. Fink*, 75 N. Y. 134.) Therefore, in *Young v. Young* (80 N. Y. 422), where the donor signed a paper certifying simply that certain bonds belonged to his sons, but did not declare in any words of plain import that he held them in trust for them, the declaration was held to be insufficient. In *Helfenstein's Estate* (77 Pa. 328), Mr. Justice SHARSWOOD says: "There is no prescribed form for the declaration

of a trust. Whatever evinces the intention of the party that the property, of which he is the legal owner, shall beneficially be another's is sufficient." In the case at bar the subject of the alleged trust is certain, the *cestui que trust* is particularly designated by name and identified, whilst the terms are specific and sufficiently shown. The contention is, however, that a trust upon these terms was not sufficiently declared; that the whole matter rested in the undeclared and unexecuted intention of the donor, and was, therefore, wholly without effect.

Thomas Smith, although a married man, had no children. He was the owner of a large estate, the personality alone aggregating about \$1,000,000. Thomas Smith Kelly was his nephew, his godson, and namesake; and, although his father and mother were both living, he lived with and was maintained and educated by his uncle from the age of three years, until the time of the decedent's death, on the 20th of May, 1883, when he was about thirteen years of age. His uncle admittedly stood *in loco parentis*, which would seem to furnish a sufficient motive for making this disposition of the bonds, and would have like effect generally to that which attends the relation of parent and child. (*Ex parte Pye*, 18 Ves. 146.) The bonds were purchased 28th of January, 1882, and the death of the decedent occurred on the 20th of May, 1883. A year or more before his decease, which was presumably near the time when the bonds were purchased, Thomas Smith, in a conversation with John H. Kelly, the father of Thomas Smith Kelly, stated "he had laid by or appropriated some bonds for Tom." After his death, when his box in the Trust Company's vaults was opened, the bonds in question were found amongst his assets. The envelope in which they were contained was indorsed "13 bonds, \$1000 each, held for Tom Smith Kelly. (Signed) T. S. Pensacola and Atlantic R. R. mortgage bonds." The envelope contained bonds of that description and amount. In the decedent's account-book was an entry in his own handwriting as follows:—

ACCOUNT THOMAS SMITH KELLY.

Dr.

Pensacola and Atlantic Railroad Company
Mortgage Bonds.

1882.

Jan. 28. To Cash paid E. W. Clark & Kimball,
for \$16,000 bonds at 95, and interest from
August 1st, 1881 \$15,189 33
Less Nos. 1223, 1224, 1225, \$3000,
sold Wm. Simpson, Jr., same day
at same price, \$3000 2,850 00

Balance, \$13,000, cost . . \$12,339 33

\$13,000 of these bonds I bought for, and are the property of, my nephew and godson, Thomas Smith Kelly, and belong to him.

THOMAS SMITH.

Philadelphia, January 28th, 1882.

1881. Cr.

August 1. Due and payable August 1st, 1921: coupons due August 1st and February 1st, six per cent per annum, on New York. Principal and interest guaranteed by the Louisville Railroad Company. Bonds \$16,000, \$1000, each. Nos. 1223, 1238, both inclusive.

1882.

August 10. Thomas Smith Kelly, interest collected for him \$390 00
1883.

February 1. Cash coupons paid M. E. Smith for Tom S. K. 390 00

It also appears that the decedent kept a pocket memorandum book, in which he jotted down his monetary transactions as they took place, and in January of each year made a summary of his investments. In the latest statement of this character in the book, and dated shortly before his death, the sum-total was \$1,000,000, and included in the items making up that total was "\$13,000 Pensacola and Atlantic bonds." Under the head of income for 1883, in the same book, was noted \$390 interest on these securities. Opposite to the entry of the bonds was the word "Tom" in testator's handwriting. The entry had a red line drawn through it, which line was afterwards scratched out by the testator, and the entry was written in again by him. It was explained that a nephew had drawn the line through at testator's request, because the testator had intended to enter the item elsewhere.

Was not all this, taken together, a sufficient and clear declaration of trust in favor of the nephew? The decedent, as we have seen, in his lifetime, in his own handwriting and over his own initials and signature, declared that these bonds, thus set apart and "appropriated or laid by" for his nephew, not only were the "property of his nephew" and "belonged to him," but they were "bought for" and "held for him." In the absence of the precise terms "in trust," it is difficult to suggest words more expressive of a trust than the words thus employed. Their meaning is so obvious and certain that there can be no doubt of the decedent's intention.

But it is said that this intention was not properly declared, that the words were written upon the envelope and in the private account-book of the decedent, and it is not shown that these entries and indorsements were witnessed by, or were ever exhibited to, any one; that they were mere private memoranda, which were wholly within the power of the donor, and which, in his

lifetime, he might have revoked, cancelled, or destroyed. The argument of appellant's counsel is, that a "declaration" of trust involves the idea that the donor must declare his assumption of the trust; in other words, that he must say something, or write something, or exhibit something, to some other person, or to the world at large. "If he stands alone," says the learned counsel, "in a room and repeats his intention to himself, that is not a declaration. If he writes a memorandum, not intended to be shown to any one during his lifetime, that is not a declaration. It may be a testamentary disposition, if he looks forward to its discovery and inspection after death, but it cannot be a declaration of trust if he does not intend to communicate it in his lifetime. As in gifts there must be a delivery, so in declarations of trust there must be something equivalent to a delivery, to wit, a declaration made to some other person, or to the world at large, which constitutes the donor at once a trustee, and conveys to the *cestui que trust* an immediate equitable interest."

It is admitted that the declaration need not be made to the *cestui que trust*; that if made to other persons, under circumstances indicating the intention of the donor to make a declaration, it is sufficient. It is conceded, also, that but little publicity is required, and that the donor may retain the paper in his possession, but, it is contended, that the declaration must of necessity be made to some one beside himself.

It may be conceded that if a man, being alone, merely repeat his purpose to himself, that would not be a declaration, for it is obvious that, as his utterance was not intended for other ears than his own, it was merely the expression of an intention. It may also be conceded that if, under such circumstances, he were to have written his purpose formally upon paper and added his signature and seal he might the next moment have destroyed it. The trust in such case would take effect whenever it appeared that the instrument was executed as the deliberate expression of his purpose, and this may be shown by his acts or declarations respecting it, or by circumstances tending to establish the fact.

The purpose of Thomas Smith with reference to these bonds was not only written and authenticated by his initials or signature, but the writing was carefully preserved until the time of decedent's death. The envelope containing the bonds in question had an informal declaration indorsed thereon that the bonds were held for Tom Smith Kelly; the account book showed not only that they were bought for his nephew, but that they belonged to him—they were his property. For whose inspection were those written declarations intended? Certainly, not for the inspection of the donor, but for those

who might have occasion at any time in the future to investigate his affairs. The donor was advanced in years, and was subject to the ordinary ills, accidents, and misfortunes of life, both physically and mentally. He was liable, although living, to be incapacitated for all business affairs, or he might be removed by death. In any event, his purpose would seem to have been to leave a memorandum for the eyes of others, exhibiting his intention and purpose with respect to these bonds. It is unnecessary for us to consider whether or not the donor might have revoked the declaration; he did not revoke it; he put it away with the bonds themselves, and carefully preserved it. He collected the interest semi-annually, and in recognition of the existing trust, placed the several amounts to the credit of the donee. It is not essential to the validity of a trust of personal property, that it should be irrevocable; indeed, a right of revocation may be expressly reserved. (Dickerson's Appeal, 115 Pa. 198; Lines v. Lines, 21 Atl. Rep. 809.) The question in such case is not so much whether in the lifetime of the decedent the declaration was actually exhibited to the inspection of others, as whether under all the circumstances of the case it would appear to have been written and preserved for the inspection of others. If the declaration had been a formal one, under the hand and seal of the declarant, upon proof of its execution, we think its effectuality would not have been questioned, even though it never had been exhibited to the *cestui que trust* or to any other person, and we cannot see that the informal nature of the writing could alter its effect, if the donor's intention is otherwise clearly established.

There was no provision for the assignment of the bonds of the Pensacola & Atlantic Railroad Company on the books of the company. They were simply ordinary coupon bonds, transferable by delivery. A formal assignment was unnecessary to transfer the title. The rights of creditors do not intervene. The appellants stand in the shoes of the testator and their rights do not rise superior to his. Whilst a gift, in its proper legal acceptation, was not contemplated by Thomas Smith, it is plain that his purpose was to vest the equitable ownership of these bonds in his nephew, and to apply the interest for his benefit. In the language of the President Judge of the Orphans' Court, his "declarations and subsequent acts, evidenced by his admissions and solemn entries in his books, and the indorsement upon the envelope containing the bonds, furnish incontrovertible proofs of his intention to hold them as a trustee."

In Crawford's Appeal (61 Pa. 52), Crawford, who was indebted to his wife about \$600, said to her, "I have added \$3000 to your little money;"

and it appeared that on the 9th of May, 1864, the bookkeeper by his direction made an entry of \$3000 additional to her credit on the books. The bookkeeper was directed to enter the credit simply "for cash received." It does not appear that any declaration of trust was communicated to him by Crawford, or, in fact, that a trust was expressly declared to any other person. Mrs. Crawford at no time afterwards received any portion of the principal or interest of the money standing to her credit, but interest was from year to year credited upon it. After the husband's death, on the distribution of his estate, the widow claimed this \$3000 with the accrued interest. It was held by this Court that her claim could not be supported as a gift, but it was sustained upon the footing of a trust.

We are of opinion, upon similar grounds, that the railroad bonds were, in this instance, intended not as a present gift, for the testator retained the possession of them, and exhibited no intention whatever of parting with them; on the contrary, he expressly declared in writing that he "held" them for Thomas Smith Kelly, for whom he had bought and paid for them, and that the bonds were his property. Completeness of the trust is to be judged of not only by what the testator said and what was written, but by what the testator did. He did not read the declaration to others, but he put it away with the bonds in his box in the trust company's vaults and carefully preserved it; he received and properly applied the interest; circumstances which give rise to the reasonable implication that the writing was intended for the eyes of others and not merely for his own.

We are of opinion that the trust is fully established, and the decree of the Orphans' Court is affirmed, and the appeal dismissed at the costs of the appellant.

C. K. Z.

July '90, 178.

January 23, 1891.

Shackamaxon Bank to use v. Yard.

Principal and surety—Bond for fidelity of cashier—Provisions and stipulations as to term of service—Particular phrases—When surety liable.

H. being elected cashier of a bank for the term of one year, gave bond for his fidelity with M. as surety, "for and during the time of his employment by the said bank, whether under his present election or under any subsequent election, or whether under its present organization or charter, or under any renewals or extension thereof." He was never again elected, but continued to perform the duties of cashier and to receive the salary of the office for fifteen years, when the bank collapsed, and he was found to be a defaulter:

Held, (1) That the words "whether under the present election, or any subsequent election," enlarged the scope of those previously employed, and were apt for the purpose.

(2) That as H. was acting as cashier, and was held out to the world as such when the default was committed, both he and the bank were concluded both as to the public and each other, and the surety standing on the same ground as his principal was likewise concluded.

(3) That if H.'s title to the office lacked authentication by the record of a formal election, and if he or the bank could have set this up and so have terminated the relation, yet neither having done so the irregularity was waived.

(4) That, therefore, the surety was liable on his bond.

Appeal of the Shackamaxon Bank, to the use of Joseph C. Ferguson and William E. Swire, assignees, plaintiffs, from the judgment of the Common Pleas No. 2, of Philadelphia County, in an action brought against Mary E. Yard, executrix of Charles S. Murphy, deceased, upon a bond given by the said Murphy for the faithful performance of the duties of cashier by Thomas L. Huggard.

The bond was executed jointly and severally by Huggard and Murphy, was dated May 1, 1873, and its condition was:—

Whereas, the above-named Thomas L. Huggard has been duly elected cashier in the Shackamaxon Bank and Saving Fund.

Now the condition of this obligation is such, that if the said Thomas L. Huggard shall for and during the time of his employment by the said bank, whether under his present election or under any subsequent election to the said position, or whether under its present organization or charter, or under any renewals or extension thereof, discharge and fulfil with integrity and fidelity the trust thereby reposed in him, and faithfully and honestly execute the duties that may be assigned to him, then this obligation to be void, otherwise to be and remain in full force and virtue.

On the trial, before HARE, P. J., it was shown that Huggard was first elected cashier on February 17, 1873, and gave the bond May 1st, following. He never was re-elected, but continued to act as such until the bank failed in 1885, when it was shown that he was a defaulter. The surety died in 1876, and notice was at once given to the bank. The defalcations occurred after the death of the surety.

It was shown that the bank was subject to the provisions of the following Acts of Assembly:—

ACT APRIL 16, 1850 (P. L. 480).

Sect. 10, Art. I. The affairs of every such bank shall be conducted by thirteen directors to be chosen annually by the stockholders.

Art. II. The election of the directors shall be by ballot . . . the directors shall assemble on the first Monday succeeding such election and choose one of their number to be president; the directors shall continue in office one year, and until others be chosen; if

it shall happen that the election of directors shall not be made on the day prescribed, it may be made at any time within thirty days, and the directors shall at their first meeting after such election elect one of their number to be president; and in case of the death, resignation, absence from the United States, or inability of the president or any director to act, the board of directors shall choose another to supply his place.

Art. V. The board of directors shall have power to appoint a cashier, and all other officers, etc.

ACT OF MARCH 29, 1851 (P. L. 295).

Sec. 15. That from and after the passage of this Act the cashiers and solicitors in the several banks in the county of Philadelphia shall be elected annually by the directors of said banks, at the same time and in the same manner that the presidents thereof are now elected.

Additional facts appear in the opinion of the Supreme Court.

The Court directed a verdict for plaintiff, reserving certain points among which was the following: (5) The Act of March 29, 1851, requiring that the cashier shall be elected annually, and the default in this case having occurred more than a year after the death of the surety was known to the bank, the verdict must be for the defendant.

The Court subsequently entered judgment for the defendant upon the above reserved point *non obstante veredicto*, HARE, P. J., filing an opinion in part as follows:—

“The remaining question affords ample room for argument. It is conceded that the obligation would not have endured beyond the current year without a stipulation to that effect, but the plaintiff contends that inasmuch as the bond is conditioned for the cashier's ‘good behavior for and during the term of his employment by said bank,’ ‘whether under his present election or any subsequent election to the said position,’ effect should be given to the plainly expressed intent that the surety's liability should endure so long as the principal remained in the service of the bank. There was no second election, but the cashier must be presumed to have held over with the assent of the directors, and it was immaterial that their approval was tacit without a formal vote. The argument has much weight, but does not cover the entire ground. In many respects it matters not whether the cashier is re-elected or suffered to remain in office. His responsibility to the bank is the same, and it is equally bound by his acts. It does not, however, follow that his fitness will be as carefully considered at the close of each succeeding year where he holds over by sufferance, as if the question were brought before the board. The point would appear to me doubtful were it not for the language of the Act of Assembly. The Legislature there provided for an annual election, and even

if the clause is merely directory, the surety was entitled to suppose that it would be obeyed. The phrase ‘under the present election, or under any subsequent election,’ should consequently be taken as restricting, rather than enlarging, the preceding clause, ‘as long as he shall remain in the service of said bank.’ If this stood alone there could be no doubt of the surety's liability; but the qualifying words should not be stretched beyond their literal meaning, or read as implying a holding over, without a deliberate vote. Here the distinction between the principal and the surety is marked, because the former is precluded from raising an objection which he waived at the time, while the latter derives no benefit from the consideration, and may insist on the letter of the bond.”

Whereupon the plaintiff appealed, assigning for error this action of the Court.

Richard C. McMurtrie, for appellant.

The contract was misconstrued. It was the intention of the surety to be liable for the acts of Huggard so long as he continued to be *de facto* the cashier of the bank with the consent of the directors. The Act does not require any particular mode of election of a cashier, and the acceptance of his services as cashier by the directors was an election within the meaning of the Act. The word election as there used means no more than *choose* or *appoint* in the Act of 1851.

The death of the surety did not discharge him.

Harris v. Fawcett, 8 Ch. Ap. 866.

Calvert v. Gordon, 9 B. & C. 809.

Alexander Simpson, Jr. (A. W. Horton with him), for appellee.

The fallacy of appellant is in assuming that there was indefinite liability under the words used.

Kitson v. Julian, 82 E. C. L. R. 853.

Bamford v. Iles, 3 Exch. 380.

Loan Co. v. Hall Assn., 48 Pa. 446.

It is submitted that this is not merely a question of construction of the contract. It is as much or more a question as to whether or not a condition precedent to liability has been performed. It is quite true that questions of construction are the same for principal and surety. But questions of performance are not, and in the case of a surety the performance must be literal.

Whitecher v. Hall, 11 E. C. L. R. 458; 5 B. & C. 269.

October 5, 1891. WILLIAMS, J. This action was brought upon a cashier's bond. The defence made by the surety rests on his construction of the condition in the bond. It appears that one Thomas L. Huggard was elected cashier of the Shackamaxon Bank in 1873, and gave a bond to secure the faithful discharge of his duties, with Murphy as surety. It is clear that all the parties

contemplated the establishment of permanent relations between the bank and its cashier. They knew that the office was an annual one, and that a bond in the ordinary form would impose no liability beyond the current year. They undertook therefore to provide against the necessity for an annual renewal of the bond, and to extend the security afforded by it so as to cover the whole period of Huggard's service as cashier, by giving to the condition the following form: "If the said Thomas L. Huggard shall, for and during the time of his employment by said bank, whether under his present election or under any subsequent election to the said position, or whether under its present organization or charter or under any renewals or extension thereof, discharge and fulfil with integrity and fidelity the trust," etc. The bank relied on the bond in this form and did not require its renewal, and Huggard remained in the employment of the bank as its cashier down to the time of its disastrous failure in 1885.

A course of fraudulent conduct was entered upon by him, as we understand the evidence of Mr. Faunce, the expert accountant, in 1877 or 1878, which continued until, and which greatly contributed to, if it did not occasion, the final collapse.

Some time after the bank was closed this action was brought upon the cashier's bond, and the surety asks to be relieved from his undertaking, because the evidence does not show a formal re-election of his principal year by year to the office of cashier.

The learned Judge of the Court below thought the position well taken, holding that the phrase "under the present election or under any subsequent election," should be understood as restricting rather than enlarging the preceding clause, "during the time of his employment by the said bank;" and that to render the surety liable a formal re-election annually must be shown by the plaintiff. Our inquiry, then, in the first place, is, whether the words referred to are restrictive or enlarging in their operation; and next, whether a formal re-election is necessary in order to continue the liability of the surety.

The condition was intelligently framed. The scrivener seems to have been aware of the general doctrine affecting the liability of sureties on official bonds as laid down in *Addison on Contracts*, p. 1117, and as applied in the *Savings and Loan Co. v. The Odd Fellows' Hall Association of Spring Garden* (48 Pa. 446). Instead therefore of making the bond relate to the term to which Huggard was elected, he used the words "during the time of his employment by the said bank" as cashier. Then, as if apprehensive that these words might also be restricted to the term to which Huggard had been

elected, he added the further words for the express purpose of enlarging the scope of those previously employed, "whether (such employment shall be) under his present election or under any subsequent election to the said position." The fear seems then to have suggested itself that even these words were not broad enough, because they might be held to be limited to the present charter. He then adds, to relieve against this danger, the further words "or whether under its present organization or charter or any renewals or extension thereof." The object of these explanatory sentences was to relieve against the fear that the previous words might be held to relate to the present term of Huggard, or to the present form of organization under the existing charter of the bank, and by express words to so enlarge the condition as to exclude such interpretation of it. In this form it was intended to protect the bank during the time of Huggard's employment as cashier, and during the existence of the bank, though acting under a renewal or extension of its charter at the time a breach should occur. In this form it was executed by both principal and surety, and accepted by the bank. The purpose to make the bond impose a continuing liability and relieve against the necessity for annual renewals, was a lawful one. The words employed for that purpose are apt and sufficient. The question is not new or barren of authority. In the *Mayor of Berwick v. Oswell* (3 Ell. & Bl. 653), a person was elected borough treasurer, which was then an annual office. He gave bond for the faithful performance of his duties as treasurer "during the whole time of his continuing in said office in consequence of the said election or under any annual or other future election to the said office." The bond was given in 1842. He held the office until 1848. The term had been changed meantime, so that it became an office to be held during the pleasure of the borough councils instead of an annual one. The default occurred after the change of the term and the appointment of the treasurer for an indefinite term. The surety pleaded these facts as a defence, but the Court regarded them as insufficient, and held the surety was liable for the default occurring after the change in term of office and while the treasurer was holding under an appointment made after such change had taken place. The same question was raised in the *Mayor of Dartmouth v. Silly* (7 Ell. & Bl. 97), and the same rule was held.

It may be regarded as settled that the obligation of a bond for the faithful discharge of the duties of an office or an employment is co-extensive with the duration of the office or employment. If the office is for life the liability of the surety will continue during the life of the incumbent. If the term is indefinite, as during

good behavior or at the pleasure of the employer, the liability of the surety is indefinite, and will continue until the will of the employer is exercised and the term ended. (Add. on Cont. Par. 1118). Substantially the same rule was applied in *Coe v. Vogdes* (71 Pa. 383). The action in that case was against the sureties of a tenant who had held over and was in arrears for rent. The lease was for one year, but contained a stipulation that if the tenant should remain in possession after the end of the term, the lease should "continue for another year and so on from year to year until legal notice is given for a removal." The sureties signed a stipulation agreeing to be liable for the performance of the lease on part of the tenant. The rent for the first year was paid, but the tenant held over, and the sureties were notified. They thereupon gave notice that they would not be further liable, and the tenant paid to the end of the then current year. The action was for rent accruing during a subsequent year. The sureties replied first, that they were only liable for the original term of one year; and next, that after the year expired, they had given notice of their refusal to be bound. They were held liable for the tenant's performance not only during the first year but during the holding over; and this Court said that "a mere notice by a surety that he would not be liable was no defence; he could not dissolve the contract at pleasure."

The remaining question is, was Huggard still in the employment of the bank as cashier when the default sued for occurred? It is conceded that he was acting as cashier at the time and that it was because of that fact that it was possible for him to inflict the injury complained of. It is conceded also that the bank recognized and accepted him as its cashier, trusted him with the custody of its funds, paid him his salary, and held him out to the world as such. He could not deny his official relation to the bank, nor could the bank disavow or repudiate his acts done in their service within the scope of a cashier's authority. As Huggard and the bank employing him are concluded by their conduct both as to the public and each other, the surety standing on the same ground with his principal, so far as the writing is concerned, is also concluded. The employment of the principal as cashier with the position and emoluments legitimately belonging to the office, was the object of the bond. This object was secured and the principal was for twelve years in possession of it. If the action of the directors was irregular, the irregularity was never taken advantage of. If his title to the office lacked authentication by the record of a formal election, nobody ever questioned his right or suggested a doubt about his powers. If either he or the bank could have set up want

of an annual re-election as an excuse for terminating the relation between them, neither did so, but both waived the want of form and continued the official relation.

No form of election is provided for by the statute and none is made necessary by the bond. So far as the liability of the principal or surety on this bond is concerned, continuous service beginning in a formal election and extended by mutual consent with the acquiescence of all parties interested, is enough.

The judgment of the Court below is now reversed, and judgment is now entered on the points reserved in favor of the plaintiff.

R. H. N.

July '91, 26.

May 21, 1891.

Eshleman v. Bolenius.

Liability of surety for acts of co-surety—Contribution among co-sureties—Innocent parties.

Where one of the sureties for an administrator invests on behalf of his principal funds of the estate in an unauthorized loan and the funds are lost, he cannot recover half of this loss from his co-surety if he has paid the loss himself, when it appears that the co-surety had no knowledge of the loan and never ratified it.

The loss of the money being the result of the unauthorized loan by one surety, even if it was made in entire good faith, the case must be determined by the very familiar principle that where one of two innocent parties must suffer he must bear the loss whose act or neglect has been the occasion of the suffering.

Appeal of Dr. Robert M. Bolenius, defendant, from the judgment of the Common Pleas of Lancaster County, in an action of assumpsit brought by David G. Eshleman to recover one-half of the loss which plaintiff had paid as surety upon the administration bond of Daniel M. Harman, administrator of the estate of John H. Harman, deceased, upon which bond plaintiff and defendant were co-sureties.

Plaintiff brought suit to recover \$419.45, one-half of the loss which he had been compelled to pay as surety for Daniel M. Harman, upon said administration bond, bearing date October 16, 1885, the said administrator having become insolvent.

The defendant filed the following affidavit of defence, which contains the facts of the case as accepted by the Supreme Court.

"Robert M. Bolenius, the defendant above named, being duly sworn according to law, doth depose and say that he has a just and legal de-

fence to the whole of the plaintiff's demand in the above suit, the nature and character of which is as follows:—

"Daniel M. Harman, administrator of John H. Harman, deceased, resided in 1883, and continues to reside in Baltimore County, in the State of Maryland. The plaintiff was the attorney for administrator, and likewise co-surety with the defendant on the said administrator's bond. That the said plaintiff, acting as attorney for Daniel M. Harman, administrator, etc., received from Reuben Baer, executor of the last will and testament of Daniel Harman, deceased, the sum of \$1374.61, which was the full share of the estate of Daniel Harman, deceased.

"That of the sum so received, after paying several small items, there remained the sum of \$1346.61.

"Your affiant is informed and expects to be able to prove on the trial that the plaintiff retained the said sum of \$1346.61 to indemnify himself from liability on the said administrator's bond.

"That afterwards the plaintiff deposited the sum of \$1354.11 on June 25, 1884, in the bank of A. S. Henderson, in the city of Lancaster, without the knowledge or consent of your affiant, the defendant in this suit, taking a certificate of deposit, of which the following is a copy:—

\$1354.11.

No. 1549.

BANKING HOUSE OF A. S. HENDERSON,
LANCASTER, PA., June 25, 1884.

D. M. Harman, administrator of the estate of John H. Harman, deceased, has deposited in this office, thirteen hundred and fifty-four and $\frac{11}{100}$ dollars, payable to his order or the order of D. G. Eshleman, his attorney, on the return of this certificate, twelve months after date, with interest at the rate of four per cent. per annum. A. S. HENDERSON.

No interest allowed after due.

W. H.

"That this certificate of deposit the plaintiff received and held until the 13th day of January, 1885, when A. S. Henderson died, and it was learned that he was insolvent.

"Afterwards the plaintiff, as attorney for D. M. Harman, administrator as aforesaid, presented a claim against the estate of A. S. Henderson, deceased, upon the said certificate of deposit, and there was paid to him a dividend amounting to \$357.42.

"That your affiant had no knowledge from any one that the said plaintiff had received the money of the estate of John H. Harman, as aforesaid, and only learned of it when a citation was issued out of the Orphans' Court of Lancaster County in 1886, upon Daniel M. Harman, administrator, to file his account.

"That your affiant at no time ratified the action of the plaintiff in making the deposit of said money in the bank of A. S. Henderson, all

of which your affiant expects to be able to prove on the trial of said suit.

"That the loss sustained by the estate of John H. Harman, deceased, as aforesaid, was caused by the negligence and want of care on the part of the plaintiff in depositing the money in said bank, who, as a surety on the administrator's bond, voluntarily assumed the duty and obligation of keeping the money of said estate, safe, and in a secure place for purposes of distribution. And further saith not."

Defendant afterwards filed the following supplemental affidavit:—

"Robert M. Bolenius, the defendant above named, being duly affirmed, doth depose and say as a further defence to the above claim that he is informed, believes, and expects to be able to prove that the loss sustained by the estate of John H. Harman, deceased, as aforesaid, was caused by the negligence and want of care on the part of the plaintiff in depositing with and loaning the money of said estate to A. S. Henderson, a private banker. The plaintiff, who as a surety on the administrator's bond, and as the attorney for the administrator, having assumed the duty and obligation of keeping the money of said estate safe, and in a secure place for distribution; and further your affiant saith not."

Upon a rule for judgment for want of a sufficient affidavit of defence, the Court (PATTERSON, J.) entered judgment in favor of the plaintiff for \$434.52; whereupon defendant took this appeal, assigning for error this action of the Court.

B. Frank Eshleman, for appellant.

G. Ross Eshleman and Charles I. Landis, for appellee.

October 5, 1891. GREEN, J. The affidavit of defence contains a positive averment that the money received by the plaintiff for Daniel M. Harman, adm., etc., was deposited by the plaintiff in Henderson's Bank, and that he took therefor a certificate of deposit payable twelve months after date, with interest at four per cent. This certificate we held in Baer's Appeal (127 Pa. 360) to be a loan not authorized by law, for which the administrator was personally liable. It seems now that Mr. Eshleman, who was attorney for the administrator, was also one of the sureties on his bond, and paid the loss himself. He seeks to recover in the present action one-half the loss from the defendant, who was his co-surety. The defendant alleges, in his affidavit of defence, that the loan made to the Henderson Bank by the plaintiff was made without his knowledge or consent, and that he never ratified the action of the plaintiff in making the loan. The loss of the money was the result exclusively of the unauthorized loan made by the plaintiff to the Henderson Bank, and it is

difficult to understand upon what principle the defendant can be held responsible for any part of the loss as between him and the plaintiff. The facts set forth in the affidavit of defence must be accepted as verity for the purposes of the case as it is now presented, and upon these facts the plaintiff's own action was the sole cause of the loss. Had the loan been made by the administrator, a different question would have arisen. But as it is, conceding the entire good faith of the plaintiff, the case must be determined by the very familiar principle that where one of two innocent persons must suffer, he must bear the loss whose act or neglect has been the occasion of the suffering. (*Jeffers v. Gill*, 91 Pa. 290.) It was the plaintiff himself whose act occasioned the loss, according to the facts stated in the affidavit of defence, and therefore he cannot recover against the defendant, who was entirely innocent of any participation in the act.

Judgment reversed, and procedendo awarded.

H. S. P. N.

Orphans' Court.

Jan. '91, 164.

October, 1891.

Whitecar's Estate.

Trustees—Duty of, to invest trust funds—Liability of, on failure to invest—Deposit in savings banks—Advice of counsel—When client is not protected thereby.

Sur exceptions to adjudication.

At the audit of the account of Charles R. Webb, trustee, under the will of Enos Whitecar, for Nathaniel L. and Ellen B. Henderson, before FERGUSON, J., the following facts appeared: Enos Whitecar by his will dated December 18, 1868, and duly proved January 20, 1869, provided that his residuary share should be divided into three shares, one share to be invested by his executor as trustee, in trust for Ellen B. Henderson and her husband Nathaniel L. Henderson, the interest thereof to be paid to them or either of them during their lives. In November, 1876, certain loans amounting to about \$2900 received by the trustee, and held by him as an investment for this trust, were paid off. The trustee deposited the money in the Western Savings Fund, which for a short time paid four per cent. interest, then the interest was reduced

to three and a half per cent., and on January 1, 1883, to three per cent. per annum. On October 31, 1888, another loan of \$725.87 was paid off, and in like manner deposited. The interest less the trustee's commission was duly paid over. A surcharge was now asked for the difference between the income received and that which should have been received. The trustee testified that he made four or five efforts to invest the money in a mortgage or in a Philadelphia City loan, but could not find what he considered a safe investment that would pay more interest unless he paid a bonus to which the *cestuis que trustent* would not consent. He applied to the Orphans' Court for leave to invest in a New Jersey mortgage, but permission was refused. He further claimed that his attorney advised him he was authorized in keeping the money in the savings fund. His attorney corroborated this evidence, but it did not appear that the accountant had made any effort to invest the money for a number of years until just prior to filing his account when he did invest the same in a mortgage bearing five per cent. interest.

The Auditing Judge found as follows: "In every case a trustee is entitled to a reasonable time in which to find an investment for trust property, and he has the right in the meantime to deposit it with or without interest. But it can hardly be contended that fifteen years is such a reasonable time, and in this case it can hardly be claimed that if this trustee had made an effort he could not have found a secure investment for three thousand dollars or thereabouts at a rate of interest considerably above three per centum. He claims that he did make such an effort, but the evidence only shows four or five efforts to obtain a security, and these made many years ago. The fact that under the pressure of a citation for an account and this threatened surcharge, he found an investment for this fund at five per cent. interest almost immediately, is a sufficient answer to the claim that he could not obtain a security. It is a fact of which the Court may take judicial notice that there has hardly been a time since 1876, when a five per cent. mortgage for \$3000 could not have been obtained if the effort had been made to find it, and at four and a half per centum interest the money could have been placed without any effort or expense either.

"If a person accepts a position as trustee he must perform the duties or take the responsibility for their non-performance. There is no obligation upon his part to accept the office, but if he does accept, there is an obligation to perform the duties. In this case the trust was a very simple one and easily performed, *i. e.*, to invest the fund and pay the income. The

trustee did not invest, he deposited the fund in a savings bank. The fact that it paid him the interest it did, is the best evidence that it was finding plenty of safe investments from which it realized more, and if it could find such investments why could not this trustee do the same?

"In none of the evidence which has been offered in this case can the Auditing Judge see anything to justify or excuse the supineness and neglect of this trustee, by which this *cestui que trust* has been deprived of a large portion of the income which she ought to have received. He thinks that in surcharging him with one per cent. additional upon the balance in his hands, substantial justice will be done. While the *cestui que trust* may not receive all she might have received if she had had a diligent trustee, she will at least receive part of it, and at the same time the accountant will be taught the lesson that if he accepts an office of trust he must perform its duties or give place to some one who will do so. The accountant will be surcharged fifteen years' income at the rate of one per cent. upon \$3614.52, \$36.14 a year for fifteen years, \$542.10, which sum is awarded to Ellen B. Henderson, *cestui que trust*."

To this adjudication exceptions were filed by the accountant.

Robert H. Hinckley, for exceptant.
Henry R. Edmunds, contra.

October 31, 1891. *ASHMAN, J.* It would be difficult to frame an excuse which would absolve a trustee from the charge of supine negligence, who has permitted a trust fund of \$2900 to remain on deposit in a savings fund for fifteen years; at all events, this accountant has not presented it. Neither the fact that the *cestui que trust* was not dependent upon the income of the fund for her living, and for a time did not object to his course, nor the fact that years ago he sought an investment for the money and failed, can be accepted as proof that the trustee used that care and diligence in the management of the trust which he would be likely to bestow upon his own property. The *cestui que trust* was old and infirm, and resided in another State, and she did complain repeatedly of the meagre income she was receiving from the estate. She had a right, under the will, to the product of a well-secured investment, whether she was relatively rich or relatively poor. The accountant alleged that his then counsel had told him he might safely continue the deposit. He did not say, however, that he understood this to mean that he was at liberty to continue it forever; and besides, even the advice of counsel will not justify a man in abandoning his own common sense.

We agree with the Auditing Judge that a sur-

charge of one per cent. per annum will not more than represent the loss to the *cestui que trust* by the failure to invest; but we find that \$725 was inadvertently calculated as forming part of the fund in 1876, when it was not in fact included therein until 1888. The surcharge is accordingly reduced to \$455.10, and with this correction the adjudication is confirmed.

C. K. Z.

U. S. Circuit Court— Eastern District.

Shapleigh v. Chester Electric Light and Power Co.

Practice—Cross-examination of witness—Jurisdiction of Examiner to adjourn meeting.

An Examiner may adjourn the cross-examination of a witness, and his decision to do so is final and binding on the parties.

Motion to produce witness or suppress his testimony.

A witness produced by respondents finished his direct examination, and was tendered for cross-examination. The Examiner adjourned the meeting until a subsequent day, and upon that day again adjourned it on account of the absence in St. Louis of one and the illness of the other of complainant's counsel. On the day to which this adjournment was made the witness was not produced.

Mark Wilks Collet and *John R. Bennett*, for the motion.

William C. Strawbridge and *J. Bonsall Taylor*, for respondents.

October 18, 1891. *ACHESON, Circ. J.* The Examiner's ruling is final; the witness must be produced within thirty days for cross-examination, or his deposition be stricken out.

C. B. T.

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BY

HENRY BUDD, Esq.

ABATEMENT. That process was served upon an officer of a foreign corporation, who was temporarily within the State, the corporation not doing business within the same, and the cause of action arising out of the same, is a good plea in abatement by the corporation. *Phillips v. Library Co.*, 21.

ACCOUNTS. Of trustees. See **TRUSTEES**. (O. C.) *Hockins's Estate*, 312.

Between tenants in common. See **CO-HEIRS**. *Clayton v. McCay*, 402.

ACCUMULATIONS. A., by the 14th item of his will directed as follows: "The rest, residue and remainder of my estate . . . after satisfying the foregoing bequests, as such remainder shall be realized and converted into proper securities by my executors, as provided in item 17 of this will, shall be by them transferred . . . to the P. Company, which company shall hold the same . . . in special trust . . . to keep the same invested . . . and . . . to add the interest and income thereof to the capital and thus accumulate and increase the fund until the expiration of ten years after my decease, at which time it shall be divided amongst such of my grand nephews and grand nieces who shall then be living," etc. The 17th item was an absolute bequest of the entire personalty to the executors to enable them freely and fully to execute the various provisions of the will, "giving them full power and control over the entire estate until the time of its being turned over to the residuary trustee. Debts, costs, expenses, taxes, insurance, legacies, etc., were to be paid by the executors before the residuary trust should arise. Rents and income received by the executors were directed, "to constitute part of my residuary estate," and it was directed that the "executors shall apply the proceeds of sale of real estate equally and in like manner with the proceeds of sales of personal estate in payment of all or of any of the bequests." On filing the account it appeared that the payments during the first year exceeded the income of that year: held, (1) the income for the first year entered into the general estate and was applicable to debts, legacies and expenses, the residue only after the deduction on these accounts being payable to the trustee; (2) that there was during the first year no accumulation in transgression of the Act of April 18, 1853. *Williamson's Estate*, 353.

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ADMISSION. In an action to recover damages for the taking of land, counsel for defence offered an

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agreement of the defendant to take "damages in stock in said railroad. Cost of fencing not included as damages, provided no damage is done my buildings, race or water-power," and added that he offered it to show that there had been a voluntary assessment of damages payable in stock, and that he did "not question that, if the water-power is damaged, the defendant is liable to a money assessment in this suit:" *held*, not to be an admission that, in case of an injury to the water-power, all damage would be payable in cash, but only that that particular damage would be so payable. *Hoffman v. Bloomsburg & Sullivan R. R. Co.*, 361.

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An affidavit of defence must contain all the facts necessary to make a legal answer, and their omission cannot be supplied by possible inferences. *Class v. Kingsley*, 320.

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Of municipal claim. See PRACTICE. MUNICIPAL CLAIM. (C. P.) *City of Phila. v. Laughlin*, 306.

APPEAL. No appeal lies from the refusal of the Common Pleas to enforce summarily an agreement for the discontinuance of a cause. *Bach v. Burke*, 124.

Appeal does not lie from a decree of Common Pleas approving the sufficiency of bond given on exercise of right of eminent domain. *Twelfth St. Market Co. v. Phila. & Read. Term. R. R. Co.*, 111.

Appeal from a refusal to open a judgment lies only when the judgment has been entered upon a warrant of attorney or a judgment note; it does not lie where the judgment has been confessed in an adverse proceeding. *Maneval v. Township of Jackson*, 130.

An appeal does not lie from the decision of the Common Pleas in a proceeding to recover the penalty for a breach of an ordinance prohibiting an act, neither

APPEAL—Continued

indictable nor a public offence, begun before a justice of the peace but removed to the Common Pleas by certiorari. *Borough of Mahanoy City v. Wadlinger*, 132.

No appeal lies in road cases; the writ in such cases, called, since the Act of May 9, 1889 (P. L. 158), an appeal is, in reality, a certiorari, and brings up nothing but the record. Road in Roaring Brook Township, 141.

An appeal (so-called) in a road case from a decree of confirmation of the report of viewlers in the Quarter Sessions, must be taken within two years from the date of the confirmation. *Id.*

In the case of the vacation of a street, although no appeal is expressly given by the words of the Act of April 21, 1858 (P. L. 386), or of June 13, 1874 (P. L. 263), or of Art. XVI, § 8 of the Constitution, yet the provisions in the Constitution and the Act of 1874, giving an appeal to either party from any preliminary assessment of damages in the case of the taking, injury, or destruction of property, give by implication an appeal in such cases from the Quarter Sessions jury of view to the Common Pleas. *Hare v. Rice*, 161.

Where on the trial of seven defendants for conspiracy three file a plea of *autrefois convict*, which is overruled, a defendant who has not so pleaded cannot maintain an appeal from the overruling of the plea. *Commonwealth v. Doughty*, 178.

From Orphans' Court, condition of recognizance upon, see RECOGNIZANCES. *Commonwealth v. Wistar*, 97.

APPORTIONMENT. An apportionment of taxes and water rents may be made between the life-tenant and the remainderman when the former dies before the expiration of the year for which the taxes, etc., were paid; this rule will be applied with liberality in favor of a widow taking a life estate under the will of her husband. (O. C.) *Fest's Estate*, 415.

ARBITRATION. A statement by a defendant, to whom it is proposed that *H.* shall restate an account between the plaintiff and himself, that he would as *lieu* *H.* should do it as any one, does not constitute an agreement of submission to arbitration. *Linderman v. Pomeroy*, 216.

A, by his will, directed that any difficulty to the matter should be referred to B, a member of the bar; a dispute arose and B. gave a decision; he afterwards became counsel for one of the exceptants, and the same question which he had decided was made the subject of proceedings in Court: *held*, that B.'s action as referee was not invalidated by his subsequent retention as counsel, and that his decision was binding. (O. C.) *Phillips's Estate*, 229.

Where a building contract contains an agreement that all disputes "which may arise between the parties to this agreement relative to or touching the same" shall be referred to the engineer and architect, whose decision shall be final, and also that the parties "waive any right of action . . . or other remedy in law or otherwise . . . so that the decision of said engineer . . . shall be final and conclusive," the reference will cover a dispute in which the negligence of one party is set up as an excuse for the poor quality of work done by the other, who claims to recover for the said work. *Brown & Hendrickson v. Decker*, 309.

The case is not altered by the fact that the contract provides that one of the parties may sue the other for damages sustained through defective work done by him. *Id.*

See EMINENT DOMAIN. *CONTRACT*. *Jones v. Penna. R. R. Co.*, 375.

ASSIGNMENT. A letter of attorney authorizing the recipient to receive from a city "all moneys due

ASSIGNMENT—Continued.

and owing . . . on account of said contract," which contract contained a prohibition of its assignment or subletting, does not operate as an assignment of the contract or of the money due thereunder. *Watson v. Philadelphia*, 86.

Of lease, see LANDLORD AND TENANT. *Hessel v. Johnson*, 102.

ASSIGNMENT FOR BENEFIT OF CREDITORS. An assignment for the benefit of creditors may be made in Pennsylvania by a foreign corporation which by the laws of the State of its creation could not within such State make such an assignment. (C. P.) *Active Workers v. Sanders*, 321.

ATTACHMENT. A sheriff's sale under a judgment prior in date to attachments issued against the same personalty, frees the property from the lien of the attachment; and transfers the lien to the fund. *Tisch v. Utz*, 55.

Perishable and chargeable articles, including household effects and live stock, which have been attached, may be sold by order of Court. (C. P.) *Baker v. Baker*, 300.

An attaching creditor of a remainderman of personalty, who is himself not entitled to demand security of the life-tenant, cannot demand such security. (O. C.) *Bourguignon's Estate*, 315.

Foreign Attachment. See FOREIGN ATTACHMENT.

ATTEMPT. See CRIMINAL LAW. (Q. S.) *Commonwealth v. Clark*, 640.

ATTORNEY AND CLIENT. What takes place in the presence of an attorney between two other persons, although both may be clients of the attorney, is not a privileged communication, and the attorney may be compelled to testify with reference thereto. (O. C.) *Weaver's Estate*, 85.

ATTORNEYS' FEES. In an action to recover fees for services as an attorney, where the defence is that the suits in which the services were rendered were managed unskillfully, the facts constituting such unskillfulness must be set forth, in the affidavit of defence, with particularity sufficient to enable the Court to decide whether they did or did not render the plaintiff chargeable with professional unskillfulness. *Chain v. Hart*, 317.

AUDITOR. A fund arising on execution and about which there is any dispute must be distributed through an Auditor; the sheriff cannot be directed, by the Court, to make distribution. (C. P.) *Leinaw v. Albright*, 165.

BANK. The Act of March 29, 1851 (P. L. 295), providing that the cashiers of banks shall be elected annually, provides no form of election. *Shackamaxon Bank v. Yard*, 570.

BANKRUPTCY. See FOREIGN ATTACHMENT. (C. P.) *Loug v. Girwood*, 299.

BOND. A judgment bond accompanying a mortgage is not discharged by satisfaction of the mortgage where the judgment is allowed to stand and is marked "to use." *Meigs v. Bunting*, 1.

A bond with a company authorized to become security for the payment of land damages is sufficient, although such company be the only surety thereon. (C. P.) *In re Application of the Phila. and Read. Term. R. R. Co.*, 117.

To secure damages on taking of private property by virtue of right of eminent domain. See EMINENT DOMAIN. *Twelfth Street Market Co. v. Philad. and Read. Term. R. R. Co.*, 111.

Replevin Bond. See REPLEVIN. *Clark v. Morris*, 301.

BOND—*Continued.*

Interpretation of bond accompanying deed. See **GRANTOR AND GRANTEE**. *Shields v. Deio*, 427.

Official Bond, liability of surety on. See **SURETY**. *Shackamaxon Bank v. Yard*, 570.

See **RECOGNIZANCE**. *Commonwealth v. Wistar*, 97.

BRIBERY. Bribery of a delegate to a nominating convention is a criminal offence. *Com'th ex rel. Tate v. Bell*, 333.

Bribery as used in Art. III., § 32 of the Constitution is to be taken in its popular, natural and ordinary meaning, and includes all bribery, whether at common law, or under the Constitution itself, or any kind of statutory bribery. *Id.*

BRIDGE. A bridge is a public improvement, and when a street is opened as an approach thereto benefits cannot be assessed upon properties in the neighborhood for the opening of said street. (Q. S.) *Opening of Walnut Street*, 51.

Measure of damages on taking of toll-bridge for public use. See **EMINENT DOMAIN**. *Miffin Bridge Co. v. County of Juniata*, 389.

BUILDING RESTRICTION. See **EQUITY**. *Orne v. Fridenberg*, 545.

CANVASSER. See **PEDDLER**. *City of Titusville v. Brennan*, 534.

CAPITAL. The word capital is not confined in legal significance to personal property; it may include realty. (O. C.) *Arrott's Estate*, 198.

CARRIER. The negligence of a carrier cannot be imputed to his passenger who is guilty of no contributory negligence. *Carr v. City of Easton*, 77.

CASES FOLLOWED, AFFIRMED, REVERSED, CRITICISED, DISTINGUISHED, OR OVERRULED.

Baer's Appeal, 127 Pa. 360, distinguished, 491.

Brower v. Philadelphia, 26 WEEKLY NOTES, 270, affirmed, 87.

Campbell v. City, 108 Pa. 300, distinguished, 406. *City v. Wright*, 100 Id. 235, 406.

Clement v. Philadelphia, 137 Id. 328; 27 WEEKLY NOTES, 194; followed, 86.

Commonwealth v. American Dredging Co., 122 Id. 386, followed, 326.

Commonwealth v. Baiph, 111 Id. 365, followed and distinguished, 563.

Commonwealth v. Kerchner, 24 WEEKLY NOTES, 260, report of, criticised, 273.

Collins's Estate, 26 Id. 216, affirmed 41.

Cummings v. R. R. Co., 92 Pa. 82, distinguished, 5. *Davis Shoe Co. v. Kittanning Ins. Co.*, 27 WEEKLY NOTES, 108, dictum overruled, 269.

Fraukensfeld's Appeal, 11 Id. 373, distinguished, 491.

Funk's Estate, 27 Id. 573, affirmed, 557. *Hestonville Pass. Ry. Co. v. Connell*, 88 Pa. 520, distinguished, 432.

Hocking v. Insurance Co., 130 Id. 170, distinguished, 201.

Huckensline's Appeal, 70 Id. 102, distinguished, 340.

Insurance Co. v. Block, 109 Id. 535, dictum overruled, 269.

Law's Estate, 27 WEEKLY NOTES, 345, reversed, 490.

Logan v. Murray, 6 S. & R. 175, followed, 451.

Lombard and South Streets Pass. R. Co. v. Steinhart, 2 Penny, 358, followed 432.

McClure v. Watertown Fire Ins. Co., 90 Pa. 277, distinguished 20.

Mercer v. Watson, 1 Watts, 330, followed, 84.

CASES FOLLOWED, AFFIRMED, REVERSED, CRITICISED, DISTINGUISHED, OR OVERRULED—*Continued.*

Morrison v. Henderson, 22 WEEKLY NOTES, 8, followed, 18.

Neale's Appeal, 104 Pa. 214, followed, 557.

Paul v. Travelers' Ins. Co., 112 N. Y. 472, followed, 456.

Penna. Coal Co. v. Sanderson, 113 Pa. 126, distinguished, 340.

Philadelphia v. Anderson, 26 WEEKLY NOTES, 315.

Pollock v. Accident Association, 102 Pa. 230, distinguished, 458.

Pullman's Palace Car Co. v. Com'th, 107 Id. 156, followed, 325.

R. R. v. Colvin, 118 Id. 230, distinguished, 5.

R. R. v. Lippincott, 116 Id. 472, distinguished, 340.

Richter v. R. R. Co., 104 Id. 511, followed 5.

Riddiesbarger v. Ins. Co., 7 Wall. 386, distinguished, 201.

Ridge Avenue, In re, 99 Pa. 469, followed, 406.

Ridge Avenue P. R. Co. v. Phila., 124 Id. 219; 23 WEEKLY NOTES, 324, followed, 106.

Road in Salem Township, In re, 103 Pa. 250, followed, 141.

Schroeder v. Galland, 134 Id. 277, followed, 477.

Smedley v. Erwin, 51 Id. 445, distinguished, 87.

Taggart v. Commonwealth, 102 Id. 354, followed, 153.

Tate v. Stoeltzfoos, 16 S. & R. 35, followed, 84.

Wilkins v. Burr, 6 Binney, 389, followed, 134.

Wilkesburg v. Home for Aged Women, 131 Pa. 117, followed, 434.

CASHIER. Election of. See **BANK**. *Shackamaxon Bank v. Yard*, 570.

CHARGE OF COURT. See **ERROR**. *Perry v. Jensen*, 126; *Catasauqua Mfg. Co. v. Hopkins*, 146; *Gorgas v. P. H. & P. R. R. Co.*, 436.

CHARITY. A society whose object is to aid, by means of lectures, music, debates, etc., in establishing the right of every person to entertain and express his cherished opinions, to promote just principles, to disseminate scientific truth, and aid human progress, and which forwards its object by means of meetings to which the public is invited by published advertisements, is a charity and within the Act of 1855, avoiding bequests to charities made within thirty days of the death of the testator. (O. C.) *Knight's Estate*, 265.

A bequest to the editor and proprietor of a newspaper, managed for private profit, but intended to promote a charity, is not for a charitable use. *Id.*

When a gift is made to a charity, but the trustee designated is a corporation forbidden by law to hold the subject of the gift, the Court will appoint a capable trustee, who will use the corporation as an agent to distribute the gift in accordance with the will of the donor or testator. (C. P.) *Frazier v. Rector et al. of St. Luke's Church*, 307.

A charitable corporation, whose property is exempt from taxation, is nevertheless liable to pay a municipal assessment for the cost of a curb along the footway in front of its premises. *City of Philadelphia v. Pennsylvania Hospital*, 434.

CHARITABLE USES. See **CHARITIES**. (O. C.) *Knight's Estate*, 265. (C. P.) *Frazier v. Rector et al. of St. Luke's Church*, 307.

CHARTER. The validity of a charter cannot be attacked in a collateral proceeding, even upon the ground of fraud in the obtaining of said charter. (C. P.) *Active Workers v. Sanders*, 321.

CITIZENSHIP. Where the jurisdiction of the federal courts does not arise solely out of citizenship, a service of a writ upon a defendant, domiciled in another district, temporarily reaching the district of which the complainant is a resident, and in which the suit is brought, is improper. (U. S. C. C.) *Harvey v. Seegar*, 300.

See **DOMICILE**. (C. P.) *Long v. Girdwood*, 239.

CITY TREASURER. The office of treasurer of the city of Philadelphia is a county office, and any vacancy therein is to be filled by the governor of the State. *Commonwealth v. Oellers*, 153. [GREGG, WILLIAMS and MITCHELL, J.J., dissenting.]

CLASSIFICATION OF CITIES. See **CONSTITUTIONAL LAW**. *Com'th ex rel. Atty-Gen. v. Denworth*, 440.

CO-HEIRS. Where one of several co-heirs is in possession of the land descended, he is liable to account to his co-heirs for the use of their share of the land. *Clayton v. McCay*, 402.

COLLATERAL INHERITANCE TAX. The proviso to the Act of May 6, 1887, § 20: "That all collateral inheritance taxes shall be sued for within five years after they are due and legally demandable, otherwise they shall be presumed to have been paid and cease to be a lien as against any purchasers of real estate," is only intended to quiet the title of purchasers of realty, but, notwithstanding the expiration of the five years, the personal liability to pay the tax remains, and the lien is only discharged when the land has been sold. *Clullen's Estate*, 41.

The proviso in the Act of May 6, 1887, that no estate valued at less than \$250 shall be subject to collateral inheritance tax, refers to the whole estate, and not to the legacies, devises or distributive shares carved out of it. (O. C.) *Mixer's Estate*, 182; (O. C.) *Howell's Estate*, 273.

French spoliation claims are not subject to collateral inheritance tax when paid to the heirs of a claimant. (O. C.) *Kingston's Estate*, 284.

A release or conveyance by a devisee, legatee, or distributee, not exempt from the payment of the collateral inheritance tax, to one whose right of succession is not subject to the tax, after the devise, legacy or distributive share has once vested, will not deprive the Commonwealth of its tax, even if the consideration for the release or conveyance be nominal. (O. C.) *Frank's Estate*, 323.

COLLATERAL SECURITY. See **PROMISSORY NOTES**. *Van Hooken Soap Mfg. Co.'s Estate*, 62.

COMMERCIAL PAPER. Persons to whom commercial paper is offered are charged with notice of its character and of the character of its maker or drawer. See **NOTICE**. *Mercantile National Bank v. Louth*, 213.

COMMISSIONER. A commission is necessary to vest the right of an appointee of the governor to an office, even after confirmation by the senate. (C. P.) *Commonwealth v. Waller*, 252.

COMMON CARRIERS. The rule that the happening of an accident to a passenger while in the hands of a common carrier raises a presumption of negligence, which it is incumbent on the carrier to rebut, does not apply where the cause of accident is as well known to the passenger as to the carrier. *Fearn v. West Jersey Ferry Co.*, 554.

Where a person slips, falls and is injured on the deck of a ferry boat, during a snow storm, which has begun a few minutes before the accident, there is no evidence upon which the carrier can be held liable. *Id.*

COMMON PLEAS. The decision of the Common Pleas upon a certiorari by which an action to recover the penalty for the violation of a municipal ordinance, prohibiting an act which is neither indictable nor a public offence, has been removed from a Justice of the Peace is final. *Borough of Mahanoy City v. Wadlinger*, 132.

Where there is any dispute about a fund made upon execution, the Common Pleas cannot direct the sheriff to distribute; it can only order the money into Court, and distribute through an Auditor. (C. P.) *Leinan v. Albright*, 165.

Jurisdiction in cases of actions for damages in opening of street, and change of grade. See **ROAD LAW**. *In re Change of Grade of Plan 166, In re Allen's Lane*, 406; *Ogden v. Philadelphia*, 413.

CONDITION. A devise over of land, after a gift of fee, in case the devisee should "die without leaving to any person," if regarded as introducing a condition by inference, is void as an attempted restraint of the alienation of property. *Gillmer v. Daix*, 330.

CONFLICT OF LAWS. Bankruptcy proceedings in a foreign State against one of its subjects will pass the title to his property in this country. (C. P.) *Long v. Girdwood*, 239.

A citizen of the United States domiciled abroad, and a creditor of a foreigner whose property is here attached, is, so far as the attachment is concerned, a foreign creditor. *Id.*

Domicile, not citizenship, determines the national character of persons for the purposes of trade. *Id.*

When the statute of one State forbids the making of an assignment for the benefit of creditors by a corporation, and a corporation of that State enters and does business in another State whose laws permit such an assignment, an assignment by said corporation will be recognized in the latter State. (C. P.) *Active Workers v. Sanders*, 321.

CONSEQUENTIAL DAMAGES. See **EMMENT DOMAINS**. *Jones v. Penna. R. R. Co.*, 375.

CONSIDERATION. Payment of part of a debt, after the whole is due, is no consideration for a release of the balance, or an agreement to look to another source for the payment thereof. (O. C.) *Dickinson's Estate*, 84.

CONSPIRACY. On a trial for conspiracy to extort money by beginning actions for penalties and criminal prosecutions and obtaining from the persons proceeded against money to settle the cases, it is not error to charge that participation in the division of the money is strong evidence of guilt. *Commonwealth v. Doughty*, 178.

CONSTITUTIONAL LAW. In construing a Constitution, its words should be taken in their popular natural and ordinary meaning rather than in any technical or restricted sense. *Commonwealth ex rel. Tate v. Bell*, 333.

The captions of a Constitution are merely intended to indicate the general character of the articles to which they are prefixed. *Id.*

The clause in the Fourteenth Amendment of the Federal Constitution that "no State shall deprive any person of property without due process of law" does not prevent a State from giving to a Court equity jurisdiction in partition, although it deprives a party to the proceedings of a right to a jury trial. (O. C.) *Kates's Estate*, 241.

Under Art. IV., § 8, of the Constitution of Pennsylvania, there is no power to fill a vacancy, occurring during a recess of the senate, in the office of Superintendent of Public Instruction, for a term extending

CONSTITUTIONAL LAW—*Continued.*

beyond the end of the next session of the senate. (C. P.) Commonwealth v. Waller, 252.

A commission is necessary to vest title to an office in a person appointed thereto by the governor, and confirmed by the senate. *Id.*

Bribery in Art. III., § 32, of the Constitution includes all kinds of bribery at common law, under the Constitution and under any statute. Commonwealth *ex rel.* Tate v. Bell, 333; Commonwealth *ex rel.* Downing v. Bell, 339; Commonwealth *ex rel.* Shaffer v. Bell, 339.

The Act of March 24, 1877 (P. L. 47), providing that cities of a certain population which shall adopt the provisions of the Act shall elect a recorder, and its supplements, are unconstitutional, as in conflict with Art. III., § 7 of the Constitution, because confined in their operation to cities which shall accept them by ordinance, *et c.* Commonwealth *ex rel.* Atty-Gen. v. Denworth, 440.

Acts of Assembly validating title acquired under deeds defectively acknowledged are constitutional. Shrawder v. Snyder, 84.

The Act of May 7, 1889, entitled "An Act to prevent any life insurance company or Agent thereof doing business in Pennsylvania, from making or permitting any distinction or discrimination in favor of individuals between insureds of the same class and equal expectations of life, in the amount or payment of premiums or rates charged for policies, life or endowment insurance, and providing a penalty for the violation thereof" is within the police power of the State, and does not violate Art. III., § 3 of the Constitution of Pennsylvania, requiring an Act to contain but one subject which must be clearly expressed in the title. Commonwealth v. Morningstar, 442.

The title of an Act need not be a complete index to its provisions, but the subject of the proposed legislation must be so expressed therein as to give notice of its purpose to those especially interested. The title to a supplemental Act is sufficient if it set out the title of the original Act, giving the date of its approval and declaring itself to be a supplement thereto, provided the title of the original Act sufficiently express the subject thereof. City of Philadelphia v. Ridge Ave. Pass. Ry. Co., 106.

The Act of March 8, 1872 (P. L. 264), relating to the tax on dividends of the Ridge Avenue Pass. Ry. Co., entitled "An Act relating to the Ridge Avenue Passenger Railway Company" is unconstitutional, being in contravention of Art. XI., § 8 of the Constitution of 1790, as amended in 1874, which requires that "no bill shall be passed . . . containing more than one subject which shall be clearly expressed in the title," *et c.* *Id.*

The Act of April 21, 1858, § 6, directing that damages awarded on the vacation of a street shall be assessed upon the owners of properties benefited, is constitutional. *In re* Howard Street, 159.

While the State is under no constitutional obligation to pay for the damage caused by vacating a street, the Legislature may impose such obligation on the Commonwealth or its agents by statute; and the Legislature may impose the assessed benefit upon the landowner instead of on his land only. *Id.*

The method of fixing the taxation on the capital stock of corporations, presented by Act of June 7, 1879, is not unconstitutional or in conflict with the Constitution of Pennsylvania. Art. IX., § 1, or Art. XIV., § 1, of the Amendments to the Federal Constitution. Com'th v. Brush Electric Light Co., 527.

See INTERSTATE COMMERCE. City of Titusville v. Brennan, 534.

CONSTITUTION OF PENNSYLVANIA.

Art. III., § 3, 106, 442.

§ 7, 440.

§ 32, 333.

Art. IV., § 8, 252.

Art. IX., § 1, 527.

Art. XIV., § 1, 153.

Art. XVI., § 8, 159, 413.

Constitution of 1790.

Art. XI., § 8, 106.

CONSTITUTION OF UNITED STATES.

Amendment, XIV., 241, 627.

CONSTRUCTIVE FRAUD. See FRAUD. Tisch v. Urz, 55; Woods v. Irvin, 185.

CONTEMPT. The Quarter Sessions made an order that a certain township road should be opened; the supervisors did not obey, and, on being attached for contempt, answered (1) that the road was not necessary; (2) that to open it would increase the township indebtedness beyond the constitutional limit. It appeared that there were funds in the supervisors' hands which they intended to apply to other purposes; *he d.* that the answer was unsatisfactory, and the supervisors were punishable for contempt. Road in Roaring Brook Township, 141.

A witness who, on the trial of a third person, refuses to answer questions which he is of opinion will tend to incriminate him, after being informed by the Judge that the answer to the questions cannot be used against him afterwards, and being directed to answer, is in contempt of Court. Com'th *ex rel.* Tate v. Bell, 332.

Habas corpus proceedings where relator has been committed for contempt. See HABEAS CORPUS. Com'th *ex rel.* Tate v. Bell, 333.

CONTRACT. A. being indebted to B., paid him part of the sum due, and the parties entered into an agreement that A. should pay the balance of the claim out of the first moneys received from the amount due him for paving certain streets, whether such money was received from the city or otherwise; no money was ever paid A. on that street paving account, his claim having been decided invalid; *held*, that as there was no agreement in the original contract to restrict B. to a certain fund for payment and there was no evidence of an agreement to accept the new agreement as payment in full, B. could demand payment as a general creditor out of A.'s estate. (O. C.) Dickinson's Estate, 94.

When a contract is made by which one party is to furnish to another "sufficient samples" for the purpose of introducing a new article, "as the same may be called for," if the parties cannot agree as to what is a reasonable quantity to be furnished, the question must be left to the jury. Perry v. Jensen, 126.

A preceding independent parol contract, by a grantor, of indemnity against a defective title to realty, which contract is the inducing cause of the purchase of land, is not merged in a deed subsequently executed, but confers a cause of action if the title fail. Close v. Zell, 277.

Where land has been conveyed by deed with special warranty, and title falls from a cause not within said warranty, an action by the grantee upon a preceding independent parol contract of indemnity against a defective title, which contract was the inducing cause of the purchase, is not in any sense a proceeding to change, alter, modify or reform the deed. Close v. Zell, 277.

A. contracted to erect for B. a building; the contract contained the following: "the decision of the engineers . . . shall be final . . . in any dispute which may arise between the parties to this agree-

CONTRACT—Continued.

ment, relative to or touching the same, and . . . said parties do hereby waive any right of action . . . or other remedy in law . . . so that the decision of the said engineers . . . shall be final and conclusive on the rights and claims of said parties." The specifications annexed contained the following: "Any disagreement . . . between the owners and contractor upon any matter . . . arising from these specifications . . . or the kind or quality of the work required thereby shall be decided by the engineers . . . whose decision and interpretation of the same shall be considered final." C. contracted with A. to do certain work; the plans, specifications, terms and conditions of the contract between A. and B. were expressly made part of the contract between A. and C., and A. reserved the right to sue C. for any damages he might suffer from defective work on the part of C.: *held* (a), the sub-contract was subject to all the terms of the principal contract; (b) in case of dispute between A. and C., C. had no right of action at law, except on an award of the engineers; (c) although the dispute involved an alleged fault of A., which interfered with C.'s work, the decision of the question rested with the engineers; (d) the case was not altered by the reservation by A. of the right to sue C. Brown v. Decker, 309.

A land-owner made a contract with a railroad company about to construct a road across his land as follows: "I will release to the company which undertakes to construct such road the right of way through my land . . . the damages to be assessed when the road is located; and the amount of said damages to be paid in stock in said railroad. Cost of fencing not included in damages, provided no damage is done my building, race or water-power;" *held* to mean (1) that the cost of fencing was not to be included as damages, if no damage were done to the buildings, etc.; (2) that "the damages" meant *all* the damages. Hoffman v. Bloomsburg & Sullivan R. R. Co., 361.

Where, after an action has been begun to recover for consequential injury to land by the construction of a railroad, the plaintiff and the railroad company enter into agreement that the price of the land injured shall be fixed by arbitrators, and on payment of the same to be conveyed to the railroad company, the payment to operate as a release of all claims on the part of the plaintiff, such contract is valid and binding, and will be a good defence to an action brought to recover the consequential damages. Jones v. Penna. R. R. Co., 373.

Attempted assignment of municipal contract containing prohibition of assignment. See **ASSIGNMENT**. Watson v. Philadelphia, 86.

See **GUARANTEE**. Martinez v. Earnshaw, 493.

CONTRIBUTION. See **STRETT**. Eshleman v. Bolandus, 573.

CONTRIBUTORY NEGLIGENCE. See **NEGLIGENCE**.

CONVERSION. A devise of realty to trustees in trust, to be reduced into possession, collected, etc., and to pay over income to the widow of testator: *held* to work a conversion. See **WILLS**. (O. C.) Arrott's Estate, 198.

Where a ground-rent is owned in part by a person *non sui juris*, and is extinguished by a deed in which the trustee of the said person joins, his interest is converted into personality no less than the shares of the other owners. (O. C.) Hirst's Estate, 212.

CORPORATION. A corporation is private if the foundation be private, although the uses to which it puts its property may be in a certain sense called

CORPORATION—Continued.

public, *i. e.*, as affording the public a convenience. Twelfth St. Market Co. v. Phila. & Reading Term. R. R. Co., 111.

A corporation authorized to hold property for the maintenance of a market-house, to sell, mortgage, or convey the same at pleasure, and to rent and dispose of its stalls in its market-house on such terms as its managers may determine, is not a public corporation. *Id.*

A water company incorporated under the Act of April 29, 1874, P. L. 93, is a public corporation, and the structures necessary to its operation are not subject to a mechanic's lien. Guest v. Lower Merion Water Co., 285.

The charter of a regularly erected corporation cannot be assailed in any merely collateral action affecting the rights of the corporation. Twelfth St. Market Co. v. Phila. & Read. Term. R. R. Co., 111.

A charter of a corporation cannot be attacked in a collateral proceeding, even on the ground of fraud in the obtaining of the charter. (C. P.) Active Workers v. Sanders, 321.

The domicile of a corporation is in the State by which it was created. (C. P.) Pierce v. Electric Co., 311.

The effect of a seal upon an instrument issued by a corporation depends to a great extent on the purpose for which the instrument is issued. Stevens v. Phila. Ball Club, Limited, 37.

The property of foreign and domestic corporations, whether located permanently or used temporarily in this State, is subject to taxation by it. Commonwealth v. Del. Lock & West. R. R. Co., 325.

For the purpose of taxing a corporation, a dividend is *prima facie* evidence that its amount was earned in the taxing year in which it was declared, but it may be shown to have been made out of accumulated earnings. See **TAXATION**. Commonwealth v. Brush Electric Light Co., 527.

A foreign corporation may assign its property in Pennsylvania for the benefit of its creditors, although an Act of the State of its incorporation forbid such an assignment in said State. (C. P.) Active Workers v. Sanders, 321.

A service upon a domestic corporation, to be good, must be upon a director, manager, or other officer; service upon a mere agent is not sufficient, the Act of April 8, 1851 (P. L. 354), applying only to foreign corporations. (C. P.) Williams v. Del., Lack. & Western R. R. Co., 282.

The *fi. fa.* given by the Act of April 7, 1870 (P. L. 58), is in lieu of the sequestration provided for by the Act of 1836 (P. L. 58), and must be preceded by an ordinary *fi. fa.*, which has been returned unsatisfied in whole or in part. Guest v. Lower Merion Water Co., 285.

Where a *fi. fa.* issues to sell stock in a corporation, which is annulled as a garnishee, the corporation cannot claim to have the plaintiff's execution confined to so much of the stock as remains after the corporation has taken out a debt due to it by the defendant. (C. P.) Lanahan v. Collins, 287.

Devise to corporation in trust for charity, when corporation is incapable of holding subject of gift. See **CHARITY**. (C. P.) Frazier v. Rector et al. of St. Luke's Church, 307.

COSTS. A rule of the Court of Common Pleas that bills of costs for witnesses at terms when a case is continued or tried must be filed and a copy thereof served on the other party within four days after the continuance or trial, is within the power of the Court. Fisher v. Allen, 8.

COSTS—Continued.

When the sheriff makes a special return in favor of the lien of a purchaser and exceptions are taken by a creditor and the same are referred to an Auditor, the ex-emptant, although unsuccessful, will not be compelled to pay the costs of the audit, if he show that there was probable cause to object to the claim of his adversary. *Sansubacher v. Schickendantz*, 13.

Costs will not be given the landlord in a replevin where the verdict is partly in favor of the plaintiff. (C. P.) *Park v. Holmes*, 288.

When plaintiff in replevin, who endeavors to retain possession of goods without paying the balance of price due, pays the price into Court after a trial which has been reversed, and the money is taken out by the defendant, the plaintiff is liable for costs. *Summers v. Hicks*, 304.

Bringing money into Court after action brought carries with it a liability for costs up to that time. *Id.*

When depositions of witnesses, whose testimony, even if in the district, could have been taken only by deposition, might have been taken abroad, mileage will not be allowed for travel into the district where the Court sits. (U. S. D. C.) *Street v. The Progresso*, 308.

A libellant testifying on his own behalf is not entitled to witness fees. *Id.*

CO-SURETY. See **SURETY**. *Eshleman v. Bolenins*, 573.

COUNSEL. Admission of. See **ADMISSIONS**. *Hoffman v. Bloomsburg & Sullivan R. R. Co.*, 361.

Advice of counsel will not justify a client in a fiduciary capacity in abandoning his own common sense. (O. C.) *Whitcar's Estate*, 575.

COUNSEL FEES. Where counsel performs professional services for the benefit of a decedent's estate and, from feelings of friendship for the executrix, instead of taking compensation, makes a present of his claim therefor to the executrix, she has the right in her account to credit herself with the amount that should have been paid as counsel fees, although in point of fact she has not actually paid out that sum. (U. C.) *Bourguignon's Estate*, 315.

When a creditor has a policy on the life of his debtor and after the latter's death recovers the insurance money by suit, he is entitled, in a contest for the fund between him and the representative of decedent, to a credit for the amount paid for counsel fees. *Shaffer v. Spangler*, 425.

COUNTY ROAD. See **ROAD LAW**. *Commonwealth v. Ruddle*, 227.

CREDITOR. See **DEBTOR AND CREDITOR**.

CRIMINAL LAW. When an indictment will lie under either of two sections of the Crimes Act the Court may impose the sentence authorized by either section. *Commonwealth v. Doughty*, 178.

When a defendant is convicted generally on an indictment containing several counts he may be sentenced on each count separately. *Id.*

On a trial of seven persons for conspiracy, three pleaded *autrefois convict*, which plea was, on demurrer, overruled; *held*, a defendant who had not so pleaded could not appeal. *Id.*

During a trial, a defendant in an entirely different case was called for sentence and made statements damaging to the defendant in the case on trial; the latter was afterward examined as a witness and denied the statement; *held*, there was no ground for arresting judgment. *Id.*

In a criminal case, the burden to prove beyond a reasonable doubt the presence of every ingredient necessary to constitute the crime charged is on the

CRIMINAL LAW—Continued.

prosecution and never shifts from it. *Commonwealth v. Gerade*, 261.

Where the defence is insanity, the defence must overcome the presumption of sanity by fairly, not cleverly, preponderating evidence; it is error to charge that the insanity must be clearly proved. *Id.*

Where a jury is given by the Court two measures of proof, one erroneous, the other substantially correct, there is sufficient ground for reversal, especially in a capital case. *Id.*

A defendant, charged with an assault and battery upon one of his employers, may prove a contract with his employers by which he was to have the exclusive use of the room, in which he worked, and where the assault was alleged to have taken place, and the employer upon whom the assault was committed was not to enter the room. *Commonwealth v. Ribert*, 496.

It is not error to answer the point "that the jury are judges of the law as well as of the facts, and may upon the whole case determine the grade of the offence," by saying that "the statement of the law by the Court is the best evidence, within your reach, of the law, and, therefore, in view of that evidence, and viewing it as evidence only, you are to be guided by what the Court has said with reference to the law." *Commonwealth v. McManus*, 497. [MITCHELL, J.: "I regard the doctrine that the jury are judges of the law as well as the facts as unsound in every point of view, historical, logical, or technical."]

In a murder trial where the theory of the prosecution is that the killing was prompted by jealousy, evidence of the conduct of the prisoner, previous to the killing and bearing upon the question of jealousy, is admissible to show motive. *Id.*

A prisoner has not the right to have answers given in a set form to any point he may present; the Act of March 31, 1860 only provides that the Court shall answer the same fully. *Id.*

A person who in the night-time goes upon the steps of a private dwelling with intent to commit a burglary, is guilty of an attempt to commit a burglary. (Q. S.) *Commonwealth v. Clark*, 540.

The Supreme Court may remove a pending indictment and all proceedings thereon from the Quarter Sessions by certiorari, but will do so with extreme caution and only in a clear case. *Commonwealth v. Delamater*, 563.

Pleading. An indictment for forcible detainer must always contain an allegation that the premises were detained "with strong hand" which words imply a greater force than is expressed by *vi et armis*. *Commonwealth v. Brown*, 149.

An indictment for forcible detainer which does not sufficiently aver an estate in the premises in the prosecutor does not authorize an award of restitution. *Id.*

An indictment should not be quashed for matters which are amendable under the Act of Assembly. *Commonwealth v. Morningstar*, 442.

An indictment charged that the defendant, an agent of an insurance company doing business in Pennsylvania, did offer to pay and allow B. a rebate of a portion of the premium, to wit, the sum of \$50 on a policy of insurance to be issued by the said company to C., and that the said rebate was offered by the defendant to B. as an inducement to insure the life of C. in said company; *held*, the indictment should not have been quashed. *Id.*

Practice. In a prosecution for conspiracy the Court was requested by the defence to charge that as three of the defendants had been theretofore convicted of "charges same as in this case" there could not be

CRIMINAL LAW—Continued.

a further verdict against them. The Court referred to the former trial and verdict of guilt, and added, "Three of these parties are parties to the suit, but there are several others included here. . . . This suit embraces most, if not all, of the charges made in the former suit and I believe embraces some not in that." *Held*, the reference was rendered necessary by the instruction asked for. *Commonwealth v. Doughty*, 178.

When there is no request to the Court to instruct the jury to find on each count of an indictment separately, the omission of such instruction is not error. *Id.*

CROSS-EXAMINATION. See EVIDENCE. *Irvin v. Irvin*, 137.

DAM. See EASEMENT. *Edgett v. Douglass*, 469.
DAMAGES. Damages may be often recovered at law where the carrying on of a legitimate business has done actual injury to neighboring land, although the business is one which equity would refuse to enjoin. *Robb v. Carnegie Bros. & Co.*, 339.

DEATH. Presumption of. See PRESUMPTION OF DEATH. (*O. C.*) *Meaher's Estate*, 275.

DEBTOR AND CREDITOR. A mere unexplained delivery of money by one person to another does not create the relation of debtor and creditor. *Lowery v. Robinson*, 28.

Confession of judgment to hinder creditors. See EQUITY. *Kohl v. Sullivan et al.*, 58.

When creditors may not attack confessed judgment. See JUDGMENT. *Woods v. Irwin*, 185.

In what amount and to what extent a creditor may insure the life of his debtor. See INSURANCE. *Ulrich v. Reinisch*, 419; *Shaffer v. Spangler*, 425.

DECEDENT'S ESTATE. The right of representation does not extend to great grand nephews and great-grand nieces. (*O. C.*) *Kingston's Estate*, 284.

DEED. An independent contract of indemnity against a defective title to land does not necessarily merge in a deed afterwards made for the said land. See CONTRACT. *Close v. Zell*, 277.

The receipt in a deed does not give rise to a conclusive presumption of payment of the money mentioned therein. *Kehelman's Estate*, 293.

DEFECTIVE ACKNOWLEDGMENT. See ACKNOWLEDGMENT. *Shrawder v. Snyder*, 84.

DEPOSIT. A deposit is where money is left with a banker for safe keeping subject to order, and payable, not in the specific money deposited but in an equal sum, whether it bear interest or not; the transaction does not become a loan or investment unless the money is left not for safe keeping, but for a fixed period at interest. *Law's Estate*, 490.

DEPOSITIONS. When admissible. See EVIDENCE. *Thornton v. Britton*, 467; *Fearn v. West Jersey Ferry Co.*, 554.

DEVISAVIT VEL NON. The burden of proof where undue influence is alleged rests upon those alleging it. (*O. C.*) *Lynch's Estate*, 367.

DEVISE. See WILLS.

DISCRIMINATION. See INSURANCE. CONSTITUTIONAL LAW. *Commonwealth v. Morningstar*, 442.

DISTRESS. See LANDLORD AND TENANT. (*C. P.*) *Esterly Machine Co. v. Spencer*, 287.

DISTRIBUTION. See PRACTICE. (*O. C.*) *Seward's Estate*, 544.

DIVIDEND. See STOCK DIVIDEND. (*O. C.*) *Thomson's Estate*, 231.

DIVORCE. Where a bequest is made to a person by name, to which is added "husband of my said daughter," a divorce of the said husband from said

DIVORCE—Continued.

daughter will not render the bequest to him inoperative. (*O. C.*) *Mellon's Estate*, 120.

After divorce a husband and wife do not inherit from a deceased child as joint tenants, but each takes a share as a parent, without any right of survivorship. (*O. C.*) *Hecht's Estate*, 183.

A divorce extinguishes the right of survivorship between husband and wife. *Id.*

DOMICILE. Domicile, not citizenship, determines the national character of a person for purposes of trade. (*C. P.*) *Long v. Girdwood*, 299.

Citizens of the United States residing in Canada for business purposes, are foreign creditors so far as regards an attachment here against a native of Scotland. *Id.*

DRAFT. An acceptance of a draft for over \$500, drawn upon the "H. Company," an association under the Act of June 2, 1874, as follows: "H. Co., Ltd., per B. L., chairman," B. L. having signed in the expectation that another manager would also sign, while it cannot be enforced against the association, cannot be treated as imposing an individual liability on B. L. *Mercantile National Bank v. Lauth*, 213.

EASEMENT. A right to maintain a dam, reserved in a grant of land, involves the right to maintain the banks by which the water is confined, and, if they are washed away, the right to go upon the grantee's land for the purpose of making such repairs to the banks as are necessary to maintain the dam. *Edgett v. Douglass*, 469.

EJECTMENT. Where a return shows a defendant in possession, it is presumptive evidence of his continuance in possession at the time of trial, until overcome by evidence to the satisfaction of the jury. *Thornton v. Britton*, 467.

The presumption of continuance of possession is not overcome by evidence of the possession of the co-tenant of the person returned as in possession, this being no evidence of ouster or claim of title adverse to said person. *Id.*

ELECTION LAW. Bribery of delegates to nominating conventions is a fraud upon the elective system. *Com'th ex rel. Tate v. Bull*, 333.

ELECTRIC LIGHT COMPANIES. See TAXATION. *Com'th v. Northern Electric Light and Power Co.*, 520; *Same v. Brush Electric Light Co.*, 527; *Same v. Edison Electric Light Co.*, 531; *Same v. Chester Light and Power Co.*, 533.

EMINENT DOMAIN. The franchises, as well as the property of a corporation may be taken for public use; but land already held for public use cannot be so taken without a clear and express authority from Legislature, or one necessarily implied in the grant. *Twelfth St. Market Co. v. Phila. & Read. Term. R. R. Co.*, 111.

The test of whether a use is public or not is whether a public trust is imposed on the property, whether the public may enjoy it by right or only by permission. *Id.*

The property of a market company, held for the purposes of a market, may be taken for railroad purposes, without any other express or necessarily implied legislative authority than that which exists by virtue of the legislative grant of power to build and maintain a railroad. *Id.*

In estimating the value of a lot, before the taking of a portion of it for a railway, by virtue of the right of eminent domain, its possible and public uses are important elements, and the value of the land is to be taken as it was, not as it might have been with improvements, but still considering its availability for

EMINENT DOMAIN—Continued.

particular uses as an element of value; and the value of the remainder of the land, after the taking, to be considered, is its value then, not as it is when improved. *Harris v. Schuykill River East Side R. R. Co.*, 44.

Details and costs of improvements are not admissible as independent facts for the jury, but an expert may be asked, on cross-examination, whether such details have been taken into consideration by him in forming his judgment. *Id.*

The values of a lot, before and after the taking, are the general market values of the particular lot, without reference to the general rise or fall common to it with other property in the same neighborhood, consequent upon the coming of the railroad. *Id.*

A railroad company took land in order to build its road across a river-front lot; good engineering required a bulkhead to be built below low-water mark; the company, having no right to build outside of its right-of-way, or to do this without the consent of the lot-owner, agreed that if the latter would apply to the portwardens for permission to build the bulkhead the company would construct it, "without cost or expense" to the owner, either for labor or material; held, the jury could not consider any benefit arising to the lot-owner from the building of the bulkhead. *Id.*

The presence of a sewer discharging upon a lot at the time of the entry of the railroad, even though the sewer was there without right, is a fact affecting the value of the land. *Id.*

The test of damages for the taking of land, part of a large lot, for railroad purposes, is the difference between the value of the entire lot as it was just before the taking and the value of what is left after the taking. *Id.*

Where a toll-bridge is taken by a county for public use, under Act of May 8, 1876 (P. L. 131), the measure of damages is the value of the bridge to its owners, including therein the value of any franchise connected with it. *Miffin Bridge Co. v. Juniata County*, 399.

The liability of a bridge to destruction by flood or ice is to be considered so far as it decreases its value. *Id.*

Where, by the construction of a railroad, a farmer's access to a stream on the highway, which he had formerly used to water his horses, is rendered inconvenient, it is no element of damage to his farm, as he had no rights in the highway other than those of the general public. *Gorgas v. Phila. Hbg., and Pitts. R. R. Co.*, 436.

If the jury find that the establishment of a railroad station near a farm was a special advantage to it, they may set off such advantage against the injury done to the farm. *Id.*

Although no specific evidence be given as to the depreciation of the value of premises from danger of fire on the laying out of railroad, that matter may be taken into consideration in fixing the damages, when the evidence shows that there are buildings on the land of which part has been taken for railroad purposes. *Hoffmann v. Bloomsburg and Sullivan R. R. Co.*, 361.

It is a good defence in an action for consequential damages where land has not been taken but has been injured, that the plaintiff agreed to sell the land to the defendant at a price to be fixed by arbitrators, payment of said price to operate as a release of all claims by the plaintiff, that the price was duly fixed, and that the plaintiff refused to abide by his agreement. *Jones v. Penn. R. R. Co.*, 375.

No appeal lies from the decision of the Common

EMINENT DOMAIN—Continued.

Pleas, that bonds offered to secure damages on taking private property for public purposes, are adequate in amount and with sufficient sureties. *Twelfth Street Market Co. v. Phila. & Read Term. R. R. Co.*, 111.

In such bonds under the Act of April 9, 1856, § 2, (P. L. 281), the practice is to designate a fixed sum as a penalty. *Id.*

A deed for land damages, with but one surety, that surety being a company authorized by law to become security for the payment of land damages, is sufficient. (C. P.) *In re Application of the Phila. & Read Term. R. R. Co.*, 117.

While a jury, which has viewed the land, is not bound by the opinion of the witnesses, it may not substitute its own opinion for that of the witnesses regarded as a whole. *Hoffman v. Bloomsburg & Sullivan R. R. Co.*, 361.

EQUITY. Jurisdiction to make partition by equitable proceeding may be given by statute, without violating the Fourteenth Amendment of the Constitution of the United States. (O. C.) *Kates's Estate*, 241.

Where a judgment is confessed to hinder creditors, and the judgment creditor pays off certain prior liens on the property of the debtor, he is not, on his judgment being declared fraudulent, entitled to have allowed to him, as against creditors, the amount expended by him in paying off the liens, although such payments have increased the fund for the creditors. *Kohl v. Sullivan et al.*, 58.

A bill in equity will not lie for the removal of a defectively constructed party wall. (C. P.) *Mulligan v. Fitzpatrick*, 151.

Where a bill is dismissed for want of jurisdiction, the dismissal is not a bar to a second bill. *Weigley v. Coffman*, 453.

A bona fide purchaser for value is protected against any secret equity, of which he had not notice, and this protection is extended to his vendee, although the latter had notice of such equity. *Loan v. Eva*, 464.

Where objection to jurisdiction in equity is made for the first time where the case comes to the Supreme Court on appeal, the objection will not, as a rule, prevail, unless the want of jurisdiction is so plain that the Court would feel justified in dismissing the bill of its own motion. *Edgett v. Douglass*, 489.

A Chancellor ought not to interfere by way of mandatory injunction, even if injury be clearly established, when there has been long-continued delay in asserting the right and a remedy exists at law. *Orne v. Fridenberg*, 545.

When the owner of a lot of ground, subject to a building restriction in favor of another lot, violates the restriction by erection, and the owner of the dominant lot does not interfere for a long time, equity will not compel the removal of the erection by the purchaser of the servient lot. *Id.*

Seemle, the entire change of the character of a neighborhood may justify a Chancellor in refusing to restrain a violation of a building restriction. *Id.*

A decree in equity refusing an injunction to restrain a violation of a building restriction will not bar an action to recover damages for such violation. *Id.*

Equity will not enforce an intended gift in trust if the transaction still remains imperfect and executory. *Smith's Estate*, 565.

Equity will not sustain an imperfect gift by imputing a trust where no trust is intended. *Id.*

ERROR. It is error, for which a reversal may be had, if a Judge incorrectly state evidence, when it appears that such statement might have weighed with the jury. *Perry v. Jensen*, 126.

ERROR—*Continued.*

It is error for a Judge in charging to refer to the consequences of an unfavorable verdict to either party. *Catasauqua Mfg. Co. v. Hopkins*, 146.

It is not error to refuse a point which contains a great number of paragraphs, each containing a separate point for consideration. *Gorgas v. Phila., Hbg. & Pitts. R. R. Co.*, 436.

Where by-laws of an insurance company have been admitted in evidence under objection, contrary to the provisions of the Act of May 11, 1881 (P. L. 20), and a verdict has been given against the company, questions predicated upon the said by-laws will not be considered on appeal. *Pickett v. Pacific Mutual Ins. Co.*, 456.

Points, although taken *verbatim* from the decisions of the Supreme Court, cannot always be answered by a simple affirmative; when applied to different circumstances they may convey erroneous ideas. *Commonwealth v. McManus*, 497.

ESTOPPEL. The city of Philadelphia is estopped by the certificate of its receiver of taxes as to taxes due, as against one who obtains such certificate and in good faith purchases land in reliance thereon. *City of Philadelphia v. Baxter*, 90.

Where a city recovers taxes on dividends of a corporation under a certain Act, and afterwards said Act is declared unconstitutional, whereby the company becomes liable to taxes under earlier Acts, which taxes are greater than those of the later Act, the city cannot afterwards bring an action for any taxes alleged to be due for the years covered by the first recovery, but it is not estopped from setting up the unconstitutionality of the later Act, in an action brought to recover taxes for years subsequent to the first recovery at the rate fixed by the earlier Acts. *City of Philadelphia v. Ridge Ave. Pass. Ry. Co.*, 106.

When a city demands and accepts taxes from a corporation, as due under a certain Act, and receipts for them as in full of all taxes then due, it cannot afterwards set up the unconstitutionality of the Act according to the terms of which the taxes were calculated, and claim to recover the additional amount which would have been paid had the taxes been levied under the Act which was really in force. *Id.*

Where a decree is rendered against land only, but the defendant obtains a stay of execution on the ground that the plaintiff has in his hands funds, derived from the land, more than sufficient to pay the decree, the defendant cannot refuse to accept the decree in payment *pro tanto* of the amount found to be due and in the hands of the plaintiff. *Miller v. Klopp*, 174.

In ejectment to recover certain realty a defendant is not estopped by a recital in a bill in equity filed by her, against the plaintiff in the ejectment, when the title to the land in question was not brought in issue by the bill. *Lash v. Spayd*, 175.

Estoppel of insurer to insist on condition against over-insurance by retention of proof of loss. See *INSURANCE*. *Everett v. London & Lancashire Fire Ins. Co.*, 203.

Where a party succeeds in defeating an action by his pleading, by motion or the like, he cannot defeat a second action by taking a position inconsistent with that taken in the first. *Weigley v. Coffman*, 453.

EVIDENCE. Where a claim is made under a deed, alleged to be a forgery, and where one of the parties thereto is dead and his right has passed by his own act to a third person, the surviving party cannot testify as to any matter occurring before the death of the deceased party, although the deceased was not present

EVIDENCE—*Continued.*

at the time of the occurrence of said matter, but was represented by an agent who is still living. *Sutherland v. Ross*, 17.

Where a husband is incompetent as a witness on account of the death of the other party to a transaction to which the husband was a party, his wife is also incompetent. *Id.*

Where a lessor in an oral lease conveys the demised premises to a corporation, subject to the lease, and afterwards dies, and the lessee, a partnership, becomes incorporated with the same persons as members of the corporation, which corporation assumes the lease, a member of the said corporation, who was also a member of the original partnership lessee is not, in an action for rent, a competent witness to prove the terms of the original letting. *Arrott Steam Power Mills Co. v. Way Manufacturing Co.*, 378.

In the Orphans' Court, each claim is independent of every other and, therefore, a claimant may be called as a witness to support a claim other than his own, although the effect of his testimony may be to create a fund in which he may ultimately be interested. (O. C.) *Law's Estate*, 191.

An attorney may be compelled to testify as to what took place in his presence between two other persons, although both may have been at the time his clients. (O. C.) *Weaver's Estate*, 95.

An issue having been granted to determine the validity of a judgment confessed by J. to E., upon the allegation of the defendant in the issue, G., that the judgment was a fraudulent one; on the trial, *Held*, (1) that J. was a competent witness for G., who could not, therefore, examine him as upon cross-examination or contradict him; (2) that J.'s declarations not made in E.'s presence were not evidence in the absence of proof of collusion between J. and E. *Unangst v. Goodyear's India Rubber Glove Mfg. Co.*, 53.

The testimony of relatives, who avow enmity to one branch of a family, cannot be received upon questions of pedigree and legitimacy affecting that branch. (O. C.) *Kates's Estate*, 241.

A witness who testifies that he has no knowledge of the market value of land in question, but merely knew it by being in the neighborhood, and had heard of some of the prices, is incompetent to testify as to the value of the land. *Gorgas v. P. H. & P. R. R. Co.*, 436.

One who has acted as a viewer of land taken by a railroad company may, on appeal from the report of the viewers, testify to his observation while acting as viewer. *Id.*

A witness called to testify as to what reasonable quantities of samples has been furnished for the purpose of introducing a new article throughout the United States, under a contract, is competent, if he has had a large experience in advertising by the distribution of samples, although his experience has been in articles not precisely of the same class as the subject of the contract, and he has not distributed throughout all the United States. *Perry v. Jensen*, 126.

Where a plaintiff has contracted to "use his best endeavors to introduce and sell" an article and has employed an outside agency to distribute samples, evidence of a person in the same line of business, and who knows the methods of such agency, that such method is not the best reasonable endeavor to introduce said article, is admissible. *Id.*

A sheriff's return that a defendant in ejectment is in possession, is presumptive evidence of a continuance of his possession at the time of trial. See *EJECTMENT*. *Thornton v. Britton*, 467.

EVIDENCE—Continued.

Depositions or notes of testimony taken in a former case between the same parties, may be admitted when it is impracticable to have the witness before the jury, and the determination of the question of practicability is largely within the discretion of the judge at *nisi prius*. *Id.*

Depositions taken in one action are admissible in another involving the same subject-matter, only when the two actions are between the same parties; it is not sufficient that one of the parties is the same. *Fearn v. West Jersey Ferry Co.*, 554.

In an action for negligence by A. against B., wherein C., wife and administratrix of B., has been substituted as plaintiff, a deposition taken in an action by C. against B. for injuries received through the same accident, is not admissible. *Id.*

Stenographer's notes of the testimony of the defendants in a former trial are admissible as evidence of admissions on their part. *Commonwealth v. Doughty*, 178.

In a dispute between counsel as to what was said in an offer of testimony, little consequence can be attached to the stenographer's notes; they constitute merely a declaration of the stenographer of a fact occurring in his presence. *Thompson v. Ridelapberger*, 444.

Where a city sewer, which has emptied upon a lot, has been removed and the question is whether the said sewer has been removed by a railroad company, which has taken part of said lot for its road, or by the city; in an action between the lot owner and the railroad the record of an action in ejectment by the former against the city based on the maintenance of said sewer, is admissible. *Harris v. Schuylkill River East Side R. R. Co.*, 44.

Parol evidence is admissible to correct a mutual mistake in a written instrument no matter how plain its words may be or how obvious its meaning. *Appeal of Fox, Moore & Co.*, 143.

A confessed judgment to his attorney as "trustee for my creditors." A mortgage and bond creditor claimed to participate in a fund, raised by the sale of personally under the judgment; evidence was offered that A. had specifically told the attorney that the judgment was to protect "business creditors" and that mortgage creditors were not to be included, and that a contemporaneous paper was prepared containing the names of unsecured creditors only; the fund was a few dollars less than the whole amount of the unsecured debt and it also appeared that the mortgage creditor was not prejudiced by the fact that the judgment seemed to be for his benefit; *held*, the evidence was admissible to correct the mistake and to confine the applicability of the fund to the creditors for whom it was intended. *Id.*

In an action on a contract under seal evidence that there was a contemporaneous oral agreement, purposely omitted from the writing by the consent of both parties, the effect of which would be to destroy the contract, is not admissible. *Irvin v. Irvin*, 137.

Parol evidence is admissible to show that a promissory note of a third person presumptively given as satisfaction of a debt was given as security only. *VanHaagen Soap Mfg. Co.'s Estate*, 69.

Where a lease exists, which contains no covenant on the part of the lessor to repair, evidence of a promise to repair, made prior to the execution of the lease, cannot be given in evidence unless it has been omitted from the lease by fraud or mistake. (C. P.) *Wodcock v. Robinson*, 288.

EVIDENCE—Continued.

When a policy provides the method of ascertaining the value of the insured goods, independent testimony of their value is not admissible. *Everett v. London & Lancashire Fire Ins. Co.*, 203.

In an action by a landlord to recover rent on an oral lease made by the landlord's vendor, who was dead when the action was brought, when the only question in dispute is what were the terms of the lease, evidence is not admissible as to the custom of the vendor in leasing properties, or of the landlord in like cases. *Arrott Steam Power Mills Co. v. Way Manufacturing Co.*, 378.

Where the context of a will raises an obstacle to construing in its strict sense the term which describes the object of the gift, or where more than one subject or object exists, to which the description is equally applicable, extrinsic evidence is admissible to remove the obscurity. (O. C.) *Knight's Estate*, 265.

S. sued C. to recover a sum of money belonging to S. and which should have been paid to D., in discharge of a debt due him by S., but which C. paid over to B. so that S. was compelled to pay the money a second time over to D.: *held*, evidence that S. had endeavored to recover the amount from B.'s estate, and had defended the action brought by D. on the ground that B. was D.'s agent to receive the money, was inadmissible, being irrelevant. *Shaffer v. Corson*, 121.

Where a plaintiff's case depends on a crime imputed to the defendant, the evidence to sustain it must be strong enough to overcome the presumption of innocence on the part of the defendant, but need not be so strong as to exclude all reasonable doubt of guilt, as in a criminal case. *Catasauqua Mfg. Co. v. Hopkins*, 146.

When a witness is called to identify a note and prove signatures to a contract, it is not permissible to ask him on cross-examination whether the note was not to be held until the performance of certain conditions not mentioned in the contract. *Irvin v. Irvin*, 137.

An expert upon the value of real estate, testifying in a case to recover damages for the location of a road, may be asked on cross-examination whether the details of improvement, the cost thereof, rent afterward, etc., have entered into his estimate of the value of the realty after the location of the road. *Harris v. Schuylkill River East Side R. R. Co.*, 44.

Where testimony of a particular fraudulent act has been excluded because not included in the bill of particulars, but a party has afterwards been cross-examined with reference to said act without objection and has been re-examined thereon, testimony as to said act is admissible in rebuttal to contradict the party. *Catasauqua Mfg. Co. v. Hopkins*, 146.

A refusal to strike out evidence received without objection is not reviewable on error. *Lowery v. Robinson*, 28.

Where an action is brought upon a written contract, which is attached, as an exhibit, to the statement, and the defendant does not in his affidavit of defence deny the execution of the contract attached, it is not error (especially in view of Rule 1 of the Rules of the Court of Common Pleas No. 2 of Philadelphia) to admit the contract in evidence on the trial, although the subscribing witnesses to the contract have not been called. (C. P.) *Brook v. Watson*, 273.

When a contract has been admitted without sufficient proof of its execution by the defendant, the irregularity is cured by the subsequent admission of the defendant that he executed the contract. *Id.*

EVIDENCE—Continued.

A receipt for money in a deed and a release executed by the grantor are evidence of payment, but not conclusive. *Rehmelman's Estate*, 293.

Admission of indebtedness by the grantee and release in such case are admissible to rebut the presumption of payment. *Id.*

Where the damage alleged is from the deposit upon the plaintiff's land of gases, fumes, smoke, etc., from a coke furnace, forming on said land a black crust and impairing its crop-bearing quality, (1) the shrinkage in crops, due to the cause alleged, should be shown as nearly as possible in bushels or tons; (2) specimens of the crust and sterilizing substances should be produced and the effect of their presence explained by chemical analysis and by expert testimony; (3) evidence as to what uses the plaintiff might have devoted his land is inadmissible; (4) evidence as to the source from which the material used in making the coke was obtained, its price or the cost of its mining, is inadmissible. *Robb v. Carnegie Bros. & Co.*, 339.

While the evidence of the witnesses as to value of land is not binding on a jury, which has viewed the land, yet the jury is not at liberty to substitute its own opinion for that of the witnesses regarded as a whole. *Hoffman v. Bloomsburg & Sullivan R. Co.*, 361.

Where goods are claimed as the property of an individual, evidence that the goods were in a room occupied by a firm of which the claimant was a member, and were under his control, is not sufficient to support the claim. Such evidence does not even show such a possession as raises a *prima facie* right of property. (*C. P.*) *Bloomington v. Victor*, 272.

On a claim of a right of property, another and limited interest cannot be proved. *Id.*

An unexplained delivery of money by one person to another is not evidence of the creation of the relation of debtor and creditor; the presumption is rather that the money was received for an antecedent debt. *Lowery v. Robinson*, 28.

In an issue where the validity of a judgment is the point in controversy the declarations of the defendant in the judgment, not a party to the issue, are not admissible. *Tiech v. Uiz*, 55.

The giving of a bill of sale without a transfer of possession of the property embraced therein is not evidence of actual fraud, but of constructive fraud only. *Id.*

In an action by a pipe line company to recover on a policy of insurance upon oil stored with it, evidence that the pipe line company contracted with its customers to keep insured their oil when stored with it is admissible. *Western & Atlantic Pipe Lines v. Home Ins. Co.*, 347.

When an action has been brought to recover for negligent conduct of a business on the defendant's premises and a preliminary injunction has been issued in equity to restrain such conduct, it is not proper to submit to the jury the consideration of the question whether the injunction has been violated in order to aid it determining whether to give exemplary damages, although evidence that, after the bringing of the action, the practice complained of continued is proper. *Kelsor v. Mahanoy City Gas Co.*, 369.

In an action to recover damages for the taking of a toll bridge by the exercise of eminent domain, when the bridge company has given evidence to show the value of its stock and franchise, the defendant may give the returns of the company to the auditor-general as bearing on the value of the stock. *Miffin Bridge Co. v. County of Juniata*, 399.

In such a case, evidence is not admissible to show

EVIDENCE—Continued.

for what price the defendant could have erected a bridge on the site of the one taken, or at some other point. *Id.*

Where a jury visits land claimed to be damaged, in estimating damages it should consider the testimony of witnesses as to damages in connection with the facts as they appeared on the view. *Gorgas v. Phila., Ilbg. & Pitts. R. R. Co.*, 436.

In case of fire alleged to have been caused by sparks from an engine of a railroad company, where it appears that the fire could only have been caused by an identified engine, testimony should be confined to the condition, management, and practical operation of that engine, about the time of the fire; but where the engine is unidentified, the rule of evidence is enlarged and, after showing that the fire was communicated from some of the defendant's engines, the plaintiff may show that the company was habitually negligent in the equipment or management of its engines, or of many of them; but this must be confined to the time about that of the fire, with such a reasonable latitude as is sufficient to enable such proof to be practicable; six months is too great a latitude. *Henderson v. Phila. & Reading R. Co.*, 479; and see same case under head NEGLIGENCE.

A defendant in a prosecution for assault and battery may prove a contract with his employers by which he was to have the exclusive use of the room in which he worked, and one of the employers, the one upon whom the alleged assault was made, was not to enter it. *Commonwealth v. Ribert*, 496.

In a trial for murder, where jealousy is alleged as the motive, conduct of the prisoner an hour before the killing, bearing upon the supposed motive, is admissible in evidence. *Commonwealth v. McMaons*, 497.

Question tending to criminate witness. See WITNESS. *Commonwealth ex rel. Tate v. Bell*, 333.

Retention of proofs of loss, evidence of their acceptance. See INSURANCE. *Everett v. London & Lancashire Fire Ins. Co.*, 203.

EXAMINER. An examiner may adjourn the cross-examination of a witness and his decision to do so is final. (*U. S. C. C.*) *Shapleigh v. Chester Electric Light and Power Co.*, 576.

EXECUTION. A *fi. fa.* issued on a judgment, obtained after a sheriff's sale under a prior judgment, binds the balance left on the sheriff's hands after defraying such judgment. *Kohl v. Sullivan et al.*, 58.

The *fi. fa.* given against a corporation by the Act of April 7, 1870, is in lieu of the former process of sequestration, and must be preceded by an ordinary *fi. fa.* returned unsatisfied in whole or in part. *Guest v. Lower Merion Water Co.*, 255.

Where a *fi. fa.* issues to sell stock, the corporation in which the stock is held cannot have the execution restricted to so much of the defendant's stock as remains after the corporation has taken out a debt due it by the defendant. (*C. P.*) *Lanahan v. Collins*, 287.

A draughtsman in an architect's office is not within the purview of any Act giving claimant of wages a preference on the distribution of a fund made upon execution. (*C. P.*) *Leinaw v. Albright*, 165.

EXECUTOR. Only legatees, distributees and creditors of a decedent have any standing to contest the account of his executor or administrator; creditors of a deceased executor, alleged to be insolvent, cannot contest his account of the testator's estate, as filed after the death of the original executor by his executor. (*O. C.*) *Law's Estate*, 189.

An executor, testifying to his account in the Or-

EXECUTOR—Continued.

phans' Court, is not to be regarded as a witness competent or incompetent on the ground of interest, but, in stating the account, as performing an official act and duty imposed upon him by law. (O. C.) *Law's Estate*, 191.

The legatee for life of personality, who is also executrix of the will containing the legacy, is not required, in the absence of special cause shown, to give security for the protection of the remainderman. (O. C.) *Bourguignon's Estate*, 315.

Where an executor may have credit for counsel fees, not actually paid. See **COUNSEL FEES**. (O. C.) *Id.*

Devise held to give power of sale to executor. See **POWER**. (O. C.) *Arrott's Estate*, 198.

See TRUSTERS.

EXEMPTION. The \$300 widow's and children's exemption takes precedence of a claim for the funeral expenses of the decedent. (O. C.) *Weir's Estate*, 268.

Where the widow's exemption is claimed in cash, no appraisal is necessary, and a delay of eleven months in making a claim, in such case, is not laches, where no rights have intervened. *Id.*

EXPERT. See **EVIDENCE**. *Perry v. Jensen*, 126; *Gorgas v. P. H. & P. R. R. Co.*, 436.

FEE SIMPLE. A devise of a fee will not be reduced by words of doubtful meaning in a subsequent clause of the same will. *Gillmer v. Daix*, 330.

Where after a devise in fee, there is a devise over, if the devisees do not leave the subject of the devise to any one, the devise over is void as an attempted restraint on the alienation of the fee. *Id.*

A devise "of all my real and personal property" carries a fee. *Id.*

An attempted limitation upon the enjoyment, so as to prevent the alienation by the tenant in fee, is invalid. (O. C.) *Cooper's Estate*, 134.

A devise of a fee will not be reduced by a provision, in the will, that the devise shall have sole control of the property during her lifetime. *Suider v. Baer*, 460.

Deed of land in fee simple carries machinery of oil wells on land at time of execution of deed. See **GRANTOR AND GRANTEE**. *Shields v. Deio*, 427.

FEIGNED ISSUE. A feigned issue under the Act of April 20, 1846, is not a matter of right upon request, but is to be granted by the Court when a material fact is in dispute, and the fact of the dispute must be made to appear to the Court by affidavit or otherwise. *Irvin's Appeal*, 60.

To obtain an issue to test the validity of a judgment, the complaining creditor should file an affidavit alleging material facts in dispute and their nature; if an answer to this be filed, depositions should be taken, and on this the Court will determine whether the issue should be granted. (C. P.) *Moore v. Dunn et al.*, 63.

PICTURES. See **GRANTOR AND GRANTEE**. *Shields v. Deio*, 427.

FORCIBLE DETAINER. One who has leased premises to another is not guilty of forcible detainer if he merely refuse to admit the lessee to the premises. *Commonwealth v. Brown*, 149.

To constitute forcible detainer there must be employed greater force than is expressed by *vi et armis*, and the employment of such force must be averred in the indictment. *Id.*

Forcible detainer is not an appropriate remedy for a breach of agreement to give possession of lands and tenements. *Id.*

FOREIGN ATTACHMENT. Where a foreigner is declared bankrupt by the Courts of his own country, a foreign attachment will not lie at the suit of a per-

FOREIGN ATTACHMENT—Continued.

son domiciled abroad against the property of said bankrupt in this State. (C. P.) *Long v. Girdwood*, 299.

A foreign corporation which has registered in this State is liable to process of foreign attachment. (C. P.) *Pierce v. Electric Co.*, 311.

Garnishee in foreign attachment cannot set off notes given to him by the defendant before the attachment and return at the time of the issue of the writ. (C. P.) *Crall v. Ford*, 366.

The fact that a defendant is insolvent will not enable an undue note given by him to the garnishee to be set off by the latter unless something has been done before the attachment to show an application of the undue demand to the debt due by the garnishee. *Id.*

FOREIGN CORPORATION. A foreign corporation registered in this State is liable to process of foreign attachment. (C. P.) *Pierce v. Electric Co.*, 311.

Assignment by foreign corporation for benefit of creditors. See **CONFLICT OF LAWS**. (C. P.) *Active Workers v. Sanders*, 321.

See **ABATEMENT. JURISDICTION**. *Phillips v. Library Co.*, 21.

FOREIGN JUDGMENT. In an action on a foreign judgment, where service of process is not denied, an affidavit of defence which does not allege payment is insufficient. (C. P.) *Potter & Hubbard v. Hartnett*, 120.

FRANCHISES. A franchise is a privilege vested in certain persons, by grant from the sovereign authority in the State, to exercise powers or perform acts which, without such grant, they could not perform. *Twelfth St. Market Co. v. Phila. & Reading Terminal R. R. Co.*, 111.

Where two public franchises have to be exercised at the same point, each must be regulated by a due regard to the other, but the burden is on the last comer to show that he is encroaching on the prior privilege no more than necessity requires. *Commonwealth v. Ruddle*, 227.

FRAUD. The giving of a bill of sale for personal property and the retention or possession of the same constitute constructive, not actual, fraud. *Tisch v. Utz*, 55.

One who takes from another a judgment to hinder or defraud creditors, and, in pursuance of the common design, pays off certain liens on the debtor's property, is not entitled, as against creditors, to have the amount paid by him for the discharge of the liens allowed him. *Kohl v. Sullivan et al.*, 58.

Fraud of principal in obtaining illiterate surety to act as such is not available as a defence to the surety, if he knew what paper he was signing, although ignorant of its effect. (C. P.) *Hall v. Tobin*, 164.

It is not fraud in law on the part of a debtor, or of his personal representative, to confess a judgment for a claim barred by the Statute of Limitations. *Woods v. Irwin*, 185.

An allegation that a charter has been obtained by fraud will not render the charter liable to collateral attack. (C. P.) *Active Workers v. Sanders*, 321.

FRENCH SPOILIATION CLAIMS. Not subject to collateral inheritance tax, when paid to heirs of claimant. (O. C.) *Kingston's Estate*, 284.

GAS WORKS. See **NOISEANCE. NEGLIGENCE**. *Keiser v. Mahanoy City Gas Co.*, 369.

GIFT. A gift of personality is not effectual unless there is an intention to relinquish the right of dominion on the part of the donor and to vest it in another, accompanied by a delivery of possession or some equivalent act. *Smith's Estate*, 565.

GOVERNOR. The governor has power to fill any vacancy occurring in the office of county treasurer, and the treasurer of the city of Philadelphia, though called city treasurer, is a county treasurer. *Commonwealth v. Oellera*, 153.

Under Art. IV., § 8, of the Constitution, the governor has no power, on the occurrence of a vacancy in the office of superintendent of public instruction, to appoint a superintendent, who shall hold office for a longer period than until the end of the next session of the senate. (C. P.) *Commonwealth v. Waller*, 252.

GRANTOR AND GRANTEE. G. conveyed to D. land in fee simple, for \$5,000; on the same day D. executed a bond to G. for \$4,300 payable in four annual payments beginning one year after the death of G. and by the bond agreed to give G., during his life, a certain proportion of the produce; also, G. "to have the privilege of operating his oil wells on the premises, and the said G. may at any time at his own pleasure remove any buildings, and the machinery of the said wells, without fraud or further delay." At the time of conveyance, there were nine wells in operation; during G.'s lifetime, six were abandoned, and the machinery, etc., connected with them, removed by him; after G.'s death, his executor claimed the machinery, tubing, etc., of the remaining wells: *held*, the right to the machinery at the wells passed by the deed to D., and it was subject only to the right of removal by G. in his life-time. *Shields v. Delo*, 427.

GROUND-RENT. A ground-rent reserved in Spanish milled dollars is still payable in that coin, although it has been denominated by the United States, by Act of February 21, 1857, and by Spain, by decree in 1868. *Johnson v. Ash*, 537.

GUARANTEE. The contract of guarantee demands literal performance and, while it may be affected by a trade custom, that fact must be shown by evidence; a Court cannot take judicial notice thereof; hence in an action on a contract, which contains a guarantee by plaintiff, an affidavit of defence, which sets up a literal breach of the guarantee is sufficient to defeat a rule for judgment. *Martinez v. Earnshaw*, 493.

GUARDIAN. Liability of, where he has deposited money of the ward in bank. See **TRUSTS AND TRUSTEES**. *Law's Estate*, 490.

HABEAS CORPUS. Where the petition for the writ sets out the commitment of the relator for contempt, in refusing to testify as a witness, an objection to the return that the commitment does not set out the contempt or the facts showing the jurisdiction of the Court is insufficient. *Commonwealth ex rel. Tate v. Bell*, 333.

Where a person is committed for contempt in refusing to testify on the trial of the indictment of a third person for bribery, the Court will not in habeas corpus proceedings consider the sufficiency of the indictment. *Id.*

HALF-BLOOD. See **INHERITANCE**. (O. C.) *Hirst's Estate*, 212.

HIGHWAYS. A municipality may attach to its consent, that highway within its boundaries may be used by a railway company under the terms of its charter, such conditions as may seem good to it, the said municipality, provided they are not in conflict with the provisions of the charter, but harmonize with it. *City of Philadelphia v. Ridge Ave. Pass. Ry. Co.*, 388. See **ROAD LAW**.

HINDERING CREDITORS. See **EQUITY**. *Kohl v. Sullivan et al.*, 58.

HUSBAND AND WIFE. The community of interest between husband and wife is such that where

HUSBAND AND WIFE—Continued.

a husband is disqualified as a witness, because of the death of the adverse party to a transaction as to which he offers to testify, his wife is also disqualified. *Sutherland v. Ross*, 17.

The right of survivorship between husband and wife is extinguished by divorce, and, thereafter, consequently, on the death intestate of a child, each will take a share as a parent without any right of survivorship. (O. C.) *Hecht's Estate*, 183.

A husband of a deceased executor is a competent witness as to the debit side of the account filed by him, although his wife is a legatee under the will. (O. C.) *Law's Estate*, 191.

The difference between an action brought by a woman and husband in her right, and one brought by the husband to her use, is material; the first would not bar another action by the husband in his own right; the second would. *Thornton v. Britton*, 467.

A husband by a contract, signed in his own name, for the erection of a house on his wife's land, may subject the said land to liability to a mechanic's lien, if the wife assent to the contract and knowingly receive the goods or material, or assent to their use in the construction of the house, if they are furnished on the credit of the building and are reasonably necessary for the improvement of her separate estate. *Bodey & Livingston v. Thackara*, 470; *Bevan v. Thackara*, 473. See **RE-ENTRY TROVTS**. *Logau v. Eva*, 464.

See **MARRIED WOMEN**.

ILLITERACY. See **SECRECY**. (C. P.) *Hall v. Tobin*, 164.

INDEMNITY. Not a prerequisite to recovery on a lost promissory note, but only to execution on the judgment. *West Philadelphia National Bank v. Field*, 417.

INDORSER. An indorser is not discharged where, for the note upon which he is indorser, the holder takes a note whose indorsement is forged. *Id.*

INFANT. A child four years of age cannot be guilty of contributory negligence. *Summers v. Bergner & Engel Brewing Co.*, 431.

INHERITANCE. Where the interest in a ground-rent of a person under disability is, by extinguishment of the ground-rent, converted into money, his next of kin, both of the whole and of the half-blood, will take without distinction. (O. C.) *Hirst's Estate*, 212.

INSANITY. Measure of proof necessary to establish insanity as a defence. See **CRIMINAL LAW**. *Commonwealth v. Gerade*, 261.

INSTRUMENT. It is not error to permit counsel to use a mechanical instrument or appliance in the course of his argument to demonstrate a law of nature. *Hoffman v. Bloomsburg & Sullivan R. R. Co.*, 361.

INSURANCE. Any doubt as to the meaning of a policy must be construed in favor of the insured. *Western & Atlantic Pipe Lines v. Home Ins. Co.*, 347.

An insurance company which denies in toto its liability for a loss is not entitled to take advantage of a clause in its policy, allowing a certain time for adjustment and payment. *Id.*

Under the provisions of the Act of May 11, 1881, an insurance company failing to attach a copy of its by-laws to its policy may not offer them in evidence, and, where they are received under objection and a verdict is rendered against the company, the Supreme Court will not consider questions predicated on the evidence thus erroneously received. *Pickett v. Pacific Mutual Ins. Co.*, 456.

Accident Insurance. An exception, in a policy of accident insurance, of death or injury "from the in-

INSURANCE—Continued.

halation of gas" does not cover the case of one who is asphyxiated by gas arising from a well into which he goes for the purpose of work; the exception covers only voluntary inhalation of gas, as in dentistry, surgery, etc. *Pickett v. Pacific Mutual Ins. Co.*, 456.

A death from the sudden and involuntary inhalation of poisonous gas is a death from an external accidental injury within the meaning of an accident policy. *Id.*

Where the violent effect of gas upon the body of the person inhaling it is evident on a post-mortem examination, the death has been caused by an "injury visible upon his person." *Id.*

The Act of May 11, 1881 (P. L. 20), forbidding the offer in evidence by insurance companies of by-laws, a copy of which has not been attached to their policies, applies to accident insurance companies. *Id.*

Fire Insurance. When a policy provides that it "will not cover unoccupied buildings (unless insured as such), and if the premises insured shall be vacated without the consent of the company . . . the policy shall cease and determine," the policy is not avoided by the temporary absence of persons from the building insured existing for a reasonable time in the course of effecting a change of tenants. *Doud v. Citizens' Ins. Co.*, 20.

A stipulation in a fire policy, limiting the time within which an action upon it may be brought, is a valid contract and will be enforced; but as it is in derogation of the common law it will be strictly construed. *Everett v. Niagara Insurance Co.*, 201.

In an action on a policy limited by the terms therein to be "commenced within twelve months after the fire shall have occurred," it appeared that the fire took place January 6, 1887; that suit was brought by precept December 27, 1887; the defendant appeared d. b. e. on December 28, 1888; the return of the sheriff was set aside by the Court, on January 11, 1889; a non pros. was entered in default of a narr. being filed within a year; on January 25, 1889, an alias summons issued: on a reserved point, the Court below held that the non pros. was wrongly entered, the defendant having appeared d. b. e., and service having been set aside, was not in Court and hence could not order a non pros. and therefore the alias was merely a continuance of the original action, and the contract limitation did not apply; *held*, on appeal, that the alias was supported by the prior writ, and that the contract limitation did not apply to the period between the issuing of the two writs. *Id.*

A provision in a policy that, if the property shall be insured in another company, the policy shall be considered sunk avoids the policy the instant the other insurance is effected; such policy does not, therefore, constitute "other insurance" within the meaning of policies which provide for an apportionment of loss amongst all the companies concerned in the risk. (C. P.) *Marshall v. Ins. Co. of North America*, 283.

A policy covered "oil while contained in the iron crude tank known as No. 1, situate detached 273 feet on the J. farm;" by an extraordinary flood, the tank was carried some five hundred feet away and deposited against the pier of a railroad bridge, where it remained a few hours, and while there, the oil, while in the tank, was burned; *held*, (1) that there had been no such removal of the oil as would avoid the policy; (2) that the description of the location of the tank, if a warranty at all, was a warranty only of the location of the tank at the time the insurance was effected, or at most that the insured would not voluntarily change the location. *Western & Atlantic Pipe Lines v. Home Ins. Co.*, 347.

INSURANCE—Continued.

Where a person having a special property in the subject of insurance, or a liability therefor to another, obtains an insurance on the same, without fraud or any representation of ownership, the insurer cannot afterwards defend on the ground that the insured is not the owner of the property. *Id.*

A pipe company, authorized by its charter merely to transport, store, insure and ship petroleum, obtained a policy upon oil in its custody, without any statement as to ownership; a loss having occurred, *held*, the defendant, insurer, was chargeable with notice of this fact, and contracted with reference to it, and, at any rate, was chargeable with knowledge that the custom of pipe lines was to receive the oil of their customers and to insure the same without specifying the ownership. *Id.*

In an action under such circumstances, evidence of a contract between the pipe company, plaintiff, and its customers to insure the oil stored with it, is admissible. *Id.*

Where a company after a loss, with full knowledge of the circumstances, refuses to pay upon a specified ground, it cannot, after suit brought, set up another defence. *Id.*

It is the duty of the insured to prepare proofs of loss, and where proofs are prepared by alleged agents of the insurer, the latter is not bound by their acts without express authority shown in such agents. *Everett v. London and Lancashire Fire Ins. Co.*, 203.

The retention of proofs of loss by an insurance company without objection is evidence of their acceptance by the company. *Id.*

Where proofs of loss are furnished, containing a schedule of the different companies insuring, the amounts of their policies and the proportionate payment due from each on the basis of an adjusted loss, and no objection is made by a company, on account of over-insurance, there is evidence of a waiver, by estoppel, of a condition against over insurance, for silence in this regard might lead the insured to a disadvantageous settlement with the other companies. *Id.*

To constitute a waiver by implication of a condition in a policy as to the time within which an action must be brought thereon, the acts amounting to the waiver must be done during the running of the period of limitation. *Id.*

Where a policy provides a specific method of ascertaining the value of the goods insured, no independent testimony as to their value is admissible. *Id.*

Where the retention of proof of loss is regarded as an acquiescence as to the value of the goods as stated therein, other testimony as to the value of said goods is irrelevant. *Id.*

Where proofs are furnished and the insurer demands additional ones, which are sent, the insured thereby waives the right to claim that the first proofs were sufficient, and to date the time allowed for the exercise of an option by the insurer to rebuild from the furnishing of the first proofs. *Kelly v. San Fire Office*, 269.

Where a policy-holder begins action to recover the amount of his insurance, the insurer is relieved from carrying out an election to rebuild during the pendency of the action. *Id.*

While an insurer has no right to require a public officer to act in the adjustment of a loss, yet a contract that the insured shall procure a certificate of loss from such officer is not void as against public policy. *Id.*

Life Insurance. Where an assignee of a policy, who has no insurable interest, collects the proceeds

INSURANCE—Continued.

after the death of the insured, a payment of part thereof to one interested with him, and whose title is no better than his own, is no defence in an action by the assignee, who had an insurable interest, to recover the amount received from the insurer. *Brennan v. Franey*, 162.

The Act of May 7, 1889 (P. L. 116), prohibiting and punishing the discrimination by any life insurance company or agent thereof, in favor of individuals between insureds of the same class and expectation of life, is constitutional. *Commonwealth v. Morningstar*, 442.

A creditor may lawfully take out a policy on the life of his debtor in an amount to cover the debt with interest and the cost of insurance and interest thereon during the period of the expectancy of life of the insured, according to the Carlisle Tables. *Ulrich v. Reineohl*, 419; *Shaffer v. Spangler*, 425.

Where a creditor has taken out a policy on the life of a debtor and it is insufficient to cover the indebtedness and insurance money, he may take out a second policy, and the validity of the latter must be determined by the whole amount of the indebtedness. *Shaffer v. Spangler*, 425.

Where a creditor has taken a policy on the life of his debtor and received the amount of the insurance, counsel fees paid by him in proceedings to recover the said amount are properly charged in his favor as between himself and the representatives of the deceased debtor, and also any expense he has been at for the debtor's funeral, when he has promised to pay the same on receiving the policy. *Id.*

Title Insurance. In an action on a policy of title insurance, an affidavit of defence setting up that the defendant did not draw the deed to the insured, and that it was mislaid by a deed brought to it by the conveyancer employed by the defendant, whereby it insured a property other than the one with which it thought it was dealing, is insufficient. (C. P.) *Ganler v. Solicitors' Loan and Trust Co.*, 208.

A policy of title insurance is within the affidavit of defence law. *Id.*

INSURANCE BROKER. An insurance broker, who is employed to place an insurance, and who delivers a paper purporting to be the policy of a company named therein, when, in fact, there is no such company in existence, is responsible to his principal for any loss which occurs, and which should have been covered by a valid insurance. (C. P.) *Vann v. Downing*, 259.

INTEREST. Interest is not recoverable on a recognizance, drawn in the form prescribed by the Act of March 29, 1832, on an appeal from the Orphans' Court. *Commonwealth v. Wistar*, 100.

Interest pending an appeal cannot be made recoverable by the action of the Court in adding, to the recognizance prescribed by law, a condition that the appellant shall pay all damages that may accrue to the appellees by reason of the appeal, if unsuccessful. *Commonwealth v. Wistar*, 97.

INTERPLEADER. On a sheriff's interpleader, where goods are claimed as the individual property of the claimant, the claim is not made out by evidence that the goods were in a room occupied by a firm of which the claimant was a member, and were "separate and under his control." (C. P.) *Bloomington v. Victor*, 272.

On a claim of a right of property, another and limited interest cannot be proved. *Id.*

INTERSTATE COMMERCE. An ordinance requiring persons soliciting orders or delivering goods

INTERSTATE COMMERCE—Continued.

under orders so solicited, to obtain a license, and applicable alike to persons from without and to those within the State, is not a restraint upon interstate commerce, but a legitimate exercise of the police power. *City of Titusville v. Brennan*, 534.

INVESTMENT. See *DEPOSIT*. *Law's Estate*, 490.

"ISSUE." *Prima facie*, means "heir of body." *Shalters v. Ladd*, 33.

JOINDER OF PARTIES. See *PRACTICE*. *Hill v. Parter*, 450.

JUDGMENT. A judgment on a bond accompanying a mortgage is not presumed to be satisfied by the satisfaction of the mortgage, when the judgment is allowed to stand and is marked to use. *Meigs v. Bunting*, 1.

In an issue to determine the validity of a judgment, attacked on the ground of fraud, the owner of the judgment may rest on it until evidence is given of fraud, to which he is a party, and, unless such evidence is given, there is no case to submit to the jury. *Unanget v. Goodyear's India Rubber Glove Mfg. Co.*, 53.

A judgment is not subject to be attacked by means of a rule to open, taken by a subsequent judgment creditor of the defendant. (C. P.) *Moore v. Dunn*, 63.

A judgment regular upon its face can be stricken off only for fraud. *Maneval v. Township of Jackson*, 130.

The power of a Court to open a judgment is very extensive, but it must rest on a foundation of competent evidence; it is irregular, therefore, to open it on petition and answer alone, without any evidence, unless by consent. *Woods v. Irwin*, 185.

A judgment confessed by a debtor or his personal representative can only be attacked by creditors for fraud or collusion; the fact that the debt was barred by the Statute of Limitations will not give the creditors any standing. *Id.*

Where a defendant has had a day in Court, and has confessed judgment, he cannot afterwards set up that the debt was barred by the Statute of Limitations. *Id.*

While a judgment may be opened to allow the interposition of the Statute of Limitations, it is not binding on the Court to open the judgment for such purpose. *Id.*

The fact that by a judgment, which has been confessed, a fund in the Orphans' Court, in which creditors of the defendant's testator are interested, will be diminished, gives said creditors no standing to attack the judgment. *Id.*

Where a judgment has been entered on a replevin bond, which contains a warrant to confess, such judgment is cautionary only, until the replevin suit is determined. *Clark v. Mora*, 301.

JURISDICTION. The Courts of Pennsylvania have no jurisdiction over a corporation of another State, not doing business in Pennsylvania, and cannot acquire such jurisdiction by a service upon an officer of the corporation casually within the State. *Phillips v. Library Company*, 21.

The Orphans' Court has no jurisdiction where a question of title to realty is raised. (O. C.) *Curran's Estate*, 96.

The Common Pleas has jurisdiction to summarily enforce an agreement of parties to an action to discontinue the same. *Bach v. Burke*, 124.

Where proceedings for damages in the opening of a road have been begun in the Quarter Sessions, and

JURISDICTION—Continued.

carried by appeal to the Common Pleas, under an agreement to waive the question of jurisdiction, the Supreme Court will not be astute to inquire into the regularity of the proceeding. *Ogden v. Philadelphia*, 413.

Where objection to jurisdiction in equity is not made until the case comes into the Supreme Court on appeal, that Court will not, as a rule, sustain the objection, unless the want of jurisdiction is so plain that the Court would feel justified in dismissing the bill of its own motion. *Edgett v. Douglass*, 469.

JUROR. Where a juror testifies on his *voir dire* that he is on intimate terms with one of the parties who has explained the case to him, both before and after he was summoned as a juror, it is improper to allow him to sit as a juror. *Catasauqua Mfg Co. v. Hopkins*, 146.

Where the question of the propriety of permitting a juror to sit depends on his impartiality, the matter is to be determined by the Court before which the trial is had, and its determination may be conclusive. *Id.*

LABOR. See **PREFERRED CLAIM.** (C. P.) *Leinaw v. Albright*, 165.

LACHES. A delay of eleven months in claiming the widow's and children's exemption of \$300, where the same is claimed in cash, is not laches, where no expenses have been incurred, or rights with which it interferes have intervened. (O. C.) *Weir's Estate*, 268.

A testator died May 31, 1881; the Commonwealth claiming her estate by escheat, took an appeal from the admission of the will to probate, Nov. 19, 1881 (before which date the estate was practically distributed), had an examiner appointed July 1, 1882, who took the testimony of some ten witnesses, at no great length, between that date and Mar. 11, 1887, and filed his report, December 3, 1890; the case appeared on the argument list in May, 1891; *held*, the Commonwealth was guilty of laches. (O. C.) *Cardwell's Estate*, 291.

See **EQUITY.** *Orne v. Fridenberg*, 545.

LAND DAMAGES. See **ROAD LAW.** *EMERSON DRAIN.*

LANDLORD AND TENANT. Where a tenant for a term certain sub-lets a portion of the premises for the same term, and then assigns his tenancy, and, without notice to the sub-tenant, whose rights are known to both landlord and assignee, the latter surrenders the lease prior to its termination, and the surrender is accepted by the landlord, who immediately executes to the assignee a new lease for a longer term, part of which covers the same time as the original lease, the landlord sustains no such relation to the sub-tenant as will sustain any right to distrain. *Hessel v. Johnson*, 102. [MITCHELL, J., dissenting.]

To constitute a forcible detainer by a landlord, as against his tenant, the latter must have had possession of the premises and the former must, subsequently, have detained them by force. *Commonwealth v. Brown*, 149.

Where goods are illegally distrained for rent and sold, the measure of damages is the value and not the selling price of the goods. (C. P.) *Esterly Machine Co. v. Spencer*, 287.

Goods in possession of tenant for sale on commission are not distrainable. *Id.*

The landlord will not be given costs in replevin, where the verdict is partly in favor of the plaintiff. (C. P.) *Park v. Holmes*, 288.

Where an intending lessor has, orally, promised to put premises in repair, and subsequently executes a

LANDLORD AND TENANT—Continued.

lease in which there is no covenant to repair, the lessee cannot recover for a breach of the oral promise, unless such promise was omitted from the lease by fraud or mistake. (C. P.) *Wodock v. Robinson*, 288.

Evidence of custom in leasing other properties not admissible in action by landlord for rent. See **EVIDENCE.** *Arrott Steam Power Mills Co. v. Way Manufacturing Co.*, 378.

Where a railroad company leases mines to a mining company, and the latter so negligently mines as to injure a surface owner, the lessor railroad company is not liable to the surface owner. *Hill v. Pardee*, 450.

LEGITIMACY. See **EVIDENCE.** (O. C.) *Kates's Estate*, 241.

LIEN. Of collateral inheritance tax, effect of Act of May 6, 1887, § 20, passed upon. See **COLLATERAL INHERITANCE TAX.** *Collen's Estate*, 41.

Of Taxes *Philadelphia v. Heister*, 43. (C. P.) *City v. Conyers*, 152.

McManis's Lien. See **Mechanic's Lien.**

LIFE ESTATE. Will held to give. See **WILLS.** *Shalters v. Ladd*, 33; (C. P.) *Peirce v. Hubbard*, 193.

LIFE TENANT. Where a life tenant of personality under a will is also the executrix thereof, and has been permitted to enjoy the possession of the personality for a number of years, she will not be required to enter security for the protection of the remainderman. (O. C.) *Bourguignon's Estate*, 315.

Apportionment of taxes, etc., between life tenant and remainderman. See **APPORTIONMENT.** (O. C.) *Fest's Estate*, 415.

LIMITATION OF ACTION. The statute in a case of seduction runs from the time of the seduction. *Dunlap v. Linton*, 451.

Under the Act providing for the widening of Chestnut Street, Philadelphia, the Statute of Limitations does not begin to run against a land-owner from the passage of the Act, but from the time the land between the old and the new line is abandoned by the owner and absorbed into the highway for the benefit of the public. *Brower v. City of Philadelphia*, 87.

The Statute of Limitations in an action for damages for opening a street runs from the time of actual physical opening. *In re Change of Grade of Plan 166; In re Allen's Lane*, 406.

The Statute of Limitations runs against an action for damages, suffered by a change of grade, from the time of the actual physical change. *Ogden v. Philadelphia*, 413.

The time within which an action may be brought may be limited by contract, but such contract, being in derogation of the common law, will be strictly construed. *Everett v. Niagara Ins. Co.*, 201.

Construction of limitation in insurance policy. See **INSURANCE.** *Id.*

To remove the bar of the Statute of Limitations there must be a clear and distinct promise to pay, or an acknowledgment and identification of the debt consistent with such a promise; a mere declaration of an intention to pay is not the equivalent of such a promise. *Lowery v. Robinson*, 28.

To constitute a waiver by contract of a condition fixing the time within which an action must be brought, the contract must be while the period of limitation is running. *Everett v. London and Lancashire Fire Ins. Co.*, 203.

Where A., having a disputed account against B., which is barred by the Statute of Limitations, proposes to have the claim stated by H., saying: "If H. does this, if I pay you anything I will pay you, and if you owe me anything you will pay me;" to which B.

LIMITATION OF ACTION—Continued.

replies: "Yes, sir; if you owe me anything you must pay me, and if I owe you, I will pay you," there is no such admission of indebtedness as will remove the bar of the statute. *Linderman v. Pomeroy*, 216.

An assent to the correctness of an accountant's figures, coupled with a denial of any debt, will not remove the bar of the statute. *Id.*

The mere fact that a judgment has been confessed for a debt which is barred by the Statute of Limitations, is not such a fraud as will subject the judgment to attack by the creditors of the defendant. *Woods v. Irwin*, 185.

Neither a debtor, even though insolvent, nor his executor or administrator, is bound to interpose the Statute of Limitations against a recovery. *Id.*

LIQUOR LAW. Mandamus to the Quarter Sessions requiring it to issue a wholesale license where there was no remonstrance against the petitioner and the petition alleged that he was a citizen of the United States, of temperate habits and good moral character, refused. *Com'th ex rel. Ostertag v. Fell*, 429.

LOST NOTE. See **PROMISSORY NOTE**. *West Philadelphia National Bank v. Field*, 417.

MANDAMUS to compel Quarter Sessions to issue wholesale liquor license refused. See **LIQUOR LAW**. *Com'th ex rel. Ostertag v. Fell*, 429.

MANUFACTURING COMPANIES. See **TAXATION**. *Com'th v. Northern Electric Light and Power Co.*, 520; *Same v. Brush Electric Light Co.*, 527; *Same v. Edison Electric Light Co.*, 531; *Same v. Chester Electric Light and Power Co.*, 533.

MARKET HOUSE. A market house is not a public use. *Twelfth St. Market Co. v. Phila. & Read Terminal R. R. Co.*, 111.

MARRIED WOMEN. A married woman has only those powers over her separate estate which are actually and expressly conferred by the instrument creating it. *Funk's Estate*, 557.

In order to validate a contract, invalid on account of coverture, by a promise made after the coverture has terminated, the promise must be express, and clear and distinct in its terms, and such contract is enforceable only according to the terms of the promise. *Kelly v. Eby*, 26.

In an action to recover money loaned to a married woman, before the Act of 1867, a promise made by the debtor after becoming covert, as follows: "According as I get the money from my boarders I will give you so much until I pay you the money," is insufficient to support an action. *Id.*

A deed of a married woman made prior to 1848, containing an acknowledgment which is defective, in that it does not set out the separate examination of the grantor, is validated by the Acts of April 11, 1848, P. L. 526; January 24, 1849, P. L. 676, and April 25, 1850, P. L. 576. *Shrawder v. Snyder*, 84.

See **HUSBAND AND WIFE**.

MASTER AND SERVANT. The test of the liability of a master to his servant, for a personal injury suffered by the latter in the former's employ, is negligence, not danger. *Monks v. Delaware and Hudson Canal Co.*, 80.

An honest, though mistaken, exercise of judgment by a competent employé in the course of his employment can never be such negligence as will render the employer liable to a fellow-employé. *Id.*

Where an employer has furnished his employé with tools and appliances which, though not of the best character, may, by ordinary care, be used without

MASTER AND SERVANT—Continued.

danger, he is not liable, if an accident happen to the employé. *Bemis v. Roberts*, 169.

An employé who has had the opportunity of becoming acquainted with the risks of his situation and accepts them, cannot, afterwards, complain if that of which he takes the risk subsequently happens and he is injured thereby. *Id.*

The plaintiff, a workman, was engaged in pushing a "buggy," loaded with iron, over a trolley in an iron mill; the buggy used for the purpose had a flat floor, in the corners of which were holes, into which were put iron rods to prevent the load from slipping; the holes in the particular buggy had become worn, and the rods would not remain in place; the iron fell off and injured the plaintiff. There was some evidence that the load was improperly placed, and no evidence of knowledge on the part of the employer, defendant, of the defect in the buggy: *held* (1) plaintiff was chargeable with knowledge of the fact that the pins were not in place, and hence was barred of a recovery on the ground of contributory negligence; (2) that if the accident were the result of improper loading, it was the result of negligence of a fellow-workman of the plaintiff, for which the employer was not liable. *Id.*

MEASURE OF DAMAGES. In an action on a recognizance upon an appeal from a decree of the Orphans' Court, drawn as prescribed by the Act of March 29, 1832, § 59, interest is not recoverable by way of damages. *Commonwealth v. Wistar*, 97, 100.

In fixing damages in an action to recover for personal injuries, the jury should consider, in addition to loss of time and the expenses incurred by the plaintiff by reason of the injury, the pain and inconvenience resulting from it, and make such allowance therefor as under all the circumstances, including the age, habits, and pursuits of the plaintiff, may seem just and reasonable, not overlooking the absence of a cruel or wanton purpose on the part of the defendant. *Baker v. Penna. Co.*, 220.

The proper measure of damages sustained by a land-owner by reason of a change of grade in the road on which his property abuts is the difference between the market value of his land immediately before and that immediately after the change; and expense to which the land-owner might be put in consequence of the change, injury to business, etc., can only be taken into consideration as elements in determining the market value; they cannot be an independent source of damages. *Chambers v. Borough of South Chester*, 249.

The measure of damages where goods are illegally distrained and sold is the value of the goods, not the price for which they sold. (C. P.) *Easterly Machlue Co. v. Spencer*, 257.

Where a legitimate business, which is in no sense a development of the resources of the land upon which it is carried on, is conducted without negligence and works injury to neighboring land, in an action therefor, the measure of damages is the actual injury done to the soil and crops, without regarding any depreciation in selling value caused by the business being considered an undesirable one to have conducted on a neighboring property. *Robb v. Carnegie Bros. & Co., Limited*, 339.

Where the verdict shows that the damages have been arrived at by the adoption of an erroneous measure or a mistake in computation, the Judge at nisi prius should not hesitate to set the verdict aside. *Id.*

Where a loss of business to a hotel is alleged as the

MEASURE OF DAMAGES—Continued.

result of negligence in the conduct of an obnoxious business on a neighboring property, the measure of damages is the actual falling off of income so far as that can be traced to the alleged cause, and that must be shown, not conjectured without evidence to support it. *Kelser v. Mahanoy City Gas Co.*, 369.

Exemplary damages may be given in an action for negligence, where it is shown that the negligent practice complained of continued after the bringing of this action. *Id.*

For land taken for street, see *ROAD LAW*. *Whitaker v. Borough of Phoenixville*, 30; for land taken for railroad, see *EMINENT DOMAIN*. *Harris v. Schuylkill River East Side R. R. Co.*, 44; for bridge taken by county. See *Mifflin Bridge Co. v. County of Juniata*, 399.

MEASURE OF PROOF. Where the plaintiff's case depends on an alleged crime of the defendant, it must be made out by evidence strong enough to overcome the presumption of innocence which exists in favor of the defendant, but it is not necessary to establish that guilt beyond all reasonable doubt, as in a criminal case. *Catasauqua Mfg. Co. v. Hopkins*, 146.

MECHANICS' LIENS. A mechanic's lien for alterations and additions which does not aver that notice of intention to file a lien was given to the owner at the time of furnishing the materials or doing the work, is fatally defective. (*C. P.*) *Kramer v. Crump*, 16.

The Act of May 18, 1887 (*P. L.* 118), repeals by implication the Lien Act of August 1, 1868. *Id.*

A mechanic's lien for a gas machine will not be stricken off on motion, where the character of the machine does not appear in the lien or bill of particulars. (*C. P.*) *Pennia Gas Light Co. v. Gill*, 36.

The necessary structures of a water company, incorporated under the Act of April 29, 1874 (*P. L.* 93), are not subject to a mechanic's lien. *Gnest v. Lower Merion Water Co.*, 285.

To deprive a sub-contractor of his right to file a lien, the agreement between the owner and contractor that no liens shall be filed must be clear, positive and precise. (*C. P.*) *Lloyd v. Krause*, 305.

Where a husband makes a contract in his own name for the erection of a house on his wife's property, a mechanic's lien may be filed against the said property if the wife have assented to the contract, and received the goods or materials or consented to their use in the building of the house, and the same be reasonably necessary for the improvement of the wife's separate estate and have been furnished on the credit of the building. *Bodey & Livingston v. Thackara*, 470; *Bevan v. Thackara*, 473.

A claim under the Mechanics' Lien Law must set forth the nature of the work and materials, with such a specification of the building as will exclude work done or material supplied for anything else. *Bevan v. Thackara*, 473.

A lien was filed against a dwelling-house, properly described, the particular items "being specifically set out in bill annexed, and made part of the claim and furnished for the erection of said building;" in the caption of the bill of particulars appeared the words, "House and stable near R.:" *held*, the lien was good only for the materials used in the construction of the dwelling-house; it was not good for those used in the erection of the stable. *Id.*

A sub-contractor is chargeable with notice of all the terms of the contract between the original contractor and the owner. *Id.*

MECHANICS' LIENS—Continued.

A contract between the owner of a dwelling and a contractor for work thereon, that "the owner will not in any manner be answerable, for any of the materials or other things used and employed in finishing and completing said works," and that there shall not "be any legal or lawful claims against the contractor in any manner, from any source whatever for work or materials furnished," is, in effect, an implied covenant that no liens shall be filed and binds a sub-contractor. *Dershimer v. Maloney*, 477.

MERGER. See *DEED*. *Close v. Zell*, 277.

MILEAGE. Refusal of allowance of. See *COSTS*. (*U. S. D. C.*) *Street v. The Progresso*, 368.

MISTAKE. Correction of mistake in judgment in trust, by supplying the names of the creditors for whose use it was intended, with the effect of excluding others apparently within the trust. See *EVIDENCE*. *Appeal of Fox, Moore et al.*, 143.

MONEY. Money of a defendant, not on his person, may be taken in execution; this rule covers the balance in the hands of a sheriff produced by a sale upon execution, after paying the execution creditor. *Kohl v. Sullivan et al.*, 58.

MORTGAGE. Satisfaction of a mortgage does not work a satisfaction of the judgment or the bond accompanying it when the latter is allowed to stand and is marked to use. *Meigs v. Bunting*, 1.

A mortgagee is regarded as a purchaser and is protected from all secret equities and trusts of which he had no notice, and a purchaser at sheriff's sale under the mortgage is protected by the mortgagee's want of notice. *Logan v. Kva*, 464.

Such purchaser does not lose protection because he was the surety on the bond accompanying the mortgage. *Id.*

See *NOTICE*. *Meigs v. Bunting*, 1.

MUNICIPALITY. Where a city makes two contracts with the same person, in an action brought by him upon one it may set off the damages accruing through his failure to fulfil the other, and, where the contract prohibits assignment or sub letting, it may exercise this right even against a new plaintiff, who has advanced money to the legal plaintiff on the faith of his contract. *Watson v. Philadelphia*, 86.

A municipality which possesses a register of unpaid taxes is bound by its certificate, as to the contents thereof, given to one who procures and acts upon the same in good faith. *Philadelphia v. Anderson and Baxter*, 90.

A township is not bound by the act of its supervisors in borrowing money under ordinary circumstances, but is bound where the money is borrowed to enable the supervisors to perform their duties in extraordinary emergency. *Maneval v. Township of Jackson*, 130.

Where, by the charter of a railway company, the assent of a municipality is required to be obtained before the said company can occupy a street within the boundaries of the municipality, the municipality may couple with its consent any conditions or restrictions which do not conflict with the charter. *City of Philadelphia v. Ridge Ave. Pass. Ry. Co.*, 388.

Where a municipality has assented to the use of its streets by a railway company on condition that the company shall repair and repave the said streets when necessary, the municipality is to judge when such repairing or repaving is needed and how and with what material it shall be done. *Id.*

An Act applicable only to those cities of a specified population which accept its provisions is unconstitutional. See *CONSTITUTIONAL LAW*. *Commonwealth ex rel. Attorney General v. Denworth*, 440.

MUNICIPAL CLAIMS. An amendment to a municipal claim should be fortified by affidavit, and will not be allowed where the effect would be to deprive the defendant of a defence. (C. P.) *City of Philadelphia v. Laughlin*, 306.

Notice to remove a nuisance, to sustain a claim, must be given to the registered owner of the property, not to the reputed owner. *Id.*

A municipal claim for curbing may be enforced against a charity, whose property is exempt from taxation, the right to assess for curbing a footway being referable to the police and not to the taxing power. *City of Philadelphia v. Pennsylvania Hospital*, 434.

NEGLIGENCE. Where one carrying on a lawful business (e. g., a gas works) conducts it negligently, so that persons in the neighborhood are injured, such negligence will render him liable to the injured persons. *Kelser v. Mahanoy City Gas Co.*, 369.

The honest, though mistaken, exercise of judgment by a competent employé in the course of his employment whereby a fellow-servant is injured, can never be attributed to the employer so as to render him liable for the injury. *Moules v. Delaware & Hudson Canal Co.*, 80.

A railroad company which, by the use of engines, communicates fire to buildings along the line of its road is liable for the damage occasioned thereby, only if it be the result of negligence in the operation of the engines or in their insufficient equipment. *Henderson v. Phila. & Reading R. R. Co.*, 479.

A railroad company which fails to provide its engines with the best appliances in general use, and shown by experience to be most effectual against the communication of fire to buildings and fields along its line, is negligent, and in case of a fire, fairly attributable to sparks from an engine, an absence therefrom of a spark-arrester is *prima facie* evidence of negligence. *Id.*

The mere fact that sparks are thrown from the stack is not *per se* evidence of negligence, but when sparks of large size are emitted, which carried to a long distance set fire to fields, it may be inferred that the engine was not provided with a sufficient spark-arrester. *Id.*

Where witnesses testify that they did not hear the whistle or bell of a locomotive until the lead horse of a team was on the railroad crossing, and that they were giving particular attention and were listening for the whistle, and that if it had been blown they would have heard it, their testimony is more than merely negative and will sustain a charge of negligence. *Quigley v. Delaware & Hudson Canal Co.*, 225.

An engineer is held to have foreseen any consequence which might ensue from his failure to give notice of the approach of his train without the intervention of some other independent agency, and for such consequence he and his employer will be held liable, although in advance the actual result would have seemed improbable. *Id.*

It is not negligence on the part of a common carrier to fail to remove snow or ice from its platforms and approaches while the snow is actually falling or the ice has very recently been formed; liability for an injury to a passenger caused by the ordinary slipperiness of ice and snow arises only where they have been suffered to remain for an unreasonable length of time. *Fearn v. West Jersey Ferry Co.*, 554.

Fire arising from negligence of railroad company in management of its engines. See EVIDENCE. *Henderson v. Phila. & Reading R. R. Co.*, 479.

Where there is evidence that the driver of a cart was asleep while his team was on a down grade, going

NEGLIGENCE—Continued.

rapidly, and that a small child was seen upon her feet being turned around between the fore legs of one of the horses, and to be thrown and struck by one of the wheels and injured, there is sufficient evidence to submit to the jury that the driver's negligence was the cause of the child's injury. *Summers v. Bergner & Engel Brewing Co.*, 431.

Plaintiff was walking on the street passenger railway track of defendant; at a certain point the defendant had cleared a way through a drift some two hundred feet long, leaving a passage just wide enough for its cars, with vertical snow walls, some two and a half feet high; the drift was at the top of a rise from which there was an unobstructed view, of the direction from which a street car was approaching, of a quarter of a mile; the car came on at a moderate speed, with bells that could be heard forty rods; the plaintiff was overtaken by the car shortly after entering this cut, and stepped one side, was struck by the hinder part of the car and injured. She testified that before entering the cut she looked for a car but saw none; *held*, the plaintiff was guilty of negligence contributory to her injury. *Warner v. People's Street Railway Co.*, 3.

The plaintiff, an employé of an iron company, was engaged in removing iron from between two tracks of a private siding of the iron company, where it had been deposited by a railroad company the previous day; in doing so he had to pass between two empty cars on one of the sidings; to give himself more room he removed the coupling iron; seeing the shifting engine pass up the near track he replaced the coupling iron; while so engaged the cars beyond the two mentioned were backed down, without warning and without any person on the rear of the train to give warning, and injured the plaintiff; *held*, (a) he was not within the provision of the Act of April 4, 1868 (P. L. 58); (b) the question of whether he was guilty of contributory negligence was for the jury. *Christman v. Phila. & Reading R. R. Co.*, 5.

The negligence of a voluntary carrier cannot be imputed to a passenger who is himself guilty of no contributory negligence. *Carr v. City of Easton*, 77.

A and a companion were on a country road approaching a railroad track in a severe thunder shower; they were holding umbrellas close down and toward the wind; it was testified that they looked along the track but saw and heard nothing; in attempting to cross the track A was struck by a train and killed; *held*, that the evidence showed negligence on the part of A, and there could be no recovery for his death. *Blight v. Camden and Atlantic R. R. Co.*, 172.

Where a driver before attempting to cross a track stops, at a proper place, looks, and listens for the approach of a train, and not hearing any, drives on the track and then sees the train coming, he is not guilty of negligence in jumping from his wagon and leaving the team to its fate. *Quigley v. Delaware and Hudson Canal Co.*, 225.

It is negligence *per se* to attempt to board a moving railroad train. *Bacon v. Delaware, Lackawanna, and Western R. R. Co.*, 233.

A passenger who starts to leave a train after it has stopped at a station and who is about alighting when it starts again, after an insufficient stop, is not guilty of negligence if she jump from the moving train, provided the suddenness of the danger which confronts her, through the negligence of those in charge of the train, is such as to deprive her of power to form a proper judgment and decide judiciously what she ought to do under the circumstances. *Leggett v. Western N. Y. & Pa. R. R. Co.*, 236.

NEGLIGENCE—Continued.

Where, after a train has stopped, a passenger goes on the platform to alight, and before a sufficient time for her to alight has elapsed, the train is started and the passenger immediately afterwards falls to the ground, and is injured, it should be left to the jury to say whether the passenger voluntarily stepped off the car or was thrown off by the motion of the train. *Id.*

The Court can rule as a matter of law that a plaintiff is guilty of negligence only in a clear case. *Id.*

How damages for negligence should be set out. See **PLEADING**. (C. P.) *Mallon v. Gay*, 93.

Manner of alleged negligence. See **PLEADING**. (C. P.) *Fender v. Mason Wrecking Co.*, 93.

Contributory negligence in use of defective apparatus supplied by employer. See **MARTER AND SERVANT**. *Bemis v. Roberts*, 169.

NONSUIT. A peremptory nonsuit should not be entered if there is any evidence, beyond a mere scintilla, which by itself would justify an inference of the disputed facts on which the right to recover depends. *West Phila. National Bank v. Field*, 417.

NOTICE. An entry of satisfaction of a mortgage while a judgment on the bond accompanying it is left standing is notice to a purchaser at sheriff's sale that the judgment is an existing encumbrance. *Meigs v. Bunting*, 1.

This is not altered by the fact that when the docket is inspected there is a rule pending to open the judgment. *Id.*

An intending purchaser of land in Philadelphia must take notice of the Register of Unpaid Taxes, and a certificate of the contents thereof, obtained from the proper officer, acted upon in good faith, will protect him against all taxes not set out in the certificate. *City of Philadelphia v. Anderson*, 90.

One to whom commercial paper is offered is bound to take notice of the maker or drawee and also whether such maker or drawee be a firm, a private person or an unincorporated association, and of what is necessary to bind an artificial person, apparently a party to such paper. *Mercantile National Bank v. Lauth*, 213.

Strangers dealing with a Partnership Association, Limited, under the Act of June 2, 1874, are charged with notice of the limitations imposed upon such association. *Id.*

Notice to remove nuisance must, to sustain municipal claim, be given to registered owner. See **NUISANCE**. (C. P.) *City of Phila. v. Laughlin*, 306.

Notice of a trust in land, after a sheriff's sale thereof under a mortgage, is too late to affect the purchaser if the mortgagee had no notice of the trust when the mortgage was executed. *Logan v. Eva*, 464.

Under the mechanic's lien law, a sub-contractor is chargeable with notice of all the terms and stipulations of the contract between the original contractor and the owner. *Bevan v. Thackara*, 473; *Dershimer v. Maloney*, 477.

NUISANCE. Not opening a highway, so soon as practicable after an order of Court that it be opened, is indictable as a nuisance. *Road in Roaring Brook Township*, 141.

Notice to remove a nuisance must, in order to sustain a city claim, be given to the registered, not to the reputed, owner of the property. (C. P.) *City of Phila. v. Laughlin*, 306.

The carrying on of the manufacture of illuminating gas in a town by an incorporated company in the ordinary way is not a nuisance, but if the manufacture is negligently conducted the company will become

NUISANCE—Continued.

liable for damage done by such negligence. *Keiser v. Mahanoy City Gas Co.*, 369.

ORPHANS' COURT. A creditor of a deceased executor, alleged to be insolvent, has no standing to contest the account of the said executor's decedent's estate as filed by the executor of the executor. *Law's Estate*, 189.

It is discretionary with the Orphans' Court whether it will grant an issue in partition proceedings under the Act of March 29, 1832. (O. C.) *Kates's Estate*, 241.

Where persons who, if alive, would be entitled to a share of an estate have been absent, unheard of for seven years, the Orphans' Court may disregard such persons in distribution, but may require the distributees to enter into a bond, conditioned for the payment of the shares of the absentees with interest, should they or their representatives subsequently appear. (O. C.) *Mealer's Estate*, 275.

Has no jurisdiction where title is in question. See **JURISDICTION**. (O. C.) *Curran's Estate*, 96.

Conditions of recognition, on appeal from. See **RECOGNIZANCE**. *Commonwealth v. Wistar*, 97.

OUTSTANDING INTEREST. Where, in an action for money received to plaintiff's use, the defence is an outstanding title in a third person, such defence is fully met by the testimony of the latter disclaiming all interest. *Brennan v. Franey*, 162.

PARTITION. Under the act of March 29, 1832, the Orphans' Court has full power to make partition; it has also power to send an issue to the Court of Common Pleas for the trial by jury of questions and facts arising in the course of the partition proceedings, but whether it will send an issue is entirely within the discretion of the Court. (J. C.) *Kates's Estate*, 241.

The Act of March 29, 1832 (Partition), is not in violation of the Fourteenth Amendment of the Constitution of the United States. *Id.*

PARTNERSHIP. If a partner borrow money and give his own note therefor, it does not become a partnership debt merely because it is applied to partnership purposes. *Van Haaen Soap Mfg. Co.'s Estate*, 64.

PARTNERSHIP ASSOCIATIONS, LIMITED. A partnership association, limited, under Act of June 2, 1874, is neither required nor authorized to use a common seal. *Stevens v. Phila. Ball Club, Limited*, 37.

The addition of a device called a seal to a promissory note of such association, issued by its authority and signed by its treasurer, will not render the note non-negotiable. *Id.*

Strangers dealing with an association under the Act of June 2, 1874, are bound by the limitations imposed upon it by the Act. *Mercantile National Bank v. Lauth*, 213.

Where one receives, in the ordinary course of business, a draft in excess of \$500 drawn upon an association under the Act of June 2, 1874, with an acceptance signed "H. Co., Ltd., per B. L., chairman," he presumably takes the draft on the credit of the indorser and drawer; he cannot enforce it as a personal liability against B. L., who signed, expecting another manager would also sign so as to bind the association. *Id.*

PARTY WALL. A bill in equity will not lie to compel the removal of a defectively constructed party wall; the remedy is by proceeding under the statutes. (C. P.) *Mulligan v. Fitzpatrick*, 151.

PASSENGER RAILWAY COMPANIES.

Passenger railway companies in the city of Philadelphia are required to keep the streets occupied by them in repair from curb to curb and not merely between their own tracks; and their liability is not restricted to such kind of pavement as has been laid at the time of their first occupancy of the street, but they may be required to lay such kind of a pavement as the city may direct, and to repair or repave when the city shall deem repairing or repavement necessary. *City of Phila. v. Ridge Ave. Pass. Ry. Co.*, [388](#).

PATENT. A "patent right" is the right, protected by letters-patent, to use the process, combination, or appliance discovered by the patentee for the production of a certain result. *Com'th v. Central District and Printing Telegraph Co.*, [515](#).

An article or machine made under letters patent is not a "patent-right," but is the property of the maker, in the same way and with the same attributes that any other article made or grown by him is his property. *Id.*

Where stock of a corporation is issued in payment of a right to use machines covered by a patent, neither the patent nor any interests therein being assigned to the corporation, the issue is not an investment in the patent right, and the stock so issued is liable to taxation. *Id.*; *Com'th v. Philadelphia Company*, [518](#); *Com'th v. Brush Electric Light Co.*, [527](#); *Com'th v. Edison Electric Light Co.*, [531](#); *Com'th v. Chester Electric Light and Power Co.*, [533](#).

PAYMENT. Payment of part of a debt after the whole is due is no consideration for a release of the balance, or for an agreement to look to another source for payment thereof. (*O. C.*) *Dickinson's Estate*, [94](#).

Where a decree provides that it should be enforceable only against land, but the defendant afterwards obtains a stay of execution on the ground that the plaintiff has funds in his hands, derived from the land in dispute, more than sufficient to pay the decree, she cannot afterwards refuse to accept the tender of the decree in payment, *pro tanto*, of the amount found to be due and in the hands of the plaintiff. *Miller v. Kloppe*, [174](#).

A receipt contained in a deed gives rise to a presumption of payment of the sum named, but the presumption is rebuttable and admissions of the grantee may serve to rebut the presumption. *Eshelman's Estate*, [293](#).

The receiving a note whose indorsement is forged will not amount to payment of a genuine note. *West Philadelphia National Bank v. Field*, [417](#).

PAYMENT INTO COURT. See **TENDER**. *Summerson v. Hicks*, [304](#).

PEDDLER. A peddler is one who goes from house to house to sell goods by personal solicitation; his essential character is not changed by the fact that he does not sell the identical article which he exhibits to the purchaser, but another article of which the one exhibited is a sample. *City of Titusville v. Brennan*, [534](#).

An ordinance requiring persons soliciting orders, or delivering goods under orders so solicited, to obtain a license, and punishing persons so soliciting or delivering without a license is a legitimate exercise of the police power, whether applied to citizens of other States or of this State, provided there be no discrimination. *Id.*

PERPETUITIES. See **TRUSTS**. (*O. C.*) *Cooper's Estate*, [134](#).

PERSONAL PROPERTY. Tangible personal property has, for purposes of taxation, a situs where-

PERSONAL PROPERTY—Continued

ever it may be found. See **TAXES AND TAXATION**. *Com'th v. Del., Lack. & West. R. R. Co.*, [325](#).

PERSONALTY. See **GIFT**. *Trust. Smith's Estate*, [565](#).

PERSONS NON SUI JURIS. Whatever a person under disability may be compelled to do, he or his representative may do voluntarily with like effect. (*O. C.*) *Hirst's Estate*, [212](#).

PHILADELPHIA. The office of treasurer of the city of Philadelphia is a county office, and vacancies therein are to be filled by appointment by the governor. *Commonwealth v. Oellers*, [153](#).

The ordinance of the city of Philadelphia, approved July 7, 1857, requiring all railroad companies to keep in repair and repave any streets occupied by them, is binding upon all passenger railway companies obtaining the right to use the streets of said city since said ordinance, and under it they are required to keep the streets in repair, and repave from curb to curb with such kind of pavement as the city may direct, the said city being the judge of when repair or repavement is needed. *City of Phila. v. Ridge Ave. Pass. Ry. Co.*, [388](#).

The ordinance of 1881 forbidding the use of cobble or rubble pavements, except between the tracks of railway companies, is binding upon passenger railway companies in Philadelphia. *Id.*

The Consolidation Act of Feb. 2, 1854, § 27, establishing a board of surveyors provided, that surveys and regulations already made, or directed by law to be made, of any part of the county of Philadelphia should not be affected by the section, "unless such alteration shall be ordered by a resolution of council, and approved by the Court of Quarter Sessions upon public notice . . . and provided, further, that in any alteration that may be made of the regulations of any portion of the city, in conformity with the provisions of this section, whereby damage may ensue to private property, compensation shall be made for such damage, to be ascertained and paid by law as in case of damage for opening streets"; *held*, the proviso as to damage applied only to changes of grade regulations which were legally established at the time of the passage of the Act. *In re Change of Plan 166; In re Allen's Lane*, [406](#).

PLEADING. A statement in an action for negligence, while it should set out the elements of damage for which a recovery is sought, need not set out the amount claimed for each item of damage, the amount stated under the *ad damnum* being sufficient. (*C. P.*) *Mallon v. Gay*, [93](#).

A statement in an action for negligence in the performance of a contract need not set out the contract or the particulars of the alleged negligence. (*C. P.*) *Fender v. Mason Wrecking Co.*, [93](#).

A statement which sets forth the employment of the defendant by the plaintiff to do a specific act, sufficiently avers agency without the use of the word agent. *Shaffer v. Corson*, [121](#).

A statement which avers employment of the defendant by the plaintiff, and avers that the defendant had in his hands sufficient funds for a certain agreed purpose, and neglected to pay them over, and avers damage to the plaintiff thereby, sets up sufficiently a case of negligence. *Id.*

Where the suggestion for a quo warranto sets forth that the respondent is exercising a certain office under color of certain Acts of Assembly, which are cited by their titles, "without any warrant or lawful authority," and the answer sets up said Acts as justification, the pleadings sufficiently raise the question of the consti-

PLEADING—Continued.

tutionality of the said Acts. Com'th *ex rel.* Att'y-Gen. v. Denworth, 440.

The copy of statement served must contain the names of all the plaintiffs, and a copy of the affidavit in support of the statement. (C. P.) Wolf v. Hinder, 131.

See CRIMINAL LAW PLEADING.

POLICE POWER. See CONSTITUTIONAL LAW. Com'th v. Morningstar, 442.

See INTERSTATE COMMERCE. City of Titusville v. Brennan, 534.

POSSESSION. Evidence sufficient to show such possession as will raise *prima facie* a right of property. See EVIDENCE. (C. P.) Bloomingdale v. Viator, 272.

POWER. A devise of an estate, comprising both realty and personality, to executors, in trust, to receive, collect, secure and obtain and reduce into possession all the capital, principal, moneys or interest of the testator, and to pay over the income to testator's widow, gave to the executor a power of sale over the realty. (O. C.) Arrott's Estate, 198.

PRACTICE. When goods have been illegally distrained, either trespass or replevin may be brought. (C. P.) Esterly Machine Co. v. Spencer, 287.

In case of a domestic corporation, service must be made upon a director, manager, or other officer; service upon a mere agent is not good, the Act of April 8, 1851, applying to foreign corporations only. (C. P.) Williams v. Del. Lack. and West R. R. Co., 282.

Where a liability exists on the part of two, rising as to one from covenant, and as to the other from a tort pure and simple, they may not be joined as co-defendants in the same action. Hill v. Pardee, 450.

A change of venue is to be granted under the Act of March 30, 1878 (P. L. 35), only when the Court or Judge to whom application is made is satisfied of the truth of the allegations in the petition. City of Phila. v. Ridge Ave. Pass. Ry. Co., 388.

Where to a summons a defendant appears *de bene esse*, and on his motion the return is set aside, the defendant is no longer in Court, and hence cannot order a *non pros.* for the non-filing of a writ within a year. Everett v. Niagara Insurance Co., 201.

A service of a subpoena in a suit in equity for the infringement of letters-patent will be set aside when made upon a defendant domiciled in another district while he is temporarily within the district of which the complainant is a resident, and in which the bill is filed. (U. S. C. C.) Harvey v. Seegar, 300.

An amendment of a municipal claim will not be permitted when its allowance would cut out a defence. (C. P.) City of Philadelphia v. Laughlin, 306.

An amendment of a municipal claim should be fortified by affidavit. *Id.*

An action on a replevin bond, where the replevin is not of a distress, is properly brought in the name of the sheriff to the use of the person beneficially interested. Clark v. Morsa, 301.

Where new plaintiffs are added at the trial, the jury should be sworn, but an omission to swear the jury in the absence of any request, is not ground for a new trial. (C. P.) Vauv v. Downing, 259.

A taxpayer, who intervenes in an action against a township upon a township order, cannot set up that an action is not maintainable upon such an instrument, when the township itself does not set up such defence. Maneval v. Township of Jackson, 130.

It is not error to refuse a point consisting of a great number of paragraphs, each one of which contains a distinct subject for the consideration of the jury in assessing damages. Gorgas v. Philadelphia, Hbg. and Pitts. R. R. Co., 436.

PRACTICE—Continued.

Where the petition for a writ of habeas corpus sets out that the relator is in confinement for contempt in refusing to testify as a witness, an objection that the return does not set out the contempt or the fact showing the jurisdiction of the Court will not be considered. Commonwealth *ex rel.* Tate v. Bell, 333.

A feigned issue under the Act of April 20, 1846, is not a matter of right upon request, but facts in dispute must be shown to the Court. Irvin's Appeal, 60.

A rule by a subsequent judgment-creditor to have a prior judgment opened is against established practice. (C. P.) Moore v. Dunn, 63.

Where money has been produced or is about to be produced by a sheriff's sale, and a subsequent judgment-creditor desires to attack the validity of the judgment under which the sale takes place, the proper practice is to obtain a rule on the sheriff and plaintiff, to have the money paid into Court, and to attack the judgment before an auditor or apply for an issue to be tried in Court. *Id.*

To obtain an issue an affidavit should be presented alleging material facts in dispute; if the affidavit be disputed by an answer, depositions should be taken upon which the Court will determine to grant or refuse the issue. *Id.*

Perishable and chargeable articles, including live stock and household effects, under attachment, may be sold by order of Court. (C. P.) Baker v. Baker, 300.

A notice of claim, under the Act giving claims for wages a preference, must state the business in which the defendant is engaged. (C. P.) Leinan v. Albright, 165.

A proceeding to remove a trustee and a bill to compel the same trustee to account, should, under Rule III. (Common Pleas), properly be heard in the same Court. (C. P.) In re Daniel, 198.

An examiner may adjourn the cross-examination of a witness at his discretion. (U. S. C. C.) Shapleigh v. Chester Electric Light and Power Co., 576.

Orphans' Court Practice. A bill of review will not be entertained when it does not disclose that the decree complained of was made in confirming the account of an executor, administrator or guardian. (O. C.) Curran's Estate, 96.

Under the Act of October 13, 1840, a bill of review must be filed within five years after the final decree of confirmation complained of. *Id.*

An administrator *pendente lite* will not be required to file an account while an appeal in the course of the litigation remains undisposed of in the Supreme Court. (O. C.) Fow's Estate, 134.

Under the Act of March 29, 1832, the Orphans' Court has power to send an issue to the Common Pleas to determine facts, but it is entirely discretionary with the Court to exercise such power, and an issue will not be granted where the Court would not sustain a verdict in favor of the allegations of the petitioner for such issue. (O. C.) Kates's Estate, 241.

While after the lapse of time the Orphans' Court may award a distributive share directly to the heirs of a deceased distributee, the better practice ordinarily is, to award it to her administrator. (O. C.) Sweeds's Estate, 544.

Supreme Court Practice. A refusal to strike out evidence received without objection is not reviewable in the Supreme Court. Lowery v. Robinson, 28.

A refusal to grant a compulsory nonsuit is not reviewable on error. *Id.*

The decision of the Common Pleas on the sufficiency

PRACTICE—Continued.

of a bond given to secure damages on the exercise of the right of eminent domain is not reviewable in the Supreme Court. Twelfth St. Market Co. v. Phila. & Reading Terminal R. R. Co., 111.

On an appeal from an interlocutory order where the facts are before the Supreme Court as fully as they would be upon final hearing, and it is to the manifest interest of both parties that their rights shall be settled, the case may be disposed of on its merits, if the parties agree that a final decree shall be entered. *Id.*

A refusal to enforce summarily an agreement to discontinue pending action is not the subject of appeal. *Bach v. Burke*, 124.

An assignment of error to the rejection of testimony which does not set out the offer is bad and may be disregarded by the Court. *Chambers v. Borough of South Chester*, 249.

Amendment of matter of form, even if the form be material, allowed in Supreme Court after a trial on the merits between the real parties. *Thornton v. Britton*, 467.

The Supreme Court will not dismiss a bill in equity for want of jurisdiction where the objection is made for the first time on appeal, unless the want is so plain that the Court would feel justified in dismissing the bill on its own motion. *Edgett v. Donclass*, 469.

Where the bill of exceptions is incomplete, there being no notes of testimony except the abbreviated ones taken by the Judge for his own use, assignments of error as to evidence or comments thereon will be disregarded. *Commonwealth v. Ribert*, 496.

The Supreme Court will not reverse on account of immaterial inaccuracies in statements of facts contained in a charge to the jury. *Commonwealth v. McManns*, 497.

PREFERRED CLAIMS. A notice of claim for preference, under the Acts giving a preference to wages for labor, in the distribution of a fund made upon execution, must state the business in which the defendant is engaged. (*C. P.*) *Leinaw v. Albright*, 165.

A draughtsman in an architect's office is not within the purview of any Act of Assembly giving claimants of wages a preference. *Id.*

PRESUMPTION OF DEATH. Although a presumption of death arises after seven years' absence unheard of, yet in distributing an estate to a share of which the presumptively dead persons would, if alive, be entitled, a Court of Equity may require bonds to be given by the distributees to refund in case the absentees or their representatives subsequently appear. (*O. C.*) *Weaver's Estate*, 275.

PRINCIPAL AND AGENT. A principal who adopts a contract of his agent, made without authority, must adopt it as a whole. *Wheeler & Wilson Mfg. Co. v. Aughey*, 381.

A, on settling his accounts with B, was found to be indebted, and was directed by B. to go to C. to get him to go on certain judgment notes as surety. A. went to C. and obtained his signature by falsely stating that the notes were not for a past indebtedness, but as security for machines to be sent to him by B.; the machines were never sent: *held* A. was B.'s agent for the purpose of obtaining the signature to the notes, and the representations being false the notes could not be enforced against C. *Id.*

See **AGENT**.

PRINCIPAL AND INCOME. As between *cestui que trust* for life under a will and those entitled to the corpus of an estate at his death, the only profits to which the former is entitled are those which have accrued since the testator's death; where a stock divi-

PRINCIPAL AND INCOME—Continued.

dend or price of an option is involved, the question depends upon whether the new stock represents a capitalization of profits earned since the death of the testator. (*O. C.*) *Thomson's Estate*, 231.

PRIVILEGED COMMUNICATION. See **ATTORNEY AND CLIENT**; **EVIDENCE**. (*O. C.*) *Weaver's Estate*, 25.

PROMISSORY NOTES. A promissory note issued by virtue of a resolution of a partnership association under the Act of June 2, 1874, and signed by its treasurer, but bearing also a device called the seal of the said association, is negotiable. *Stevens v. Phila. Ball Club, Limited*, 37.

Where a note of a third person is given to the lender of money at the time of the loan the presumption is that the note is discounted or given as a consideration and not as security; the presumption is, however, rebuttable. *Van Haagen Soap Mfg. Co.'s Estate*, 69.

The V. company made an assignment for benefit of creditors; at the audit, the S. bank and L. made claims for money loaned; it appeared that the bank held the note of V., the manager of the company, for the amount of its loan, indorsed by H., the president; and L. the note of H., for the amount of his loan; both notes having been given when the loans were made. It appeared that both loans were solicited by V. to provide means for the company, and that all parties so understood the transaction; the money was paid to H., who owned nearly all the stock of the company, the funds of which were supplied from and deposited in his own private account. V. and H. had authority to bind the company for borrowed money and the loans were used by the company: *held*, the evidence was sufficient to show that there was a loan to the company and that the notes were collateral security only. *Id.*

The giving of indemnity is not necessary to enable the owner of a promissory note to recover on the same when lost, but merely a prerequisite to the issuance of execution. *West Philadelphia National Bank v. Field*, 417.

The receiving of a note with a forged indorsement will not amount to payment of a genuine note or extinguish the right of action against the indorsers on the first note. *Id.*

PROPERTY. Upon a claim of a right of property, another and limited interest cannot be proved. (*C. P.*) *Bloomington v. Victor*, 272.

PURCHASER. A purchaser of real estate in Philadelphia is bound to take notice of the register of unpaid taxes, and where an intending purchaser obtains from the proper officer a certificate of the liens on the land he proposes to buy, and acts on the faith of the certificate, the city is bound by the certificate and cannot collect from the land taxes not mentioned in the certificate but really due at the time of its issue. *City of Philadelphia v. Anderson*, 39.

A purchaser for value without notice of a secret trust affecting the land purchased takes the same unaffected thereby, and a purchaser from him may protect himself under his vendor's equity against the trust, although he himself bought with knowledge of its existence. *Logan v. Eva*, 464.

A mortgagee is a purchaser within the above rule. *Id.*

At sheriff's sale. See **SHERIFF'S SALE**. *Meigs v. Bunting*, 1.

QUESTIONS OF LAW AND FACT. When question whether a person comes within the provisions of the Act of April 4, 1868 (*P. L.* 59), as to persons

QUESTIONS OF LAW AND FACT—Continued.

employed on the premises of a railroad company may be left to the jury. See **RAILROADS**. *Christman v. Phila. & Reading R. R. Co.*, 5.

In an issue to determine the validity of a judgment, attacked on the ground of fraud, the judgment-creditor has a right to rest on his judgment until fraud to which he is a party is shown impeaching it; in the absence of evidence of such fraud, there is no case to submit to the jury. *Unangst v. Goodyear's India Rubber Glove Mfg. Co.*, 53.

Whether a plaintiff has been guilty of contributory negligence is a question for the Court only in a clear case. *Carr v. City of Easton*, 77.

What is a reasonable amount of samples for the purpose of introducing a new article under a contract to furnish "sufficient samples . . . as the same may be called for," is a question for jury. *Perry v. Jensen*, 128.

The question of what is a reasonable allowance for suffering is for the jury, subject to the duty on the part of the Court to set aside a verdict that is unreasonable and excessive. *Baker v. Penna. Co.*, 220.

Where a deed recites that the grant is subject to certain leases, *inter alia*, "J. B. three acres," and, in an ejectment for a portion of the land conveyed, the plaintiffs claim under a lease of the grantors to G. C. B. and J. B. S. for a tract known as No. 53, it is error to say as matter of law that the reservation and the lease under which plaintiffs claim are identical; that is a question for the jury. *Thompson v. Riddelsperger*, 444.

QUO WARRANTO. See **PLEADING**. *Commonwealth ex rel. Atty.-Gen. v. Denworth*, 440.

RAILROADS. A person employed in removing iron which has been unloaded from railroad cars, and laid between two tracks of a private siding belonging to an iron company, and on its ground, is not clearly employed on the premises of the railroad company within the meaning of the Act of April 4, 1868 (P. L. 58), and, in the absence of a specific request for a charge to that effect, the question of employment may be left to the jury. *Christman v. Philadelphia & Reading R. R. Co.*, 5.

Taxation of railroads. See **TAXES AND TAXATION**. *Commonwealth v. Del. Lack. & West R. R. Co.*, 325.

Liability of railroad company for fire communicated by engines. See **EVIDENCE; NEGLIGENCE**. *Henderson v. Philadelphia & Reading R. R. Co.*, 479.

REAL ESTATE. Where real estate is sold through an auctioneer, and part of the amount of the bid is paid to him, but there is no written evidence of the sale, the contract of sale is not enforceable. (C. P.) *Harvey v. Thacher*, 134.

RECEIPT. See **DEED; EVIDENCE**. *Eshelman's Estate*, 293.

RECEIVER OF TAXES. The receiver of taxes of Philadelphia, in issuing a certificate of search as to registered taxes, does not act as the agent of the person ordering the search, but in the discharge of an official duty, and his search certificate binds the city. *City of Philadelphia v. Anderson*, 90.

RECITAL. A recital in a bill in equity will not estop the plaintiff therein in an action of ejectment subsequently brought to recover land whose title was not brought in issue by the bill. *Lash v. Spayd*, 175.

RECOGNIZANCE. The amount of security upon a recognizance on appeal from the Orphans' Court is within the discretion of said Court, and may be increased by it at any time before the record is removed. *Commonwealth v. Wistar*, 97.

RECOGNIZANCE—Continued.

Where a recognizance is exacted containing terms harder than those prescribed by the statute under which it is given the recognizance as a rule, is void; accordingly, a recognizance on an appeal from the Orphans' Court, by one who has assumed no official duty, and is in no fiduciary relation to the Court, which contains conditions beyond those required by the Act of March 29, 1832, § 59, is void. *Id.*

W., an heir-at-law of R., appealed from a partition of R.'s realty in the Orphans' Court; he entered security in the usual form; upon rule taken, the Court ordered W. to enter security conditioned "to prosecute his appeal with effect, and to pay all costs that may be adjudged against him, and if the decree be affirmed or the appeal be discontinued or *non prosequi*, to pay all costs and damages that may accrue to the appellees or any of them by reason of his said appeal;" *held*, the bond was void and that, on the dismissal of the appeal, the distributees could not recover thereon interest on the money to which they were entitled from the date of the decree to the dismissal of the appeal. *Id.*

Interest is not recoverable by way of damages upon a recognizance on an appeal from a decree of the Orphans' Court. *Commonwealth v. Wistar*, 100.

Surety in recognizance *sur* appeal not discharged from liability on account of having been tricked into signing by the appellant, the surety being illiterate and ignorant of the effect of the instrument. See **SURETY**. (C. P.) *Hall v. Tobin*, 164.

RELEASE. A release by a devisee, legatee, or distributee, who is a collateral heir or stranger to the blood of a testator, to one whose right of succession is not subject to collateral inheritance tax, will not, after the devise, legacy, or distributive share has once vested, deprive the Commonwealth of the tax. (O. C.) *Frank's Estate*, 323.

REMAINDERMAN. Apportionment of taxes, etc., between life-tenant and remainderman. See **APPORTIONMENT**. (O. C.) *Fest's Estate*, 415.

REPLEVIN. Where goods are illegally distrained their owner is not bound to replevy them; he may seek his remedy in trespass. (C. P.) *Esterly Machine Co. v. Spencer*, 287.

Costs will not be allowed to the defendant in replevin where the verdict is partly in favor of the plaintiff. (C. P.) *Park v. Holmes*, 288.

A replevin bond which contains a warrant to confess judgment is not invalid; while the sheriff cannot exact a bond with such warrant he is not prohibited taking such a bond if voluntarily given. *Clark v. Morris*, 301.

A judgment on such bond and warrant is cautionary only until the replevin suit is determined. *Id.*

The Act of March 21, 1772, is limited to the replevin of a distress for rent and is not applicable to a case of which the subject is the title to the property replevied; hence in all cases of the latter class, the action on the replevin bond is properly brought in the name of the sheriff to use of the person beneficially interested. *Id.*

Where a plaintiff in replevin, who endeavors to hold property without payment of a balance due therefor, after one trial had paid the money into Court on leave, and the defendant takes it out on leave, the plaintiff is liable for costs. *Summerson v. Hicks*, 304.

RES ADJUDICATA. A judgment upon the merits is an absolute bar to a subsequent action on the same claim or demand and concludes parties and privies, as to any admissible matter which might have been offered to sustain or defeat the same claim;

RES ADJUDICATA—Continued.

but in a second action between the same parties upon a different claim, the judgment in the prior action concludes only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. *City of Phila. v. Ridge Ave. Pass. Ry. Co.*, 106.

Where a city brings an action for taxes on dividends of a corporation under a certain Act and recovers therein, and afterwards the said Act is declared unconstitutional, the city is not estopped from setting up the unconstitutionality of the Act, in an action brought under earlier Acts to recover taxes due for years subsequent to the first judgment, which taxes are greater than those recoverable under the Act on which the first action was based, but it is estopped from any action to recover the surplus of the tax for years preceding the first action and to recover the taxes of which the said action was brought. *Id.*

To render a decree conclusive in other cases between the same parties it must have been on the merits of the case; if it be merely upon a decree dismissing a cause for want of jurisdiction, it does not render the matter of the case *res adjudicata*. *Weigley v. Coffman*, 453.

An action by a husband and wife in right of the wife is not, and an action by the husband to use of wife is, a bar to a subsequent action by the husband in his own right. *Thornton v. Britton*, 467.

A decree in equity refusing an injunction to restrain a violation of a building restriction is not a bar to an action to recover damages for said violation. *Orne v. Fridenberg*, 545.

RESTITUTION. An award of restitution cannot be made in a prosecution for forcible detainer, where the indictment does not sufficiently allege an estate in the prosecutor. *Commonwealth v. Brown*, 149.

RESULTING TRUST. Where the evidence shows that a wife was possessed of a separate estate, that a portion of it went to the purchase of real estate the title to which was taken in her husband's name without her knowledge, and that a purchaser of the husband's title knew the foregoing facts, there is enough to establish a resulting trust in favor of the wife. *Logan v. Eva*, 464.

ROAD LAW. Where a person, at the time of the opening of a street, owns only the land taken for such street, he is entitled to the full value thereof. *Whitaker v. Borough of Phoenixville*, 30.

There is no right on the part of a land-owner to have damages for the opening of a street assessed until the street is opened, or there is some unequivocal act on the part of the municipality which indicates that the owner's possession is about to be disturbed. *Id.*

One who in good faith before the opening of a street has sold all the land owned by him except that which is taken upon the opening, is not liable to have the award to him reduced by a consideration of benefits to the land formerly held by him. *Id.*

One who has sold the adjoining land as a corner lot adjoining a new street, and has conveyed the right of frontage thereon absolutely, can recover only the value of the land taken for the street, as affected by his conveyance of the adjoining land. *Id.*

Where a street is opened merely as an approach to a bridge, which is a great public improvement, an assessment for benefits cannot be made against the neighboring properties. (Q. S.) *Opening of Walnut St.*, 51.

Benefits cannot legally be assessed by the foot front rule. *Id.*

ROAD LAW—Continued.

A jury may be appointed to assess damages, even where a street has been opened and is in public use. (Q. S.) *In re Opening of Musgrove St.*, 52.

An act establishing a new line of a street, with a proviso that it shall not interfere with existing buildings, but that it shall not be lawful to erect any buildings, or rebuild or alter the front of a building without receding to the new line, is not a taking of land *per se*; there is no taking until on the erection of a building, or otherwise, the property-owner retires his line to the new one, and the city advances its highway thereto. *Brower v. City of Philadelphia*, 87.

No appeal, properly so called, lies in a road case. See *APPEAL*. Road in Roaring Brook Township, 141.

A certiorari in proceedings to locate a township road must be taken within two years from the date of the decree of the Quarter Sessions confirming the report of the viewers. *Id.*

The refusal of supervisors to open a highway, as soon as practicable after the report locating it has been confirmed, renders them indictable for maintaining a nuisance. *Id.*

A report of viewers to locate a road having been confirmed and the opening of the road having been ordered by the Court, the supervisors instead of opening filed reasons for not doing so: (1) that the road was not necessary; (2) that to open the road would increase the township debt beyond the constitutional limit; *held*, neither answer was a sufficient excuse for disobedience. *Id.*

The Act of April 21, 1858, § 6, directing that damages awarded to property-owners upon the vacation of a street shall be assessed upon the owners of properties benefited, is constitutional. *In re Howard St.*, 159.

Although neither the Act of April 21, 1858, P. L. 386, nor any previous Act expressly provides for a jury in the case of the vacation of a street, the power to appoint a jury arises from the prescription in the Act of 1858 of the duties of "juries selected to assess damages for the opening . . . or vacating roads or streets." *Id.*

An appeal to the Common Pleas from the finding of a jury of view in the Quarter Sessions in the case of the vacation of a street is given by implication from the provisions in the Constitution, art. xvi., and the Act of June 13, 1874, P. L. 283, giving an appeal "from any preliminary assessment of damages" in the case of the taking, injury, or destruction of property. *Hare v. Rice*, 161.

Where a public road is laid out over the towpath of a navigation company, whose rights long antedate the laying out of the road, the limit of the right of the county is to cross the towpath with as little interference with it as possible. *Commonwealth v. Riddle*, 227.

Damages for the opening of streets are not given until the actual operation upon the ground. *In re Change of Grade of Plan 166; In re Allen's Lane*, 406.

The placing of a street on the public plan prohibits the erecting of any building within the line, and those so erected must be removed at the expense of the owner and without damages, but there is no right of action until the street is actually opened. *Id.*

Damages given by the Constitution on the establishment of a grade must be recovered by action in the Common Pleas; but where the jurisdiction of the Quarter Sessions has attached, as in the case of opening a street, it will determine the whole cause, including the damage from a change of grade. *Id.*

The right of action given by the Constitution, art.

ROAD LAW—Continued.

xvi., § 8, for the injury to property, does not accrue, in the case of a change of grade of a street, until the actual establishment of the new grade on the land. *Ogden v. Philadelphia*, 413.

In 1871 a grade of a street was fixed by law; in 1887 an ordinance was passed authorizing the cutting of a street to correspond to the grade of 1871: *held*, no right of action arose until the actual cutting. *Id.*

Measure of damages on change of grade of road, see **MEASURE OF DAMAGES**. *Chambers v. Borough of South Chester*, 249.

RULES OF COURT. A rule that bills of cost for witnesses at terms where a case is continued or tried, must be filed and a copy thereof served on the other party within four days after the continuance or trial, and otherwise shall not be allowed, is within the power of the Common Pleas and is not unreasonable. *Fisher v. Allen*, 8.

SALE. Of perishable and chargeable articles under attachment. (C. P.) *Baker v. Baker*, 309.

SEAL. Effect of corporate seal on promissory notes, negotiable in form. *Stevens v. Philadelphia Ball Club, Limited*, 37.

SECURITY. Where security will not be required of a legatee of personalty for life who is also executrix of the will containing the legacy. See **LIFE-TESTAMENT**. (O. C.) *Bourguignon's Estate*, 316.

SEDUCTION. The action for seduction *per quod seductum amittit*, depends upon the seduction itself, the lying-in expenses, the support of the daughter and the mental pain of the parent, though the principal elements considered in awarding damages do not *per se* give rise to a cause of action; hence the Statute of Limitations in case of seduction runs from the date of the seduction. *Dunlap v. Linton*, 451.

SEPARATE USE. A separate use can be created only for the benefit of a woman married, or in immediate contemplation of marriage with a particular person at the time of the execution of the settlement or will. *Puuk's Estate*, 667.

A separate use falls on the discovery of the *cestui que trust*, and will not revive upon her second marriage. *Id.*

The principles and policy governing separate uses in Pennsylvania are peculiar, and the English authorities upon that subject are inapplicable here, as are also the authorities of many of the States. *Id.*

SET-OFF. Unliquidated damages arising *ex contractu* from any bargain, may be set-off under the Act of 1705, whenever they are capable of liquidation by any known legal standard. *Watson v. Philadelphia*, 86.

A garnishee in a foreign attachment cannot set-off a promissory note, given to him by the defendant before the attachment issued but not due until afterwards; and the insolvency of the defendant will not alter the case, unless something has been done, before the attachment, by way of an application of the undue demand to the debt due by the garnishee. (C. P.) *Crall v. Ford*, 366.

SHELLEY'S CASE, RULE IN. See **WILL**. (C. P.) *Peirce v. Hubbard*, 193.

SHERIFF'S SALE. B. executed a mortgage to M., there being already a mortgage on the same property held by R., on the bond accompanying which judgment had been entered; the R. mortgage was subsequently satisfied, but the judgment was kept open and marked to use; subsequently R. obtained judgment against B. and the premises covered by his mortgage were sold under R.'s judgment and bought

SHERIFF'S SALE—Continued.

by C.: *held*, C. had a right to presume that the R. judgment was valid, and hence that M.'s mortgage was discharged as a junior incumbrance, although when C. bought a rule to open the R. judgment was pending. *Melgs v. Bunting*, 1.

A regular sheriff's sale in the absence of fraud gives good title against the owner. *Tisch v. Utz*, 55.

A sheriff's sale of personalty pending attachment thereof upon which judgments have not been obtained, frees the property from the lien of the attachment and transfer- it to the fund. *Id.*

Distribution of proceeds. *Kohl v. Sullivan*, 58.

The Court of Common Pleas has no power to direct the sheriff to distribute a fund made upon execution and concerning which there is any dispute. (C. P.) *Leiman v. Albright*, 165.

SHORT TERM ORDERS. An agent of a short term order who, with notice that the order has made an assignment for the benefit of creditors, has paid back money received by him as dues, may be compelled to pay the same amount to the assignee. (C. P.) *Active Workers v. Sanders*, 321.

SIC UTERE TUO UT ALIENUM NON LÆDAS. Where a land-owner establishes upon his land a legitimate business, which is in no sense a development of the resources of his land, and in the proper conduct of said business does actual injury to the crops and soil of neighboring land, he is liable for the actual damage done to the crops and soil, but not for any depreciation in the selling value of the land occasioned by the disagreeable character of the business conducted on the defendant's land. *Robb v. Carnegie Bros. & Co., Limited*, 339.

The above rule applied to land used for the manufacture of coke. *Id.*

The rule *sic utere tuo ut alienum non lædas* applies in an action for the negligent conduct of a lawful business. *Keiser v. Mahanoy City Gas Co.*, 369.

SITUS. See **TAXES AND TAXATION**; **PERSONAL PROPERTY**. *Commonwealth v. Del. Lack. & West. R. Co.*, 325.

SLANDER. Words implying a charge that a person set fire to and burned his own mill to defraud insurance companies, are actionable *per se*. *Davis v. Carey*, 10.

To render words imputing a crime actionable *per se*, the crime charged must involve moral turpitude or be punishable by infamous punishment. *Id.*

SPANISH MILLED DOLLARS. See **GROUND-RENT**. *Johnson v. Ash*, 437.

SPECIFIC PERFORMANCE. Uncertainty of description as to land intended to be conveyed in articles of agreement will not defeat a bill for specific performance, if the contract contain the means by which the land can be identified. *Felty v. Calhoun*, 15.

STATUTE OF FRAUDS. A promise by a third person that, if a landlord will forbear to evict a tenant who is in arrears, the promisor will become liable for the rent, the tenant, however, not being released from liability, is within the Statute of Frauds. *Riegelman v. Focht*, 23.

Where the object of a promisor is to become surety for the debt for which a third person is and continues to be primarily liable, the promise, whether made before, after, or at the time of the promise of the principal, is within the Statute of Frauds. *Id.*

Where land is sold at auction, and a certain sum is paid on account of the bid, but there is no writing evidencing the contract of sale, the case is within the Statute of Frauds, and the sale cannot be enforced. (C. P.) *Harvey v. Thacher*, 134.

STATUTE OF FRAUDS—Continued.

Action on an independent parol contract of indemnity against defective title of land conveyed by deed, not within the statute. See **CONTRACT**. *Close v. Zell*, **277**.

STENOGRAPHER'S NOTES. See **EVIDENCE**. *Thompson v. Ridelapenger*, **444**.

STOCK DIVIDEND. Whether a stock dividend is to be considered as part of the corpus of a decedent's estate, or income belonging to a *cestui que trust* for life, or life-tenant, under the will of the decedent, depends on whether the dividend represents a capitalization of earnings made since the testator's death, in which case it is to be regarded as income, but otherwise as capital. (O. C.) *Thomson's Estate*, **231**.

SUB-CONTRACTOR. See **MECHANIC'S LIEN**. (C. P.) *Lloyd v. Krane*, **305**; *Bevan v. Thackara*, **473**; *Dershimer v. Maloney*, **477**.

SUPERINTENDENT OF PUBLIC INSTRUCTION. Where a vacancy in the office of superintendent of public instruction occurs during the recess of the Senate, the governor has no right to fill the vacancy for a longer period than until the end of the next session of the Senate. (C. P.) *Commonwealth v. Waller*, **252**.

The appointment by the governor to the office of superintendent of public instruction, and the confirmation of such appointment by the Senate, vests no title to the office until a commission has issued. *Id.*

A superintendent of public instruction, appointed during a recess of the Senate to fill a vacancy, cannot hold office after the end of the next session of the Senate; he cannot hold until his successor is qualified. *Id.*

SUPERVISORS. Supervisors have no general power to borrow money on behalf of a township, or for the ordinary purposes of their office, but have an implied power to do so in an extraordinary emergency, e. g., when bridges are destroyed and roads rendered impassable by a flood. *Maneval v. Township of Jackson*, **130**.

Where supervisors have issued a township order for money, properly borrowed, and action is brought thereon, they may confess judgment. *Id.*

Supervisors who refuse or neglect to open a highway as soon as practicable after the report laying it out has been confirmed, are indictable for maintaining a nuisance. *Road in Roaring Brook Township*, **141**.

After an order to open a road, supervisors may not refuse obedience, on the grounds (1) that the road is not necessary; (2) that the opening would increase the township indebtedness beyond the constitutional limit. *Id.*

SURETY. One who has executed as surety a recognizance sur appeal, knowing it to be a recognizance, is not discharged from liability thereon by the fact that she was illiterate and ignorant of the effect of the instrument and was led to sign the same through misrepresentations of the appellant. (C. P.) *Hall v. Tobin*, **164**.

A, being indebted to B, by his direction went to C, to obtain his signature as surety on certain judgment notes; he obtained the signature by representing that the notes were not for an indebtedness but as security for machines to be furnished to A by B; the representation was false and the machines were not furnished; *held*, C. was not liable on the notes. *Wheeler & Wilson Mfg. Co. v. Aughey*, **381**.

Where a mortgage of a property subject to a secret trust is executed to one who has no notice of the trust, which mortgage is accompanied by a bond, the surety on which has knowledge of the trust, and on a judicial

SURETY—Continued

sale of the property under the mortgage, the surety buys the property, he will hold the same discharged from the trust. *Logan v. Bva*, **464**.

H, being elected cashier of a bank for the term of one year, gave bond for his fidelity, with M. as surety, "for and during the time of his employment by the said bank, whether under his present election or under any subsequent election." He was never again elected, but continued to perform the duties and receive the salary of cashier for fifteen years, when he was found to be a defaulter: *held*, the bond covered not only the year for which he was formally elected, but the time during which he continued to act as cashier, and that the surety was liable on the bond. *Shackamaxon Bank v. Yard*, **570**.

Where a surety for an administrator has in his hands funds of the estate and invests the same in an unauthorized loan, and the money is lost, he cannot, although he has acted in good faith, recover a contribution from a co-surety who has had no knowledge of the loan and has never ratified it. *Eshleman v. Bolenius*, **673**.

SURETY COMPANIES. Under the Act of May 9, 1889, P. L. **159**, a company authorized to become security for the payment of land damages may be the sole surety on a bond given therefor. (C. P.) *In re Application of the Phila. & Read. Term. R. R. Co.*, **117**.

SURVIVORSHIP. Right of as between husband and wife, as to estate of deceased child, is destroyed by divorce. See **DIVORCE**. (O. C.) *Hecht's Estate*, **183**.

TAXES AND TAXATION. In the city of Philadelphia a writ of *set. fa.* must issue on a claim for delinquent taxes, within five years from the first day of January in the year succeeding that in which the taxes become due, or the lien will be lost. *City of Phila. v. Heister*, **43**.

Under the Acts of April **16**, 1845, P. L. **489**, and March **11**, 1846, P. L. **114**, the issuing of a *scire facias* is "bringing suit." *Id.*

Acts of April **16**, 1845, and March **11**, 1846, are not repealed by Act of April **21**, 1855, P. L. **385**. *Id.*

Under the Act of April **16**, 1845, P. L. **489**, the lien of taxes in Philadelphia during the first five years after they become delinquent is the result of the act of the city in entering the unpaid taxes on the register; where a certificate of the contents of this book as to a property is obtained and acted upon by a person about to purchase realty, the city can enforce against the land only such taxes, whose lien depends on the registry, as are set forth in the certificate. *City of Philadelphia v. Anderson*, **90**.

Where a city accepts taxes, levied according to the provisions of a certain Act, as in full for all taxes due, it cannot afterwards allege that the Act was unconstitutional and recover an additional amount which would have been payable had the tax been properly levied under Acts really in force. *City of Philadelphia v. Ridge Ave. Pass. Ry. Co.*, **106**.

Under the Act of March **11**, 1846, "that all taxes registered . . . shall cease to be liens after the expiration of five years from the first day of January in the year succeeding that in which they become due, unless suit be brought to recover the same . . . and duly proceeded on to judgment," the judgment on the lien must be obtained within the five years. (C. P.) *City v. Conyers*, **153**.

The capital of a domestic railroad corporation invested in equipment, used interchangeably on its main

TAXES AND TAXATION—Continued.

line within the State and its leased lines in other States, is taxable only in the proportion which the number of miles of road operated and equipped by it within the State bears to the whole number operated and equipped by it. *Comm'th v. Del. Lack. & West, R. R. Co.*, 325.

For purposes of taxation, tangible personal property has a *situs* wherever it may be found, and such property, whether located permanently or used temporarily within a State, is subject to taxation therein. *Id.*

A domestic railroad is not liable to taxation here upon its interest in a railroad operated by it in another State, and subject to taxation there. *Id.*

Taxes may be apportioned between the life-tenant and remainderman, where the former dies during the year for which the taxes have been paid. (*O. C.*) *Fest's Estate*, 415.

A municipal claim for curbing is not properly a tax. *City of Philadelphia v. Pennsylvania Hospital*, 434.

Where stock is issued by a corporation in payment for a right to use patented articles, neither the patent nor an interest therein being assigned to the company, the stock so issued is not exempt from taxation as being an investment in a patent right. *Commonwealth v. Central District and Printing Telegraph Co.*, 516; *Comm'th v. Brush Electric Light Co.*, 527; *Comm'th v. Edison Electric Light Co.*, 531; *Comm'th v. Chester Electric Light and Power Co.*, 533.

The same rule held where the company's right was to "make and use in their said business," machines covered by the patent. *Commonwealth v. Philadelphia Co.*, 518.

A company that produces and sells to its customers electricity for the generation of light, heat, or power is not a manufacturing company within the meaning of the Act of June 30, 1885 (*P. L.* 193), exempting the capital stock of manufacturing companies from taxation. *Comm'th v. Northern Electric Light and Power Co.*, 520; *Same v. Brush Electric Light Co.*, 527; *Same v. Edison Electric Light Co.*, 531; *Same v. Chester Electric Light and Power Co.*, 533.

The method provided for ascertaining the value of stock of a corporation for purposes of taxation by the Act June 7, 1879, § 4, is not in conflict with Art. IX., § 1, of the Constitution of Pennsylvania, or with Art. XIV. of the Amendments to the Federal Constitution. *Comm'th v. Brush Electric Light Co.*, 527.

For the purpose of taxation a dividend is *prima facie* evidence that its amount was earned during the tax year in which it was declared; but if the corporation show clearly that the dividend was made out of accumulated earnings of previous years in none of which the earnings reached six per cent., the tax should be levied on the actual value of the stock ascertained as required by law. *Id.*

TENANTS IN COMMON. Where one tenant in common has obtained possession of the premises, by agreement between himself and his co-tenants, he is bound to restore the possession as fully as he received it by the agreement; and the possession of his tenants after the agreement has come to an end is his possession; he cannot impose on his co-tenants the task of turning his tenants out. *Clayton v. McCay*, 402.

The amount fixed by the agreement in such case, as the rental value of the premises, may justly be assumed for the purposes of account as the standard of value in the whole period of exclusive occupancy, in the absence of evidence of a change of value. *Id.*

For liability to account. See *Co-tenants*. *Id.*

TENDER. The penalty for refusing the price of goods sold when offered is not the loss of goods or

TENDER—Continued.

price, but the payment of costs when the purchaser's demand is properly made. *Summerson v. Hicks*, 364.

Bringing money into Court after action begun is analogous to a plea of tender, and carries with it the liability for costs up to that time. *Id.*

Where a ground-rent is reserved payable in Spanish milled dollars, a tender of such coins in payment of the ground-rent is good, although such coins are no longer legal tender here or in Spain. *Johnson v. Ash*, 537.

Tender of decree. See *PAYMENT*. *Miller v. Kloppe*, 174.

TERM OF OFFICE. When the law provides for the appointment of an officer to hold until a time fixed by the same law, and a commission is issued to him reciting that it is to expire at the said time, the appointee cannot hold over until his successor is duly qualified. (*C. P.*) *Commonwealth v. Waller*, 252.

TITLE. Acts of Assembly. See *CONSTITUTIONAL LAW*. *City of Philadelphia v. Ridge Avenue Pass. Ry. Co.*, 106.

TITLE INSURANCE COMPANY. A title insurance company has no right to do conveyancing. (*C. P.*) *Gauler v. Solicitors' Loan and Trust Co.*, 208.

TOWNSHIP ORDER. That action cannot be brought upon a township order is a technical defence, which is available, if at all, by the township only and cannot be set up by a taxpayer who intervenes. *Maneaval v. Township of Jackson*, 130.

TRESPASS. Trespass will lie where goods have been illegally distrained and sold; the owner is not forced to replevy. (*C. P.*) *Esterly Machine Co. v. Spencer*, 287.

TRUSTS AND TRUSTEES. A trust, with active duties in the trustee, by which he is directed to divide the profits and income amongst certain persons, from time to time, and which provides that when two-thirds of the persons who may be interested in the estate shall demand, the trustee shall sell all the realty and make division of the estate, is void as a perpetuity. (*O. C.*) *Cooper's Estate*, 134.

A trustee may do voluntarily whatever his *cestui que trust*, who is under disabilities, may be compelled to do. (*O. C.*) *Hirst's Estate*, 212.

Trustees to whom an award has been made by a decree of the Court must, in their account, charge themselves with the amount of the award, and claim credit for any portion thereof which may not have been received. (*O. C.*) *Bockius's Estate*, 312.

All matters of discharge in a trust account must be so set out as to permit of objection by the *cestui que trust*. *Id.*

Trustees must be constantly ready with their accounts, and all doubts and obscurities are to be taken adversely to them. *Id.*

Trust for accumulation. See *ACCUMULATION*. *Williamson's Estate*, 353.

A trustee will not be liable for the loss of trust money through the failure of a bank in which it has been temporarily deposited; *aliter*, if the trustee has placed the money there by way of investment. A deposit is not converted into an investment because the trustee has agreed to give two weeks' notice of his desire to withdraw the sum deposited and is to receive a low rate of interest thereon. *Law's Estate*, 490.

A technical exoneratory trust is one in which the limitations are imperfectly declared and the creator's intention expressed so generally that something not fully declared is required to be done to complete the trust. *Smith's Estate*, 565.

A trust of personal property may be proved by parol

TRUSTS AND TRUSTEES—Continued.

or written testimony, and the declaration need not be in any particular form, provided the intention to create a trust be plainly manifest and not claimed from loose and equivocal expressions made at different times. *Id.*

Where the owner of certain bonds, transferable by delivery, executes written declarations, not formal, but clearly indicating an intention to create a trust as to said bonds in favor of one to whom he stood in *loco parentis*, and makes an oral declaration consistent with such intention, afterwards disposes of the interest of said bonds for the benefit of the *cestui que trust*, and carefully preserves the written declarations, which are found with the bonds after his death, and does nothing inconsistent with this declaration of trust, the trust will be sustained against the residuary legatee of such person, although the declaration was not exhibited to any person in the lifetime of the declarant. *Id.*

A trustee who, instead of investing trust funds, suffers them to remain in a saving fund at less than the current rate of interest on legal investments for an unreasonable length of time, will be surcharged with the difference between the rate of interest accrued and that which he could have obtained. (O. C.) *Whitcar's Estate*, 575.

Advice of counsel will not justify a trustee in abandoning his own common sense. *Id.*

UNDUE INFLUENCE. See *DEVISAVIT VEL NOX.* (O. C.) *Lynch's Estate*, 367.

VACATION OF STREETS. See *ROAD LAW.* *In re Howard St.*, 159; *Hare v. Rice*, 161.

VENUE. A change of venue is to be granted under the Act of March 30, 1875, P. L. 35, only where the Court or Judge is satisfied of the truth of the facts alleged in the petition for a change. *City of Phila. v. Ridge Ave. Pass. Ry. Co.*, 388.

The Supreme Court may remove a pending criminal proceeding thereon to itself by certiorari, but will do so with great caution, and only in a clear case. *Commonwealth v. Delamater*, 563.

VIEWER. See *EVIDENCE.* *Gorgas v. Phila. Hbg.* & *Pub. R. R. Co.*, 436.

WAIVER. To constitute a waiver by implication of a condition in a contract as to the time within which an action must be brought thereon, such conduct must take place during the running of the period of limitation. *Everett v. London & Lancashire Fire Ins. Co.*, 203.

Where in response to a demand for fuller proofs of loss an insured person sends them, he waives the right to insist on his first furnished proofs as sufficient. *Kelly v. Sun Fire Office*, 269.

Of question of jurisdiction. See *JURISDICTION.* *Ogden v. Philadelphia*, 413.

WARRANTY. A parol warranty of title, which is the moving cause to a sale of realty, subsequently consummated by deed, affords a good cause of action upon failure of title. *Close v. Zell*, 277.

WATER COMPANIES. A water company under the Act of April 29, 1874, P. L. 93, is a public corporation, and its necessary structures are not subject to mechanics' liens. *Guest v. Lower Merion Water Co.*, 285.

WATERCOURSE. See *EASEMENT.* *Edgett v. Douglas*, 469.

WATER RENT. Apportionment of, between estate of life tenant and remainderman. See *APPORTIONMENT.* (O. C.) *Fest's Estate*, 415.

WIDOW. Claim for widow's \$300 exemption takes precedence of a claim for funeral expenses. See *EXEMPTIONS.* (O. C.) *Weir's Estate*, 268.

Where exemption is claimed in cash, no appraisal is necessary; and in such case a delay of eleven months in making claim is not laches where no rights have intervened. *Id.*

Where a widow having a life estate under the will of her husband pays the taxes and water-rent, and dies before the expiration of the year for which they are paid, her estate will be entitled to be allowed, as against the remainderman, an amount equal to so much of the sum paid as bears to the whole the same proportion as the part of the year during which the remainderman enjoys possession bears to the whole year. (O. C.) *Fest's Estate*, 415.

WILL. Signed checks in a check-book and the stub to which they are fastened, on which stub there is explanatory writing, unsigned, clearly expressing the wishes of the writer with regard to the disposition after his death of the sums mentioned in the checks, are admissible to probate as a will. (O. C.) *Lombart's Estate*, 67.

Whatever a testator is shown to have intended as his signature is a valid signing, no matter how imperfect, unfinished, fantastical, illegible, or even false, the separate character he has used may be when critically examined. (O. C.) *Plate's Estate*, 166.

A person in *extremis*, but of disposing ability and fully informed of the contents of his testament, attempted to sign it in the presence of two witnesses, but succeeded only in making, in the proper place, part of the first letter of his name: *held*, that the will should be admitted to probate. *Id.*

Any instrument which is revocable and whose disposition of property is intended to take effect after the death of the maker is a testament. (O. C.) *Pritchett's Estate*, 167.

A paper signed by a decedent at the end thereof, intended to take effect at his death, and making an intelligent disposition of his property, is a valid will, although it speak in the past tense and the testator call it a nuncupative will. (O. C.) *Fouché's Estate*, 542.

To give capacity to make a will, it is only necessary that the testator have a full and intelligent knowledge of the act in which he is engaged, the property he possesses, the disposition he desires to make of it, and of the objects of his bounty. (O. C.) *Cardwell's Estate*, 291.

A. died leaving a will containing the following: "To my daughter H., intermarried with F., her heirs and assigns forever, . . . the said real estate to be enjoyed by her during her natural life, to her sole and separate use; . . . she shall not be at liberty to sell or incumber the same, . . . and immediately after her death the said real estate shall vest in . . . the lawful issue of my said daughter H., excepting that if my son in law P. shall survive his wife, he shall during his lifetime enjoy the rents . . . of one-third of the said real estate;" and later, "I declare it to be my will that if any or all of my said daughters shall request my executors . . . to invest her share in said residue, . . . it shall be the duty of my said executors so to invest it for the sole and separate use of my said daughters respectively, during their lives, and after their death to go in fee simple to their children or lawful issue, the same as I devised to them the other real estate in former part of my will:" *held*, H. took an estate for life only, equitable during the life of her husband and legal thereafter. *Shalters v. Ladd*, 33.

WILL—Continued.

A bequest after the death of the testator's daughter of a certain sum for life to her husband by name and description "T. W. the husband of my said daughter," is a bequest to the individual and will take effect, although T. W. be divorced from his wife. (O. C.) Mellon's Estate, 120.

A devise in fee simple to certain persons, share and share alike, followed by a trust of the subject of the devise, but a provision that the trustee shall manage the property and sell at his discretion, gives to each of the original devisees a fee in his share freed from the trust. (O. C.) Cooper's Estate, 134.

A. devised to his daughter C. certain realty, and, when sold, the amount of the sale, "that is the rights of C., I desire to be invested . . . the interest to be regularly paid to her free from the control . . . of her husband. . . . And in case of her death without issue or issues of her children then reversible to my right consanguineous heirs:" *held*, C. took a life estate only. (C. P.) Peiros v. Hubbard, 193.

A devise and bequest of estate, real and personal, to executor in trust to receive, collect, secure, and obtain and reduce into possession all the capital, principal, moneys or interest by the testator invested, etc., and to pay the annual income to the testator's wife, works a conversion of the realty and gives to the executor a power of sale as to said realty. (O. C.) Arrott's Estate, 198.

The word "capital" may be used in a will so as to include real estate. *Id.*

A testator may provide in his will that any dispute as to its construction shall be referred to a person named therein, and that his decision shall be final, and such provision is binding upon all persons interested. (O. C.) Phillips's Estate, 229.

A bequest to a society whose object is to aid by means of lectures, music, debates, etc., in establishing free thought and speech, to promote just principles, to disseminate scientific truth, and to aid human progress, and which, in pursuance of the object, holds meetings to which the public is invited, is a charity and within the meaning of the Act of 1855, so that a bequest to it made within thirty days of the death of the testator is void. (O. C.) Knight's Estate, 265.

A bequest to the editor and proprietor of a paper managed for private profit, but intended "to assist in promoting the cause of freedom and humanity and opposing superstition, priestcraft, bigotry, and every kind of mental tyranny," is merely a personal bequest. *Id.*

When the context of a will raises an obstacle to construing in a strict sense the term which is descriptive of the object of the gift, or where more than one subject or object exists, to which the description is equally apposite, extrinsic evidence may be called in to remove the obscurity. *Id.*

A devise in fee simple is not to be reduced in quantity by words of doubtful meaning. *Gillmer v. Daix*, 330.

A. devised as follows: "I give and bequeath to my son M. all my real and personal estate. Should he die without leaving to any person then to R.:" *held*, M. took a fee, the provision "should he die without leaving," etc., being, if regarded as an expression of a desire that M. should make a will, precatory only; if regarded as a condition, void. *Id.*

WILL—Continued.

A will may be so drawn as to include the rents, interest, etc., accruing during the first year after the testator's death; and part of the corpus of the estate was to pass under a bequest of the residuum, and to be applicable to the payment of legacies, expenses, and debts. *Williamson's Estate*, 353.

A will directed the executors to sell a house, and its proceeds with those of the personal estate, to divide into three shares, two of which were devised to two legatees, and "to J. W., H. W., and C W., children of my son D. W., deceased, the remaining one-third to be equally divided amongst them, and in case of the death of any of the children of my son D. before the payment to them of their said share then to be divided between the survivors:" *held*, the legacy to each of said children was vested at the death of the testator, and not subject to divestiture through the delay of the executors in making distribution. *Wengerd's Estate*, 447.

Where a bequest is ambiguous, the interpretation which will cause it to be vested, is favored; and the presumption in favor of vesting is greater where a testator is providing for a child or grandchild, than where the gift is to a stranger or to a collateral relative. *Id.*

A bequest of personally relates to the testator's death, unless a contrary intent is clearly indicated in the will. *Id.*

A testator, who was childless, after expressing an intent "to settle my worldly affairs," directed "that my wife A. shall have and hold the property in B. . . . Said A. to have the sole control of the same during her lifetime, and at the discretion of my beloved wife A. she shall order my executor to sell the real estate . . . to the best advantage of my wife, and I hereby empower my executor to make deeds of conveyances for the same . . . and the moneys realized from the sale of my real estate my executor shall pay over to A., and she, the said A., shall have power to dispose of the same by bequest or as she directs:" *held*, A. took a fee. *Snider v. Baer*, 460.

For many purposes, a will speaks from the death of the testator, but, as a rule, the power or capacity of the testator to make the devises contained in his will, the legality of the execution of those devises and nature and quantum of the estate devised, are to be determined according to the law as it exists at the time of the execution of the will. *Funk's Estate*, 557.

A testamentary separate use is invalid, if at the time of making the will, the woman for whose benefit it is intended, be not either married or in immediate contemplation of marriage. *Id.*

A will contest must be presented with diligence. See *LACHEL*. (O. C.) *Cardwell's Estate*, 291.

WITNESS. Subscribing witness. See *EVIDENCE*. (C. P.) *Brook v. Watson*, 273.

Under the Act of May 23, 1887, P. L. 161, providing that any competent witness, except a defendant upon trial, may be compelled to testify, but not to answer any questions which, in the opinion of the Judge, would tend to criminate him, the Judge, and not the witness, is to determine whether any particular question is one tending to criminate the witness. *Com'th ex rel. Tate v. Bell*, 333.

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